



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 104 of 2012

INVESTMENTS & MORTGAGES BANK LIMITED (I & M).....PETITIONER

AND

THE COMMISSIONER OF POLICE AND THE DIRECTOR OF

CRIMINAL INVESTIGATIONS DEPARTMENT.....1<sup>ST</sup> RESPONDENT

THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT

AND

LALCHAND FULCHAND SHAH.....1<sup>ST</sup> INTERESTED PARTY

KENYA BANKERS ASSOCIATION.....2<sup>ND</sup> INTERESTED PARTY

JUDGMENT

Introduction

1. The issue for consideration in this matter is whether this court should intervene to stop investigations by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, initiated at the behest of the 1<sup>st</sup> interested party, into the conduct of the petitioner and its officers.
2. The petitioner, the Investment and Mortgages Bank ('the bank') wants this court to stop investigations into the alleged criminal conduct of its officers and legal counsel on account of a charge instrument whose execution and attestation is the subject of contestation in a pending civil suit being *Milimani HCCC No. 2533 of 1997 Lalchand Fulchand Shah and Rambhaben Lalchand Shah v Investment and Mortgages Bank Limited*. The basic facts of the case are not really in dispute and are set out in the various decisions emanating from the courts and the deposition filed by the parties and may be summarized as follows.

The facts

3. By a charge dated 29<sup>th</sup> April 1997 ("the charge") Lalchand Fulchand Shah ("Lalchand") and his wife charged their property known as **L.R No. 209/66/41** ('suit property') in favour of the bank. Before this,

the property had been charged to ABN Amro Bank. Lalchand states that he cleared the loan advanced by ABN Amro Bank and the original Title Deed and a Discharge of the Charge duly executed by ABN Amro Bank were given to him.

4.Lalchand alleges that his trouble started sometime in March 1997 when he was approached and requested by Suresh Keshavji Shah popularly known as Sulu Shah (“Sulu”) of Shah Motors Limited to provide the suit property as a third party security for a short-term facility that Sulu was to obtain from the bank. Sulu allegedly intimated to Lalchand and his wife that the suit property would not be charged but that the bank would merely hold the title deed as an equitable deposit of title. Lalchand claims that it turned out that Sulu fraudulently charged the suit property to the bank. Lalchand asserts that he came to learn from the bank that the suit property had been charged to it notwithstanding the fact that he was still holding the Discharge of Charge issued to him by ABN Amro Bank.

5.Shah Motors Limited defaulted on the loan and the bank commenced recovery by way of exercising its statutory power of sale. This prompted Lalchand to file ***Milimani HCCC No. 2533 of 1997*** and seek an injunction to restrain the sale of the suit property. Hon. Justice T. Mbaluto dismissed this application on 18<sup>th</sup> February 2000. It is noteworthy that the learned Judge disbelieved Lalchand’s allegation that he was deceived by Sulu into executing the charge.

6.Lalchand then preferred an appeal to the Court of Appeal. His application for injunctive relief pending appeal, ***Court of Appeal Civil Application No. 165 of 2000 Lalchand Fulchand Shah and Another v Investments and Mortgages Bank Limited***, was dismissed on 7<sup>th</sup> July 2000. The Court of Appeal in its decision concluded that since there were no allegations of fraud against the bank, it could not stop the intended sale. Like the learned Judge of the High Court, Justice A. B. Shah, who wrote the leading judgment, observed that the Shahs allegations lacked credibility. As Lalchand did not file an appeal, the bank sold the suit property.

7.In June 2008 Lalchand sought to amend the plaint in ***Milimani HCCC No. 2533 of 1997*** in order to join Harit Sheth, the advocate who attested the charge, as a defendant. In a ruling delivered on 18<sup>th</sup> June 2008, Hon. Justice L. Kimaru dismissed the application on grounds, inter alia, there was no allegation fraud against the bank and that in the absence of the borrower no cause of action could be established and that there was inordinate delay in making the application.

8.Lalchand now states that while preparing for hearing of ***Milimani HCCC No. 2533 of 1997*** he instructed his advocate to carry out a search on the suit property. The search revealed that the charge document at the registry materially differed from the one filed in court hence he was concerned that some form of fraud must have been perpetrated by the advocates who prepared the charge. He was also concerned that the charge in favour of the bank could have been registered against title yet he was still holding the duly executed Discharge of Charge given to him by ABN Amro Bank. These facts prompted him to lodge the complaint with the police. It is this complaint that has triggered these proceedings.

### **Petitioner’s case**

9.The petitioner’s case is grounded on a warrant issued in ***Makadara Miscellaneous Application No. 234 of 2011*** seeking to investigate the charge. The 1<sup>st</sup> respondent’s officers summoned the bank’s legal counsel to investigate a criminal complaint involving forgery and fraud. It is this process that the petitioner seeks to stop in its tracks.

10.The affidavit sworn by Sergeant Patrick Maloba on 30<sup>th</sup> December 2011 in support of the application for warrants, states at the material part;

*[3] THAT was duly instructed by the Director of Criminal Investigation Department, to conduct investigations into a fraudulent transaction of a charge dated 6<sup>th</sup> May 1997 on a property IR 28053 LR 209/66/41 (original number copy hereby attached)*

[4] THAT the respondent used the said title for a charge as per entry number 97 presentation 104 dated 6<sup>th</sup> May 1997.

[5] THAT I pray this honourable court issue me with warrants to investigate the charge on the said document and obtain certified documents of:

A. The identification of the person who charged document to the bank.

B. The account number where the proceeds were deposited and

C. The account opening documents.

11. The bank's case is straight forward and it is that a civil right or obligation cannot be determined in a criminal court in view of **Article 50** of the Constitution which protects the right to a fair hearing. It argues that the continued investigation will affect the fair trial of the pending civil suit and that the matter cannot be litigated in a criminal court and any attempt to do so violates its fundamental rights and freedoms particularly because the matter has been subject of decisions in the High Court and Court of Appeal.

12. The petitioner argues that the investigation of its advocate is a contravention of the Advocate-Client privilege enshrined in **section 134** of the **Evidence Act**. It takes issue with the timing of the investigation as the complaint to the Police was lodged fifteen years after the civil suit was commenced and which is still pending determination. The petitioner asserts that the maintenance of the investigation is contrary to public interest and a violation of its fundamental rights.

13. The bank accuses Lalchand of using the criminal process maliciously and in bad faith with a view to frustrating and purporting to bear pressure on the bank from proceeding with its counterclaim. The petitioner avers that based on the allegations of fraud, Lalchand applied to disqualify the bank's advocates from representing the bank as a way of putting pressure on the bank to abandon the counterclaim.

14. Mr Gichuhi, counsel for the bank, submitted that no allegations of fraud had been made against the bank and therefore no basis for the investigation had been established in view of the civil cases concerning the suit property. Counsel reiterated that the intended prosecution was malicious and an abuse of the legal process as evidenced by the fact that the complaint was brought too late in the day.

15. In the petition dated 27<sup>th</sup> March 2012, the bank seeks the following reliefs from this court;

a. An order of prohibition do issue restraining the 1<sup>st</sup> and 3<sup>rd</sup> respondents by themselves, agents, servants or employees from carrying out any further or continued investigations in any manner whatsoever or any intended prosecution in respect of both the legal charge dated 29<sup>th</sup> April 1997 over L.R. No. 209/66/41 or any related issues pending in the dispute between the petitioner and the 1<sup>st</sup> interested party, his servants, agents or employees in **Milimani HCCC No. 2533 of 1997 Lalchand Fulchand Shah & Another v Investment and Mortgages Limited** or summoning the Petitioner's advocates to disclose any information regarding the Legal Charge dated 29<sup>th</sup> April 18997 in respect of L.R. No. 209/66/41 or any related issues.

b. An order of Certiorari do issue quashing the continued investigations in any manner whatsoever or any intended prosecution by the 1<sup>st</sup> and 3<sup>rd</sup> respondents their agents, servants or employees in respect of both the legal charge dated 29<sup>th</sup> April 1997 over L.R. No. 209/66/41 or any related issues pending in the dispute between the petitioner and the 1<sup>st</sup> interested Party, his servants, agents or employees in **Milimani HCCC No. 2533 of 1997 Lalchand Fulchand Shah & Another v Investment and Mortgages bank Limited** or summoning the Petitioner's advocates to disclose any information regarding the Legal Charge dated 29<sup>th</sup> April 1997 in respect of L.R No. 209/66/41 or any related issues.

c. A declaration that the continued investigation of the Petitioner by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in

relation to matters pending in **Milimani HCCC No. 2533 of 1997 Lalchand Fulchand Shah & Another v Investment and Mortgages bank Limited** is a threat to the petitioner's right to a fair trial guaranteed under **Article 50** of the Constitution and in breach of advocate client privilege.

d. A declaration that the 1<sup>st</sup> Respondent should as a condition precedent seek directions from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent before commencing any investigations arising from complaints involving financial institutions and their advocates with a view to ensuring that the principles of a fair trial guaranteed under Article 50 of the Constitution are upheld particularly where the complaint arises from civil proceedings, whether pending or concluded.

e. Exemplary damages and Costs.

### **Respondents' Case**

16. The 1<sup>st</sup> and 3<sup>rd</sup> respondents have opposed the petition on the basis of a replying affidavit filed on 17<sup>th</sup> July 2012 and sworn by John Mmasi, a police officer attached to the Criminal Investigations Department and one of the officers investigating the matter. The thrust of the affidavit is that in 2011 the police received a report of irregular and unlawful dealings in the suit property from Lalchand and on the basis of the complaint, they commenced investigations.

17. According to the affidavit, copies of the charge documents, court records, specimen signature of Lalchand and his wife, Rambhaben, and the specimen signature of Harit Sheth were forwarded to the document examiner who concluded in a report that there was forgery and fraud in the charge documents. At paragraph 10 of the replying affidavit, Mmasi depones that, "*THAT owing to the discrepancies in the charge documents as established by the document examiner and the statement made by the complainant that he never signed the documents, the unprocedural way of charging and discharging the title, I opine that fraud might have been committed by some person(s) and needs to be investigated with a view to bringing the perpetrators to justice.*"

18. Mr Mule, counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, argued that the respondents were exercising their constitutionally vested powers under **Articles 244** and **245** of the Constitution and that the court should be slow to interfere in a legally mandated investigation. Counsel further submitted that there is no prejudice occasioned by an investigation conducted on the basis of a complaint as no decision has been made to charge any person. In his view the court should let the investigation run its course in order to establish the truth of the matter.

### **First Interested Party's Case**

19. The petition is opposed on the basis of the replying affidavit of Lalchand Fulchand Shah sworn on 17<sup>th</sup> April 2012 and a supplementary affidavit sworn on 14<sup>th</sup> December 2012. Mr Mutuli, counsel for Lalchand, associated himself with the 1<sup>st</sup> and 3<sup>rd</sup> respondents' position. Counsel reiterated that the circumstances surrounding the discharge of the charge and pointed out that the complaint was based on the allegations of fraud which was being investigated by the police. He urged that the Court not to interfere with the investigations until they are completed.

20. It is the interested party's case that there is no bar to concurrent criminal and civil proceedings based on the same facts and that the respondents had a constitutional duty to investigate criminal conduct and that in doing so they were not subject to the direction or authority of anyone. For this proposition, he relied on the case of **Michael Monari and Another v The Commissioner of Police and Another, Nairobi HC Misc. Application No. 68 of 2011 (Unreported)**.

21. Lalchand denies the bank's allegations that his complaint was meant to put pressure on it to drop its counterclaim. He states that he merely lodged the complaint as any citizen would and that he lacks power to pressurize the Criminal Investigation Department and the Director of Public Prosecutions to carry out investigations or prefer criminal charges against the bank and its officers.

22. Lalchand also counters the bank's argument that the complaint was raised after an inordinate period of time as he was unaware of the particular fraud and misrepresentation until November 2011 when the evidence was uncovered during the process of exchanging and discovery of documents in **HCCC No. 2533 of 1997**.

### **Third Interested Party's Case**

23. The third interested party, Harit Sheth ("Harit"), is an advocate. His position is that he witnessed the signatures of Lalchand and his wife on the charge. His reason for seeking to join these proceedings is that the CID investigation report particularly the document examiners' report seem to cast doubt his signature and official stamp on the charge document. Harit maintains that the signature and stamp of the charge are his.

24. Mr Wanjohi, counsel for the Harit, referred the court to **HCCC No. 2335 of 1997 *Mortichand Virpal Shah and Others v Investments and Mortgages Bank Limited and Others*** where a similar allegation regarding attestation of a charge was made and dismissed. In that case Lalchand was a party to the suit and the charge executed and attested in circumstances similar to the present case. Apart from this case, counsel submitted that the both the High Court in ***Milimani HCCC No. 2533 of 1997*** and the Court of Appeal rebuffed any allegations of wrongdoing against the advocate.

25. Mr Wanjohi submitted that the criminal complaint would re-open an issue already determined in court as against his client and that his client stood the risk of being prejudiced if such investigations were allowed to go on.

### **Analysis and determination**

26. I must at the outset point out that the purpose of this enquiry is not to test the legality or otherwise of the charge or determine the guilt or innocence of the petitioner and its officers. Although the parties have raised several issues for consideration, the single constitutional issue raised based on the material before court is the question as to whether the respondents' actions of conducting the investigation is within the law and whether such investigation in any way infringes on the petitioner's rights and fundamental freedoms or is an abuse of process and it is to this issue I shall limit my determination.

27. I agree with the respondents that it is within their mandate to investigate crimes where there is reasonable basis of commission of offence and that in performance of their duties, they are independent institutions. The office of the Director of Public Prosecutions established under **Article 157** is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitution dictates. One such dictate is that in the exercise of their powers, it is to ***"have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."*** **Article 244** enjoins the National Police Service to amongst other things ***"comply with constitutional standards of human rights and fundamental freedoms."*** As I stated in a similar case in ***Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 (Unreported)*** "[25] *The Office of the director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.*"[Emphasis added] (See also ***Hon. Chirau Ali Mwakwere v Robert Mabera and Others, Nairobi Petition No. 6 of 2012 (Unreported), William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported) [2010] eKLR, Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported), Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)***).

28. The petitioner bank raises the core issue of abuse of court process through invoking the criminal process.

29. I have perused the ruling delivered by Hon. Justice Mbaluto dated 18<sup>th</sup> February, 2000 in **Milimani HCCC No. 2533 of 1997** in which the learned judge dismissed Lalchand's application for injunction. The ruling touched extensively on the issue of validity of the charge in question and the allegations against Harit. The learned Judge determined the matter and dismissed the application and the Court of Appeal addressed these issues and likewise dismissed them. I would like to note that Lalchand did not raise the issue of the Discharge of Charge although at the material time he knew about it and he had it.

30. I can only view the attempt of pursuing the investigation targeted at Harit as flying in the face of the clear findings of the High Court and the Court of Appeal. The Court of Appeal addressed itself to the allegation about the advocate, Justice A. B Shah stated, *"If the Shahs were serious about what they say in regard to attestation they ought to have filed a declaratory suit to avoid the charge by making the borrower and making Mr Sheth defendants to that suit. Alternatively they should have added Mr Sheth and the Borrower as co-defendant in the suit they have filed. .... I entirely agree with observations of the learned Judge when he says that in all circumstances the credibility of the Shahs is very doubtful."*

31. In **Milimani HCCC No. 2533 of 1997** Lalchand challenges the validity and enforceability of the charge. One of the key issues framed for determination in that matter is, *"whether the plaintiffs executed a legal charge dated 29<sup>th</sup> April 1997 over the Land Reference No. 209/66/41 in favour of the defendant to secure advances made to Shah Motors Limited."* The validity or otherwise of the charge is therefore an issue that is directly subject in the pending civil suit. The criminal process seeks to investigate possible fraud in connection with the same charge. I agree with the petitioner that this is a roundabout way of having the matter subject of the civil suit determined in another forum. The court must act swift to stop this move in its tracks particularly in light of the clear decisions that have emanated from the courts.

32. On this point I agree with Mr. Gichuhi, counsel for the petitioner, that there were no allegations of fraud made directly against the bank and it would be an abuse of process for it to be exposed to the criminal investigations especially in view of the previous court ruling and the pending civil matter which has clearly confirmed the bank's position in the matter.

33. It is the duty of the court to ensure that its processes are not abused or otherwise used to perpetuate injustice or for improper motives. In the **Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police and Another (Supra)**, I observed, *"[23] Although this matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the heads of the petitioners. It is recognized even in light of section 193A of the Criminal Procedure Code, the High court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes."*

34. Similarly, in quashing criminal proceedings in the court below in the case of **Peter George Antony D'costa v Attorney General and Another, Nairobi Petition No. 83 of 2010 (Unreported)**, the court stated, *"The process of the court must be used properly, honestly and in good faith, and must not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of court to stop such abuse of the justice system."* In **Michael Monari and Another v Commissioner of Police (Supra)**, Justice Warsame observed, *"As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."* The principles, that I have alluded to must be applied in the light of the circumstance of each individual case.

35. In the circumstances of this case, I conclude that allowing criminal investigations to go on will in effect be prying into an issue that has been decided by a court of competent jurisdiction. The course taken by the respondents will upset the already decided issues which are also in consideration in the civil court. Such a move will likely undermine the case already pending in the civil courts and in addition to compromising on the right to fair hearing guaranteed under **Article 50**. This is a course that a court of

justice should strive to stop at the earliest opportunity. If there are any fresh issues relating to the charge or any document relating to the suit property, they should be raised in the civil case which is capable of dealing with them.

### **Disposition**

36. I have come to the conclusion that the continued investigation is an infringement on the petitioner's right to a fair trial enshrined under **Article 50**. Sustaining any criminal investigation in the context of the facts of this case and in relation to what has transpired, particularly in view of the court decisions, I conclude that any further investigation on allegations of fraud in relation to the charge is abuse of the court process. I am satisfied that the Lalchand has recourse in ***Milimani HCCC No. 2533 of 1997*** as the matter he complains about is so intimately connected to the case he has filed and which is pending hearing and determination.

37. In view of my findings above, I hereby grant the following orders;

**i. A declaration that the continued investigation of the petitioner and/or its agents and employees by the respondents in relation to matters concerning disputes between the petitioner and the 1<sup>st</sup> interested Party, his servants, agents or employees in relation to the charge instrument or any matter relating to L.R. No. 209/66/41 is a threat to the petitioner's right to a fair trial guaranteed under Article 50 of the Constitution and abuse of the court process.**

**ii. The respondents be and are hereby restrained from investigating, summoning or arresting the petitioner's officers and/or employees or in any way howsoever from investigating any matter in respect of the dispute in respect of both the legal charge dated 29<sup>th</sup> April 1997 over L.R. No. 209/66/41 or any related issues pending in the dispute between the petitioner and the 1<sup>st</sup> interested Party, his servants, agents or employees in *Milimani HCCC No. 2533 of 1997*.**

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of April 2013.**

**D.S. MAJANJA**

### **JUDGE**

Mr Gichuhi instructed for Walker Kontos and Company Advocates for the petitioner.

Mr Mule, State Counsel, instructed by the Directorate of Public Prosecutions for the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Mr Mutuli instructed by Mutuli and Apopo Advocates for the 1<sup>st</sup> interested party.

Mr Wanjohi instructed by Theuri Wanjohi and Company Advocates for the 3<sup>rd</sup> interested party.