REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NO. 63 OF 2012

JERALD WACHIRA GICHUKI.....……..……...…….APPLICANT

VERSUS

G. NORTH & SONS LIMITED…….....…….....……..1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS…....……2ND RESPONDENT

RULING

By a notice of motion application dated 11th October 2012, the Applicant sought the following orders-

1. ***that this application be certified as urgent and service be dispensed with in the first instance and the same be heard on priority basis,***

2. ***that pending the inter parties hearing of this application, the respondents whether acting in person, through their proxies, agents, employees, servants or anyone executing their instructions be restrained from arresting, incarcerating in any state facility, harassing or in any way applying the criminal process to recover debts allegedly owed by the applicant,***

3. ***that the court declares that the threatened action by the 1st Respondent to cause the arrest, prosecution and or detention of the applicant allegedly for a civil debt owed to the 1st respondent is clearly abuse of the criminal process,***

4. ***that the costs of to the Application be borne by the respondents.***

The Application was supported by the affidavit of Gerald Wachira sworn on 11th October 2012 and the written submissions dated 19th February 2013.

2. The Applicant's case was that by local purchase orders dated 27th and 28th November 2011, Elbur Flora Limited a limited liability company in which the Applicant herein was a director, requested the 1st Respondent to supply greenhouse materials worth Kshs. 1,786,750/=. These goods were taken on a credit facility for which the Applicant was guarantor. The Applicant confirmed issuing several cheques to the 1st Respondent on their undertaking that it would first consult the Applicant before banking the cheque. However, when the company was unable to pay, the 1st Respondent went ahead to bank the cheques without first consulting the Applicant to confirm if the funds were in place as the parties had earlier agreed. Consequently, the cheques were returned as unpaid. By a letter dated 17th September 2012, the 1st Respondent threatened to lodge a criminal matter against the Applicant in addition to applying for winding up of the company.

3. The Applicant alleges that the intended prosecution, amounts to an abuse of the criminal process and now seeks a declaration by this court that the intention of the 1st Respondent to cause the arrest, prosecution and/or detention of the Applicant is an abuse of the criminal process. Counsel submitted that criminal process is designed to punish offenders for conduct which is legally prejudged to be criminal. It is not designed to be used to attain ulterior objectives such as threatening a party to settle a civil debt and where this is done, it constitutes abuse of the criminal process and the court should step in to stop such an action, and that the court has supervisory jurisdiction to ensure that court processes are not abused. In support of his submissions Counsel relied on the holding in **Macharia & Another v The AG [2001] 449** that-

"the court can declare a prosecution improper if-

a. ***it is for a purpose other than upholding criminal law,***
b. ***it is meant to bring pressure to bear upon the applicants to settle a civil dispute,***

c. ***it is an abuse of the court's criminal process,***
d. ***it amounts to harassment and is contrary to public policy.***"

4. He also relied on the case of **Kuria & 3 Others v The Attorney General [2002] 2 KLR** where the court stated that the machinery of criminal justice is not to be allowed to become a pawn for settling personal feuds and individual vendetta. It is the duty of the court to ensure that the utilization and/ or invocation of its processes and the law is not actuated by considerations far divorced from the goal of justice as to make court virtually a scapegoat in settling personal scores and vendetta.

5. The Applicant argued that he was never supplied with any goods. It was the company where he is a shareholder and one of the directors that received the goods and it is this company that is indebted to the 1st Respondent. The cheque issued was therefore in settlement of a 3rd party's debt and it never rendered him liable on behalf of the company as a guarantor. That there is an option of recovering the debt from the company but the 1st Respondent has instead chosen to use the criminal process.

6. The 1st Respondent opposed the application and Counsel relied on the Replying Affidavit of Andrew Kaburia sworn on 23rd January 2012 and the written submissions filed on 18th February 2013. The 1st Respondent avers that it supplied the Applicant with goods worth Kshs. 1,815,317.77/=, that towards payment of the sum owed the Applicant issued the Respondent with a cheque dated 15th March 2012 for Kshs. 632,357/= which was however returned unpaid with the remarks ***"insufficient funds".*** That by the letter dated 5th May 2012, the Applicant admitted owing the 1st Respondent the said sum and proposed to pay the same at the end of August 2012 but failed to pay. That 1st Respondent accused the Applicant of several offences including obtaining goods by false pretence and issuing a bad cheque and submitted that it was its prerogative to institute criminal proceedings

7. In its written submissions the 1st Respondent submitted that the court does not have jurisdiction to hear the application in its current form. The Applicant had invoked Section 389 of the Criminal Procedure Act Cap 75 of the Laws of Kenya which deals with the court's power to issue directions on *habeus corpus*. As this was not an application for *habeus corpus*, the court's jurisdiction has been wrongly invoked and for this reason, the application was bad in law and lacked merit, and that this was not a mere technicality but one substantive in nature and therefore the application is incompetent *ab initio.* He relied on the case of **Joel K. Yegon & 4 Others v John Rotich & 4 Others Misc Application NO. 995 of 2003.**

8. The Respondent also submitted that issuance of a bad cheque is a criminal offence provided for under Section 316 A of the Penal Code *(Cap 63 of the Laws of Kenya)*. and the 1st Respondent is entitled to seek protection and justice and the allegation that by seeking criminal redress the 1st Respondent is attempting to harass the Applicant into paying a civil debt has not been supported by any evidence. The 1st respondent further argued that in order to prove ulterior motive on the part of the 1st Respondent, the Applicant needed to show that the criminal process was commenced without proper factual foundation and in this case no evidence had been submitted to prove such ulterior motive. The correspondent's counsel relied on the case of **Republic v Commissioner of Police & Another Ex-parte Michael**

Monari & Another [2012] eKLR.

9. Finally he submitted that a civil matter of the same facts is not a bar to criminal proceedings as Section 193 A of the Criminal Procedure Codeallows for both civil and criminal proceedings to proceed simultaneously and relied on the holding in **Samuel Ndung'u Gitau v Senior Resident Magistrate Court at Kiambu & 3 Others [2012] eKLR.**

10. The 2nd Respondent did not file any document in support or opposition of the application. Nevertheless Ms. Idagwa for the State made oral submissions on matters of law in opposition of the application. She stated that the court lacked jurisdiction to grant prayer 3 and cited Article 157 of the Constitution, that the court could not stop investigation by the Police or prosecutions by the 2nd Respondent.

11. The application and submissions therefore raises the following issues for determination-

a. ***whether the court has jurisdiction to hear and determine the application in its current form,***

b. ***whether this court can issue an injunction barring the 1st Respondent from taking up its right to pursue criminal action against the Applicant for issuing a dishonoured cheque,***

c. ***whether the civil nature of a dispute bars any parallel criminal proceedings.***

12. On the first issue, the 1st Respondent urged to court to dismiss the application for having been brought under the wrong provisions of the law. Section 389 under which this application has been brought provides for the powers of the court to issue directions on the order of *habeus corpus.* Whereas this is correct, the 1st Respondent has not shown any prejudice that it has suffered because the wrong provision of the law was cited. The orders sought in the applicant and the grounds upon which the same is based were clear to the 1st Respondent and it was able to adequately respond to the same. This court is mandated under Article 159 (2) (d) of the constitution to adhere to the principle of administering justice without undue regard to procedural technicalities in exercising its judicial authority. Justice in this instance demands that the application herein be heard and determined on its merit. I hold that citing a wrong provision is a curable irregularity, that it is not fatal to the matter before court and that the matter is properly before this court. I will therefore deal with the fundamental issues raised in the application.

13. It is the duty of the court to ensure that its processes including the criminal process are not abused, used to perpetuate injustice or for improper motives. The 2nd Respondent is an independent body which under Article 157 (10) of the Constitution does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of its powers or functions; and is also not under the direction or control of any person or authority. It is however mandated under sub article (11) 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. Where it acts in disregard of these principles, then the court has a duty to intervene and ensure that it acts in accordance with the constitutional principles.

14. In the present case there is an allegation by the Applicant that the 1st Respondent intends to use the 2nd Respondent to intimidate him into settling a civil debt by instituting criminal proceedings. Abuse of criminal process was defined in the case of **Floriculture International Limited High Court Misc. 144 of 1997** as cited with approval in **Republic V Commissioner of Police & Another *Ex-parte Michael Monari & Another* [2012] eKLR** as-

> ***"proceedings taken in bad faith or circumstances yielding an inference that they were up to no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of the different systems of civil remedies."***

The court also relied on the holding in **William v Spautz [1992] 66 NWS LR 585** that-

> ***"the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and, on that account, is deserving of punishment.***"

15. The 1st Respondent has accused the Applicant of issuing it with a bad cheque which constitutes an offence under Section 136 A of the Penal Code. The Applicant did not deny this but only stated that he was acting as a guarantor for a loan issued to a 3rd party and was therefore not liable. He also stated that the 1st Respondent acted in breach of their undertaking to inform him before banking the cheque. No evidence was presented to prove any of these allegations. In any event, this court is not expected to decide whether the offences with which the Applicant has been accused have been proven but only whether acting on the facts provided, the Respondents would be pursuing criminal redress in good faith or they would be driven by vendeta or malice, with an intention to compel the Applicant into settling its debt.

16. From the evidence provided, I am unable to find that there is an intention to abuse the court process by the Respondents. There is an offence disclosed from the conduct of the Applicant which the 1st Respondent is entitled and indeed mandated to report and if the 2nd Respondent upon the evaluation of the evidence presented to it deems it fit to institute criminal proceedings against the Applicant. The 2nd Respondent would in that regard be acting within its mandate. The material presented before this court discloses that there may be criminal conduct on the part of the Applicant. It would therefore be prudent for investigations to be conducted to determine whether an offence had been committed whereupon the 2nd Respondent may commence prosecution if it deems fit.

17. It is clear that the issues herein flow from an agreement between the Applicants Company, Elbur Flora, the Applicant and the 1st Respondent and have essentially been caused by breach of that agreement. There is thus a civil dispute between the parties. The existence of civil proceedings is not a bar to institution of criminal proceedings where an offence has been disclosed. In the **Kuria & 3 Others v Attorney General** *(supra)* case, the court held thus at page 80-

> ***"it is not enough to state that because there is in existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of court process. There is need to show the process of court is being abused or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an "abuse of the process", is a "manipulation", "amounts to selective prosecution" or such other processes or of even supposing the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes institution of criminal proceedings."***

The allegations by the Applicant of harassment have not been proven before this court. There is no evidence of malice, ill-will or ulterior motive on the part of the 1st Respondent and the court cannot pre-suppose their existence on the basis that there is a civil dispute between the parties. In addition, there is no step that has been taken by the 2nd Respondent on the matter at hand and this court cannot issue orders to prohibit prosecution by the 2nd Respondent without evidence that it would be acting maliciously, oppressively, against the rules of natural justice or in contravention of the Applicant's rights.

The upshot is that I find the application dated 11th October 2012 to be without merit and would dismiss it with costs to both the Respondents.

It is so ordered.

Dated, signed and delivered at Nakuru this 7th day of June, 2013

M. J. ANYARA EMUKULE

JUDGE