



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 53 OF 2012

**IN THE MATTER OF AN APPLICATION BY RAFIK DHANJI FOR ORDERS OF JUDICIAL
REVIEW IN THE NATURE OF PROHIBITION**

AND

**IN THE MATTER OF SECTION 34 (4) (B) OF THE NATIONAL SOCIAL SECURITY FUND
CAP 258 LAWS OF KENYA**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KISUMU CRIMINAL CASE
NO. 618 OF 2012**

RAFIK DHANJI.....EX-PARTE APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT KISUMU.....RESPONDENT

AND

NATIONAL SOCIAL SECURITY FUND.....INTERESTED PARTY

J U D G M E N T

By motion dated 26-11-2012 brought under Order 53 rule 3 of the Civil Procedure Rules, the ex-parte applicant sought an order of judicial review in the nature of Prohibition directed at the respondent prohibiting her or any other magistrate from taking plea or hearing or determining Criminal Case No. 618 of 2012 at Kisumu which the State (through the interested party) was complaining against him. The annexed charge sheet shows that the ex-parte applicant and JRS Group Limited were charged with failing to produce records contrary to section 34 (4) (b) of the National Social Security Fund (NSSF) Act (Cap 258) whose particulars were that on or about 18-10-2012 within Milimani Estate in Kisumu town, being the managing director of JRS Group Limited a registered contributing employer No. 279323 he neglected to produce wage records in respect of his employees for the period January 2011 to October 2012 when required to do so.

The ex-parte applicant swore that he is an advisor to JRS Group Limited, a company offering security solutions in Kisumu and its environs. The company is a registered contributing employer No. 279323 under the NSSF Act. On 15-5-2012 the ex-parte applicant was charged in criminal case No. 325

of 2012 at Kisumu with failing to pay a penalty contrary to section 14 as read with section 36 (a) of the NSSF Act, that on or about 27-3-2012 he failed without lawful excuse to pay Kshs. 1,019,500/= being a penalty levied on late payment of contributions when required to do so. He paid the penalty. On 18-10-2012 the officers of the interested party demanded that he furnishes them with all registers and muster rolls of employees for the period of January 2011 to date; petty cash and vouchers for the period; and NSSF payment receipts (SF50) for the period. The documents were required for inspection to ensure that the provisions of the Act were complied with.

The ex-parte applicant's case is that by the time he was being charged on 15-5-2012 the company did not have any outstanding debt with the interested party but, to avoid embarrassment, they were arm-twisted to pay to facilitate the withdrawal of the case. Further that, the documents were being sought with the sole intention of having them incriminate themselves which contravenes the provisions of section 34 (4) (b) of the Act and violates his rights under Article 49 (1) (d) of the Constitution of Kenya 2010.

The motion was served on the respondent and interested party but did not elicit any response. Mr. Odeny for the ex-parte applicant filed written submissions which I have considered.

Section 34 (1) to (4) of the Act provides as follows:

- “34 (1) An enforcement officer appointed under this Act shall, for the purpose of ascertaining whether this Act is being or has been complied with in any premises or place liable to inspection under this section, have power to enter any such premises or place liable to inspection under this section, have power to enter such premises or place at all reasonable times, and to examine every person who he finds therein.**
- 2. The occupier of any premises or place liable to inspection under this section, and any person who is or has been employing any person, and the servants and agents of any such occupier or other person, and any employee, shall furnish to an enforcement officer all such information and produce for inspection all such documents as the enforcement officer may reasonably require for the purpose of ascertaining whether contributions are or have been payable, or have been duly paid, by or in respect of any person, or whether any benefit is or was payable to or in respect of any person.**
 - 3. The premises and places liable to inspection under this section are any premises or places where an enforcement officer has reasonable ground for supposing that any persons are employed, except that they do not include any private dwelling not used for the purposes of a trade or business.**
 - 4. Any person who-**
 - a. willfully delays or obstructs an enforcement officer in the exercise of any power under this section; or**
 - b. refuses or neglects to answer any question or to furnish any information or to produce any document when required to do so under this section,**

shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings and where the offence is a continuing one, such person shall be liable to a further fine of one thousand shillings for every day during which offence continues.

Provided that no one shall be required under this section to answer any questions or to give any evidence tending to incriminate himself.”

Article 49 (1) of the Constitution of Kenya 2010 states that:

“49 (1) An arrested person has the right-

(a)

(b) to remain silent.”

From my understanding of these provisions, the ex-parte applicant is entitled to claim that he owes no cent to the interested party. He is entitled to say that he has paid all dues to the interested party. But that does not stop the interested party's enforcement officer from seeking those documents

“for the purpose of ascertaining whether contributions are or have been payable, or have been duly paid.....”

If the ex-parte applicant claims that he has duly paid and therefore that the request to inspect those documents was unreasonable, then that would provide a defence to the charge before the subordinate court. If the provision of the sought documents would expose him to self-incrimination, again, that would be his defence. The trial court will have to receive evidence to be able to deal with the interested party's right to inspect the documents and the ex-parte applicant's right to remain silent. I hasten to add that, the payment of penalties and the payment of standard or special contributions are, under the Act, two different things.

In Halisbury's Laws of England, 4th Edition, Volume I, at page 138 paragraph 130, it is indicated as follows:

“Prohibition lies not only for excess of or absence of jurisdiction, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of proceedings. The power of a minister to refer a matter to an inferior tribunal will be considered on an application for an order of prohibition against such tribunal. So too will the power of a local authority to make such a reference.”

In Kenya National Examinations Council -VS- Republic Ex-parte Geoffrey Gathenji Njoroge and Others, Civil Appeal No. 266 of 1996 at Nairobi, the Court of Appeal observed as follows:

“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....”

Counsel for the ex-parte applicant did not allege that the respondent did not have jurisdiction to hear and determine the complaint contained in the charge. Indeed, under section 39 of the Act all criminal and civil proceedings under the Act may be instituted or brought in a magistrate's court.

Did the institution of the criminal proceedings contravene the laws of the land? The NSSF Act allows enforcement officers to investigate offences under the Act and prefer charges. This is what happened in this case. The merits of the decision to charge, and whether or not the charge will succeed, are not within the province of Prohibition. It will be for the respondent to hear the case in the charge and make a decision thereon.

The result is that this application must fail. I order it dismissed. Since it was not defended, I make no order as to costs.

Dated, signed and delivered at Kisumu this 22nd day of July, 2013.

**A.
JUDGE**

O.

MUCHELULE