



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 244 OF 2006

SAMUEL KAMAU MACHARIA1ST PETITIONER

MADHUPAPER INTERNATIONAL LTD2ND PETITIONER

ROYAL CREDIT LIMITED3RD PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

AND

STANDARD CHARTERED BANK LIMITED.....INTERESTED PARTY

JUDGMENT

1. Central to this matter is the jurisdiction of the court over the prosecutorial authority of the State and the key issue is whether this Court should intervene to compel the respondent (currently the Director of Public Prosecutions) to institute criminal proceedings against the Interested Party.
2. The 1st petitioner is described as the majority shareholder and chairman of the Board of directors in the 2nd and 3rd petitioners herein. He is aggrieved by the failure on the part of the respondent to institute criminal proceedings against the Standard Chartered Bank (hereafter “the bank”) over what he claims to be non-remittance of sums of money to the 1st petitioner’s account received on his behalf by the bank. The money was part of the proceeds after the sale of the 2nd petitioner and the amount was to be effected through bank guarantees.
3. In their petition dated 2nd May 2006, the petitioners seeks the following prayers:
 - a. ***It be declared that the said decision made on 26th October 2005 that he shall not institute criminal proceedings against Standard Chartered Bank (k) Ltd and its directors is null and***

void.

- b. *An order of certiorari do issue to bring to the High Court the letter of the respondent dated 26th October 2005 and to quash the decision embodied therein that the respondent shall not institute criminal proceedings against Standard Chartered Bank (K) Ltd and its directors.*
- c. *An order of mandamus to compel the respondent to act on the complaint against the said bank and its directors in accordance with the Constitution and the law.*
- d. *As alternatives to (b) and (c) above, such other orders as this Honourable Court shall deem just.*
- e. *The costs of this application be provided for.*

Background

4. The present petition was precipitated by a letter dated 26th October 2005 in which the Office of the Attorney General indicated to the petitioners that it did not intend to pursue criminal prosecutions against the bank in respect of a sum of Kshs 55 million (Kshs55,000,000) alleged to have been received on behalf of the 1st petitioner but never credited to his account with the bank.
5. The 1st and 3rd petitioners had, since 1988, held with the Interested Party, Standard Chartered Bank (K) Ltd, current, saving and fixed deposits accounts into which moneys from third parties were credited on instructions of the 1st petitioner. Sometimes in August 1989, the 2nd petitioner, then under receivership, entered into a Memorandum of Understanding under which it was to be purchased at Kshs 250 million by M/s Mutune Investments Limited, a company associated with both City Finance and Trust Bank Ltd.
6. Out of the Kshs 250 million, an amount of Kshs 125 million plus some additional amount for stock and debtors totalling to Kshs 134,570,000 was to be paid to the seller (1st petitioner) through his account at Standard Chartered Bank Moi Avenue and secured by irrevocable bank guarantees issued and payable by two banks, namely, City Finance Ltd and Trade Bank Ltd. This amount was to be paid as follows: Ksh 70 million on or before 120th day after the date of the hand-over of the company and Kshs 55 million on or before the 270th day after the hand-over together with accrued interest of 15% per annum. It is this amount of Ksh 55 million that is the subject of the present contest.
7. Subsequent to the sale of Madhupaper, it was found that proceeds in the amount of Kshs 55 million was not credited to the complainant's account at Standard Chartered Bank, prompting the lodging of complaints on November 29, 2000 to the Banking Fraud Investigations Section of the Central Bank of Kenya by the 1st petitioner, on behalf of the 2nd and 3rd petitioners. The 1st petitioner accused the bank of theft of the said Ksh 55 million and requested that investigations be carried out. In August 2001, the 2nd and 3rd petitioners demanded that the said Ksh 55 million be paid to them. The bank acknowledged receipt of the said demand letter but did not pay the amount as demanded.
8. On November 9, 2001, the petitioners also filed **Milimani HCCC No 1713 of 2001** against the Bank in which they alleged breach of contractual obligation and claimed amounts in the sum of Kshs 55 million and interest thereon.
9. The Banking Fraud Investigations Section investigated the 1st petitioner's complaint between November 2000 and January 9, 2003 and in its letter of January 9, 2003, communicated the outcome to the 1st petitioner in which it opined that the onus of disclosing the whereabouts of the Kshs 55 million rested with the bank as certified records from the bank indicated the bank actually

received the money in question but failed to credit the same to the beneficiary's account. The letter also indicated that the respondent had advised that the parties settle the matter amicably.

10. This was followed by the 1st petitioner's letter to the bank dated January 10, 2003 in which he requested the bank in writing to indicate its stand on the issue. As a result of failure to receive a response from the bank, the petitioner requested the officer in charge of the Banking Fraud Investigations Section of the Central Bank of Kenya to take appropriate action. On February 11, 2003, the bank responded to the letter expressing dissatisfaction with the enquiry and requesting for more evidence. On April 16, 2004 the Attorney General requested the Banking Fraud Investigations Section of the Central Bank of Kenya to make further investigations.
11. In the letter of 31st May 2005, the 1st petitioner's Advocates, Messers Kamau Kuria & Kiraitu Advocates, demanded that the Attorney General take action and gave notice of intention to pursue private prosecution. This was also followed by another letter dated 13th June 2005 from the firm indicating to the Attorney General that the firm had instructions to pursue private prosecution.
12. In its letter of 11th July 2005, the Attorney General's office informed the petitioner's advocates that the decision to institute private prosecution is untimely and could end up prejudicing on-going investigations and advised them to await the completion of the investigations.
13. By a letter dated September 8, 2005 addressed to the Attorney General, the Banking Fraud Investigations Unit affirmed the recommendations of the first investigation, the outcome of which was communicated to the petitioner on 9th January 2003. Through the letter of October 17, 2005 the respondent informed the officer in charge Banking Fraud Investigations Unit that the further investigations had not revealed further evidence.
14. On October 26, 2005 in a letter signed by the Director of Public Prosecutions (DPP) addressed to the petitioners' advocates, the DPP informed the petitioners that it would not institute criminal proceedings against the bank. The letter read in part:

"I wish to advise that the further investigations ordered by the Hon. Attorney General into this matter have been concluded and the report in respect thereof has been submitted to and considered by the Attorney General. Regrettably, those investigations have not revealed any evidence of value or upon which to support any criminal charges against the Bank. Accordingly Hon. Attorney General after serious consideration of the evidence availed and all the relevant circumstances, decided that the state shall not institute criminal proceedings against the Bank."

15. It is this letter that is the subject of the present proceedings.

The Petitioners' Case

16. The petitioners are aggrieved that despite the fact that on two occasions investigations have confirmed that the said Kshs 55 million was allegedly stolen by the bank, the Attorney General had decided that no criminal proceedings would be instituted against the bank. The petitioners complain that this decision was made despite the fact that in January 2003, the respondent opined that the bank had committed an offence and advised him on a possible amicable settlement between the petitioners and the bank and undertook to institute proceedings if no amicable solution was found.
17. It is the petitioners' case that the respondent acted capriciously and arbitrarily in handling the petitioners' complaint. They decry what they term as the lack of will to enforce criminal law against 'strong economic actors' in the country and complain that the respondent was in breach of their legitimate expectations in failing to prosecute the matter.

18. The petitioners argue that the Constitution of Kenya is founded on the doctrine of the rule of law which requires that laws be enforced equally against the weak and strong legal persons; that although the respondent had discretion under section 26 of the former Constitution to institute or not institute criminal proceedings, that discretion was to be exercised in a quasi-judicial manner. They were also aggrieved by the respondent's sharing of confidential information with the bank, terming such sharing of information as illegal.

The Respondents' Case

19. The respondent opposes the petition and has filed an affidavit in opposition sworn by **Mr. Victor Mule**, a State Counsel in the office of the DPP, dated 25th June 2012. In the said affidavit, Mr. Mule avers that the decision of the Attorney General not to prefer charges against any person or entity was based on the evidence contained in the investigations file compiled and submitted to the Attorney General; and that the Attorney General then exercised prosecutorial authority under the old constitution of Kenya.

20. It was submitted on behalf of the office of the DPP that the office of the DPP would be prepared to reopen and reconsider the matter, review the totality of the evidence including any new and/or additional evidence the petitioners or any other party may provide, but in this case, no new evidence had emerged since the decision by the AG was made and the supplementary affidavit by the petitioner did not bring forth new evidence to warrant a review of the decision.

21. The DPP relied on several cases in support of his position including that of **Associated Provincial Pictures Houses Limited v Wednesbury Corporation (1947) 1 KB 223** and **Wainaina v Attorney General [2008] KLR** for the proposition that courts ought not to interfere with exercise of discretionary powers unless certain conditions are met. He also cited the decision of the Court in the case of **Githunguri v Republic [1986] LRC 618** for the proposition that the onus was on the petitioners to prove that the Attorney General exercised his power arbitrarily, oppressively or contrary to public policy.

22. The respondent contended that in order to sustain their claims, the petitioners needed to show that the AG's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power in *Wednesbury* terms. The case of **Richard v Republic [2006] 2 KLR 620** was also cited for the factors that the court is to take into consideration in deciding whether or not to prosecute. The AG also relied on the Mauritius decision in **Mohit v DPP [2003] 5 LRC** for the proposition that the decisions of the DPP to prosecute, not to prosecute or to stop a prosecution were not subject to judicial review. The case of **King'ori & 4 others v Mwangi & Another [1994] KLR** was also invoked to support the contention that judicial review remedies will not be exercised where other remedies were available and have not been used.

The Case for the Interested Party

23. The bank opposes the petition on the basis of an affidavit sworn by Paul Nyoike, the Manager, Special Asset Management Unit of Standard Chartered Bank Kenya Ltd dated 31st January 2013. Mr. Nyoike termed the petition an abuse of process on grounds that though couched as a constitutional reference, the application was as a matter of fact, an application for judicial review made out of time.

24. The bank denied the petitioners' claim that it received the sum of Ksh55 million on behalf of the 1st petitioner, stating that the allegation was false. It contends, further, that the petitioners could not institute parallel proceedings, in the Civil suit **HCCC No. 1713 of 2001** and the present petition; and that not every right could be elevated into a constitutional violation as was held in the case of **Methodist Church of Kenya Registered Trustees & others v Rev Jeremiah Muku & Others, Civil Appeal No. 233 of 2008**. According to the bank, the petitioners' civil suit number **HCCC No. 1713 of 2001** was dismissed for want of prosecution and was at the time of filing the current suit the subject matter of **Civil Appeal No 58 of 2001**.

Determination

25. The main issue for determination is whether the Attorney General acted contrary to the Constitution in failing to prosecute the bank on alleged theft of the amount of Ksh 55 million which it had received on behalf of the 1st petitioner and whether this Court should intervene to compel the office of the DPP to institute criminal proceedings against the bank.
26. A collateral issue raised by the respondent relates to whether the Court has jurisdiction to intervene in the matter as it is a civil dispute and further, that the prosecutorial powers of the state are discretionary and the Court ought not interfere.
27. I believe that this line of argument is unsustainable. **Section 123(8)** of the former constitution vested jurisdiction in the High Court to determine the question whether an authority or person has acted in accordance with the constitution or the law. The subsection was in the following terms:

“No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”

28. It was the clear intention of the constitution that the court should have power to examine decisions of persons or authorities for compliance with the constitution, and, the Attorney General’s authority was therefore subject to the oversight jurisdiction of the court.
29. The power of the Attorney General to institute criminal proceedings was to be found in **section 26** of the former Constitution. **Section 26(3)**, which is the equivalent of **Article 157(6)** of the current Constitution provided as follows:

“26 (3) The Attorney-General shall have power in any case in which he considers it desirable so to do –
(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.”

30. What is clear from a reading of this section is that the power to institute criminal proceedings is discretionary. In the case of **Githunguri v Republic [1985] KLR 91**, at page 100 of the Judgment, the court remarked as follows regarding the Attorney General’s power of prosecution:

“The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do.”...this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy. He “shall not be subject to the direction or control of any other person or authority” (section 26(3)). This includes judges and magistrates in relation to the decision to institute criminal proceedings...”

31. Thus, even though the power to prosecute is discretionary, such discretion must be exercised judicially and not oppressively.

32. **Article 157** of the Constitution of Kenya, 2010 establishes the office of the Director of Public

Prosecutions as a separate constitutional office from that of the Attorney General. At **Article 157(11)**, the Constitution states that:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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.”

33. The office of the Attorney General or, under the current Constitution, the Office of the DPP exercises discretion as to whether or not to institute criminal proceedings against a person or body. In the discharge of its functions, the office of the DPP is subject only to the Constitution and the law. This court will not ordinarily interfere with the free exercise of the independence of that office unless it is shown that there is a breach of the Constitution or the law. In **Kenya Commercial Bank Ltd and 2 others v Commissioner of Police and another, Nairobi Petition No. 218 of 2011**, the court observed as follows:

[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.”

34. In the present case, the Attorney General considered the evidence before him and came to the conclusion that there was not enough evidence to prosecute the bank, as evidenced in his letter of 26th October 2005 in which he stated:

“Regrettably, those investigations have not revealed any evidence of value or upon which to support any criminal charges against the Bank. Accordingly Hon. Attorney General after serious consideration of the evidence availed and all the relevant circumstances, decided that the state shall not institute criminal proceedings against the Bank.”

35. It was submitted on behalf of the 1st petitioner in impugning the decision not to prosecute that statutory powers can only be exercised validly if they are exercised reasonably. While that is indeed true, the petitioner has not, in his pleadings or submissions, demonstrated what standard of reasonableness this Court is to use to gauge whether the respondent acted reasonably and judiciously or what test of reasonableness, in light of the basis of the investigations, this Court is to employ in order to intervene in the exercise of discretion by the respondent. In other words, the court would have to descend into the minutiae of investigations and the outcome to determine whether or not there is enough evidence to charge the Interested Party.

36. This, I believe, the court cannot properly do, for that is the province of the respondent. Unless it is shown that, on the face of it, the exercise of discretion was so unreasonable, irrational or in breach of a particular law that the decision arrived at cannot be allowed to stand, I am afraid the Court cannot in the circumstances intervene to compel the respondent reach a different conclusion over the investigations. The Court cannot therefore issue the orders sought by the petitioners.

37. The Court, however, takes note of the deposition of Mr. Mule where he avers as follows:

“...as a new prosecutorial authority and in line with the spirit and principles of the Constitution of Kenya 2010, the office of the Director of Public Prosecutions would be prepared to reopen and reconsider the matter, review the totality of the evidence including any new and/ or additional evidence the petitioners or any other party

may provide.”

38. This, I believe, leaves room for the respondents to re-open the matter and carry out further investigations, bearing in mind the somewhat opaque manner in which the bank seems to have dealt with the matter of its customers' funds, and mindful also of the public interest expectations from his office under the new constitutional dispensation. Further, the office of the DPP should at all times in the conduct of its mandate bear in mind its constitutional obligation and the relevant law including the guiding principles under the **Office of the Director of Public Prosecutions Act, No. 2 of 2013 (“the Act”)**. These principles include but are not limited to, promotion of public confidence in the integrity of the Office, promotion of constitutionalism, impartiality, rules of natural justice, the need to discharge the functions of the Office on behalf of the people of Kenya and observance of democratic values and principles.

39. Further, one of the functions of the DPP under section 5 of the Act is to:

“implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.”

40. Under section 5(4)(e) of the Act, the DPP is mandated to review a decision to prosecute, or not to prosecute, any criminal offence. The DPP has an obligation to prosecute any party, regardless of its or their status, and should not be seen to fail in its duty when confronted with a situation that suggests wrongdoing on the part of a party like the bank which, in the words of the petitioners, is a ‘strong economic actor’ because of its economic status.

41. Should the office of the DPP fail to deal with the matter for reasons that do not accord with its constitutional and statutory mandate, it is open to the petitioners to pursue private prosecution in accordance with the applicable law. To this end, the respondent is under an obligation, in accordance with the provisions of Article 35(1)(b) of the Constitution, to grant access to the petitioners should the petitioners so require, of all the information in its possession that would enable the petitioners pursue a private prosecution of the Interested Party.

42. In the circumstances, however, and based on the matters set out above, the petition dated 2nd May 2006 is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 19 day of December 2013.

MUMBI NGUGI

JUDGE

Dr. Kamau Kuria instructed by the firm of Kamau Kuria & Kiraitu & Co. Advocates for the Petitioner

Mr. Mule, Litigation Counsel, instructed by the Director of Public Prosecutions

Mr. Oraro instructed by the firm of Oraro & Co. Advocates for the Interested Party.