



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 210 of 2011

ERICK WAMBUA MAILUAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. This miscellaneous application arose out of a dispute between the applicant, **Mr. Eric Wambua Mailu** trading as Mailu & Mailu Consulting Partners, and Pelican Signs Limited the Interested Party.
2. The Applicant according to the Originating Summons filed in this court, was a businessman, doing consultancy work in engineering, topography and surveying with Mailu & Consulting Partners.
3. Following a consultancy contract between the applicant and the interested party in 2008, the interested party wrote a letter dated 15th April 2011 indicating their intention to terminate the contract for non-performance.
4. On 15th April 2011, the applicant filed an Originating Summons Application seeking the enforcement of his fundamental rights under **Articles 20(1) (2) (3), 22(1), 3(b), (4), 165(3)(b), 23(1), the Judicature Act. CAP 8, Articles 23, Sub-section 60, 70, 72, 76, 77, 123(1) and 123(8) of the Criminal Procedure Code.**
5. The Originating Summons was supported by an affidavit sworn by the Applicant on the 15th of April 2011. The Applicant alleged at Paragraph 3 of his supporting affidavit that pursuant to their consultancy contract, he agreed to;
 - a. Effect change of user of their parcels of land namely L.R. 209/12555 and L.R 37/254 from Industrial to light Industries.
 - b. Amalgamate the two titles.
 - c. Apply for the allocation to Pelican Signs Ltd of the access road between the two plots.
 - d. Re-survey for the change of user and amalgamation of the plots.
6. That they further agreed on the Applicant's charges as well as the statutory charges before signing the contract. The total sum the interested party agreed to pay him for both his charges and

statutory fees at the completion of the contract was Kshs. 526,200 out of which he was paid Kshs. 231,100. The balance was to be paid upon the completion of the assignment.

7. However even though he had carried out much of the assignment, and informed the Interested party of the work progress, the completion of the contract was delayed by failure to trace the relevant files at city hall, which failure he duly informed the interested party. This notwithstanding, the interested party through one of its Directors called him on his mobile phone demanding a return of the monies it had paid the Applicant and further informed him that they had reported the matter to the Police who were looking to arrest him, on accusations of obtaining money from them by false pretense.

8. On 15th April 2011, the applicant through his counsel filed a notice of motion application under a certificate of urgency, seeking for orders inter-alia, to restrain the police from arresting him on grounds that the matters giving rise to the police action were civil and not criminal. The application was heard by the Honorable Lady Justice Mwilu on the 18th April 2011 and orders were issued restraining the commissioner of police through any other police officer from arresting the applicant in relation to the consultancy contract with the interested party pending the hearing and determination of the said application.

9. The Interested party through its General Manager, filed a replying affidavit on 19th May 2011. In it, he averred at paragraph 5, 7,10,11,13 and 19 that they contracted the Applicant on or about September 2008 to carry out the following services on its behalf:-

- a. Amalgamate two plots namely L.R No.209/12555 and L.R.No. 37/754.
- b. Apply for allocation of road access from Langata Road and on road parking.
- c. Survey for the change of user and amalgamation of the plots.
- d. Road access from Langata and on road parking.
- e. Newspaper advertisement.
- f. Apply and acquire approval from NEMA.

10. Pursuant to this contract, the interested party tendered payments via cheques to the Applicant of Kshs. 263,100 on 3rd September 2008, Kshs. 150,000 on 1st October 2009 and Kshs. 300,000 on 1st October 2009 totaling to Kshs. 713,100. However, it was their contention that since October 2008 when these payments were last made to the Applicant, he had not finalized the work nor updated the Interested Party on the current status of work done, upon which they expressed their intention to terminate the contract. The interested party further denied any knowledge of threats of Police arrest on the Applicant and any report that had been lodged at any Police station in respect to this consultancy Contract.

11. The Interested party also averred that the Applicant had failed to truthfully disclose to the Honorable Court the exact amount of money it had collected from the Interested Party. These were the reasons for which they sought to terminate the contract and demand a return of monies they had paid for performance of the consultancy contract and further allege that the Applicant had obtained money from them by false pretense and therefore his application lacked merit and ought to be dismissed.

12. The Applicant in response filed a supplementary affidavit in which he denied in paragraph 3 of the interested party's replying affidavit having received instructions to ***“apply for allocation of road access from Langata”*** and ***“Road access from Langata and on road parking”*** According to him, the instructions were limited to doing ***“On Road Parking Design Work For L.R No. 209/12555 and 37/754 Langata Road”*** and ***“Road design and approval of access Road on L.R.No. 209/12555 and 37/754 – Off Mombasa Road.”*** He produced 2 letters dated 31st August 2009 in support of these instructions.

13. The Applicant further explained that the balance of Kshs.263, 100/= he was claiming was in respect of another contract mentioned in the letter dated 2nd September 2008 under the heading “**Building and design components**” of which the Interested Party had given separate instructions. He also averred that he had performed his part of the contract as agreed and had been submitting reports as seen in his letters dated 11th January 2011, 8th October 2010 and 12th February 2009. He however disputed the sum of Kshs.450,000 which he explains was in respect of a separate contract which he had been paid in view of the works for which he had carried out.

14. The Applicant also indicated that he had completed performing the contract as evinced in copies documents which he attached and had attempted to forward to the Interested Party who declined to receive them.

In conclusion, he averred that this was purely a civil suit for which he was suing in a civil court to recover the balance of fees for the work that he had done.

Issues

15. From the pleadings and submissions filed, the court is called upon to determine two issues.

1. The first issue relates to the question of jurisdiction in view of the fact that there is a High Court Civil Division within whose subject matter this application properly falls and whether or not the applicant has established a violation or threatened violation of his constitutional rights by the respondents.

2. Whether or not the matter before the Honorable Court is of a civil nature?

16. Jurisdiction and the establishment of a violation or threatened violation of a constitutional right.

I will deal first with the issue of jurisdiction which I believe is easily disposed of. **Article 165(3) (b)** gives the High Court ‘jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’.

17. The foundation of the applicants case is that the Interested Party has threatened his arrest by the 2nd Respondent and that there has been a failure on its part to perform his part of the contract towards the applicant as agreed. His case is that the High Court should intervene to resolve the raging controversy surrounding the performance of this contractual obligation on account of work that he has already done.

18. The jurisdiction of the High Court under Article 165 is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer a “question.” The “question” contemplated in **Article 165** must arise from a **real controversy or case**. Indeed the right granted to parties either to challenge any person, office, organ or authority contemplates a real controversy or case.

Article 22(1), which gives a party the right to enforce the Bill of Rights, states:

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or is infringed or is threatened.”

A similar provision is to be found in **Article 258(1)**, which provides:

“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with a contravention.”

19. Thus, for a party to move the court there must be a contravention or threat of contravention. Whether there is a contravention or threat of the Bill of Rights or any other provisions of the Constitution is a question of fact in each case.

However what is clear, in my view, is that the “questions” referred to in **Article 165** cannot be divorced from the factual situation of the case that demonstrates the threat or contravention of specific provisions of the Constitution and not just a controversy in the popular sense of the word.

20. In the instant case, the applicant has not demonstrated any violation, infringement or even threat in terms of prayer 6 of the Originating summons that his liberty, fundamental right and freedom have been threatened. He has not demonstrated that a report was indeed made to the Police and the 3rd Respondent confirmed that no such report was made to the police. He did not produce any report that is Occurrence Book record to confirm this and it leaves this court with no other deduction.

21. As was espoused in *Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)* and *Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)* this court is therefore required to address itself to the resolution of real issues and not just purported issues that have no basis whatsoever.

Whether or not the matter before the Honorable Court is of a civil nature?

22. The Applicant through his Counsel Mr. Nyangau, submitted that the dispute before the court as set out in the Originating Summons and supporting affidavit is of a civil nature with contractual obligations thereto, and was therefore not a criminal issue. The Interested Party however argued that **Article 24(i)** of the **Constitution** sets out the limitation of rights and fundamental freedoms and the Applicant could therefore not gag the Interested Party from taking remedial action against him and that it was up to the Interested Party as the person who had been wronged to seek redress in the appropriate manner.

23. The interested Party however was categorical that it had not made any report to the Police. It mattered less whether or not a report was made to the Police as the Applicant on his part failed to convince or even demonstrate otherwise to the court, and I find this unreasonable and unjustifiable, effectively limiting the fundamental right to institute a court proceeding claiming denial or violation of a fundamental freedom as enshrined in the bill of rights.

Section 313 of the **Penal Code** creates the offence of obtaining by false pretences and provides that:-

“Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen is guilty of a misdemeanour and is liable to imprisonment for three years”.

24. It is not lost on me that the Applicant in the instant case was in a contractual engagement and to allege that he obtained money falsely from the interested party in those circumstances does not fall within the definition of false pretence as the consultancy contract between them was not only of a civil nature but was also quite clear.

This case would therefore fall squarely within the ambit of a civil matter and the issues therein would best be canvassed as such

25. On the basis of what I have stated above, I find and hold that this Application has no merit, is an abuse of the court process and it calls for striking out. The application is therefore, hereby struck out with no orders as to costs.

SIGNED DATED and DELIVERED in open court this **13th** day of **February 2012**.

L. A. ACHODE
JUDGE