



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 240 OF 2011

**IN THE MATTER OF AN APPLICATION BY CAPE HOLDINGS LIMITED
FOR AN ORDER OF PROHIBITION**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND
9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53
CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF CHIEF MAGISTRATE’S COURT IN KIAMBU MISC. APPLICATION
NO.155 OF 2011**

BETWEEN

CAPE HOLDINGS LIMITEDAPPLICANT

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

SYNERGY INDUSTRIAL CREDIT LIMITED.....INTERESTED PARTY

RULING

The applicant is the registered owner of the property known as LR NO.209/19436 situate within Nairobi. The applicant entered into 14 agreements for the lease of office suites located within the said property with the interested party. The agreements were drawn and signed by the applicant on one part and the interested party on the other hand.

Under the said agreements, the interested party towards the discharge of its obligations under the respective agreements, paid the applicants some money. It is the position of the applicant that it was paid an aggregate sum of Kshs.577,200,000/= whereas the interested party’s position is that, it paid the said sum and a further sum of US\$1526888.

By a letter dated 11th July 2011, the interested party’s counsel **Mr. Nagpal** wrote to the applicant’s

counsel **Oraro & Co.** advocates contending that a dispute has arisen between the parties and as a consequence invoked the terms of special condition of the agreements which required that the dispute be referred to arbitration. The said condition recognized that all disputes, differences and questions that have arisen between the parties must be referred to arbitration. The parties could not agree on a single arbitrator hence the matter was referred to the chair of the Chartered Institute of Arbitrators Kenya branch. The chair nominated **Mr. James Ochieng Oduol** advocate as the sole arbitrator. By a letter dated 8th September 2011 the said arbitrator accepted the appointment. The first preliminary meeting was held on 28th September 2011. There is no doubt that alongside the arbitration proceedings, interested party lodged a caveat against the applicant's subject property claiming a purchaser's interest. The interested party also filed an action by way of an originating summons in ELC No.440 of 2011 seeking an order for the extension of the caveat.

It is the case of the applicant that in spite of the foregoing the interested party has maliciously filed a complaint with Kenya Police alleging that the applicant obtained Kshs.577,200,000 and US\$1526888 from it by false pretences. It is contended that pursuant to that complaint, the Kenya Police lodged investigations by applying for and obtaining a warrant to investigate the applicant's bank accounts at I & M bank.

The applicant contends that from all the communications between the interested parties and the applicant, the nature of the dispute between them has been contractual. Consequently and being aggrieved by the conduct of the interested party in making a complaint and that of the police in deciding to investigate the applicant, it was found necessary to apply for orders of judicial review to prohibit the police from investigating the complaint filed by the interested party. What has fallen for my determination is the Notice of Motion dated 18th October 2011 seeking the following orders;

- 1. THAT this court do issue an order of prohibition to prohibit the Kenya Police from investigating any complaint filed on behalf of Synergy Industrial Credit Limited as against the *ex parte* Applicant in respect of all matters arising out of the 14 sale agreements between the Applicant as vendor and Synergy Square Located within LR. NO.209/19436(14 Riverside off Riverside Drive)**
- 2. THAT this Honourable Court do issue an order of Prohibition to prohibit the Director of Public Prosecutions of the Republic of Kenya from prosecuting the *ex parte* Applicant in respect of any matter arising out a complaint filed against the *ex parte* Applicant by Synergy Industrial Credit Limited in respect of matters concerning the 14 sale agreements between the Applicant as vendor and Synergy Industrial Credit Limited as purchaser of a building known as Synergy Square located within LR. NO.209/19436 (14 Riverside off Riverside Drive).**
- 3. THAT the costs of this application in any even be awarded to the *ex parte* Applicant.**

It is the case of the interested party that it has a genuine complaint of serious fraud perpetrated on it by the applicant as a result of which it has been induced to part with a large and substantial sums of monies and as a citizen of this country, it is not only entitled to report a criminal offence against it by another entity but is obliged by law to do so and it is the duty of the police to investigate the complaint and it is solely for the director of Public Prosecution and no one else to decide whether the complaint discloses any criminal offence which the applicant ought to be prosecuted. It is also the case of the interested party that it is entitled to the full protection of the law and to report any genuine complaint of wrong doing to the Kenya Police for investigations.

The case of the 1st and 2nd respondents are that on 21st September 2011 a complaint was lodged by one of the directors of the interested party touching on an allegation that it had been defrauded by the applicant. On the basis of the said complaint, two directors of the interested party recorded a statement with the police. It is contended that a preliminary investigation reveals that the applicant offered for sale and the respondent agreed to purchase the property in question, however, upon receipt of the money, the applicant failed to transfer the property to the purchasers. It is contended that the police in their investigations are not arbitrating but performing a statutory function to determine whether criminal offence has been

committed by any of the parties. And that no party has the right to bar the police from investigating a complaint lodged by a citizen who is aggrieved with the conduct of another party.

The question for my determination is whether the applicant is entitled to the orders sought. The orders sought by the applicant are orders of prohibition seeking to prohibit the Kenya police from investigating any complaint filed on behalf of the applicant and to prohibit the Director of Public Prosecution of the Republic of Kenya from investigating the applicant in respect of any matter arising out of the complaint filed by the interested party concerning the 14 sale agreements in respect of plot No.209/19436, Riverside off Riverside Drive.

It is essential to note that this court has power and duty to prohibit the continuation of criminal prosecution if extraneous matters, divorce, guide the basis of the prosecution. It is also the duty of the court to ensure that public power and authority are not used as tools to intimidate, harass or achieve an ulterior motive not pertaining to that which the system was even formed to perform.

In my view an order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on societies sense of fair play and decency and/or where the proceedings are oppressive or vexatious. It is also important to understand that the criminal justice system cannot be allowed to become a place to settle personal feuds and individual's vendetta. The power of judicial review is invoked so as to jealously guard from this abuse.

Mr. Chacha Odera learned counsel for the applicant submitted that the interested party is misusing the Kenya Police to institute criminal prosecution in a purely civil matter which is presently under litigation. He also submitted that the Kenya police would be acting in excess of statutory powers in acting upon or getting involved in a civil complaint which is subject of arbitration. **Mr. Chacha** further submitted that the director of Public Prosecution will also be acting in excess of his constitutional statutory powers in initiating criminal prosecution in a purely civil dispute. He relied in **Civil Appeal No.266 of 1996**, the Kenya National Examination case where the Court of Appeal said that an order of prohibition concerns itself with a future act and not what has been done. He also relied on the case of **Githunguri vs Republic [1985] KLR 91** where the court held;

(1) That notwithstanding the powers conferred upon the Attorney General by section 26(3) of the Constitution the High Court has an inherent power and duty to secure fair treatment for all persons who are brought before it or before a subordinate court in order to prevent an abuse of the process of the court.

(2) That the Attorney General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the Constitution but this discretion should be exercised in a judicious way. It should not be exercised arbitrarily, oppressively or contrary to public police.

Mr. Chacha also referred me to cases hereunder;

In the case of **Amrik Singh Rihal and Another versus Republic, Nairobi Criminal Application No.557 of 2001**, the Court held that the Kenya Police should not get involved in a dispute between parties which is purely of a civil nature.

In the case of **Ndarua versus Republic [2002] 1 EA 205** the Court held that it had power to issue an order of Prohibition against prosecution where the prosecution was mala fide and an abuse of the process of the Court. In so holding the court followed the decisions in **Republic versus Grays Justices [1982] 3 all ER 653** and **DPP versus Humphreys's [1976] 2 all ER 497**.

In **R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers co-operatives Savings and Credit Society ltd [1999] 1 EA 245, 249** the Court of Appeal held that

“It is axiomatic that statutory power can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such a power

arbitrarily, capriciously or in bad faith. “

In the case of **Ndegwa Wachira versus Ricarda Wanjiku Ndanjeru (1982-88) 1 KAR 1062 at 1065**, the Court of Appeal stated:

“At all events, it seems to me the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court must, at least, at the present day, strive to do substantive justice to the parties, undeterred by technical procedure rules. As is often said, rules of procedure are good servants but bad masters. These rules have their origin in England and the philosophy there is to move from form to substance. Lord Denning, the celebrated English Judge has said ad nauseam, that technicalities are a blot in the administration of justice...”

In short it is the contention of the applicant that the invitation and participation of the Kenyan Police into a dispute between them and the interested party is a clear abuse of police powers and that the prayer sought in the Notice of Motion should be granted.

The application was opposed by **Mrs. Obuo** for the respondents and **Mr. Nagpal** for the Interested Party. **Mrs. Obuo** submitted that it is very difficult to understand how making a complaint of commission of criminal offence or circumstances which may show a commission of a criminal offence can possibly constitute misuse of police. That is why the police exist and in fact receiving of such complaints, is the core duty of police force.

The position of the respondent was supported by **Mr. Nagpal** for interested party. **Mr. Nagpal** submitted that section 14 of the police Act Chapter 84 laws of Kenya provides that Kenya police force shall be employed for the maintenance of law and order, the protection of life and property, the prevention and detection of crime, the apprehension of offenders and enforcement of all laws and regulations with which it is mandated. He also submitted that what the applicant is seeking is an order prohibiting the police from carrying out its functions under the statute regulating its activities. He also submitted that there is absolutely nothing to stop the Kenya Police from investigating a complaint of a possible criminal offence having been committed by someone because such offence was committed in the course or in relation to civil transaction.

Mr. Nagpal submitted that fraud is mostly committed in the context of ordinary civil transactions between parties. He wondered why the applicant should be immune from criminal process. He stated that the fact that the transaction relating to the sale and purchase of the subject property took place under an agreement which has an arbitration clause cannot possibly prevent the police from investigating a possible criminal offence committed in the process of the sale transaction in question. No tribunal has jurisdiction in criminal matters except courts of law properly constituted under the constitution.

Mr. Nagpal learned counsel for the interested party submitted that no arbitrator can deal with or decide a criminal case or assume jurisdiction over a criminal act. There is not a hint in the affidavit of the applicant that the complaint is made mala fides and that it is meant for ulterior motives. He therefore invited me to dismiss application with costs against the applicant.

I have considered the application, all the documents and authorities in support of the applicant's case. I have also considered the replying affidavits and the submissions filed on behalf of the respondent and interested party. I have also taken into consideration the lengthy submissions filed by the advocates appearing for the parties herein. The applicant is seeking two orders of prohibition against the respondent. The court of Appeal in Civil Appeal 266 of 1996 Kenya National Examinations Council case has laid down the principles upon which the orders sought by the applicants would be issued. The Court of Appeal held that an order of prohibition would issue against an inferior tribunal or body forbidding the tribunal or the body from continuing proceedings in excess of jurisdiction or in contravention of the laws of the land. An order of prohibition lies not only for excess of jurisdiction or lack of it, but also for a departure from the rules of natural justice. It does not lie to correct the course practice or procedure of an inferior tribunal.

As was stated by **Mr. Nagpal** and **Mrs. Obuo** it is the duty of the police to receive and investigate complaints of criminal offences brought to it by any member of the public. Such a complaint cannot be made to an arbitrator as an arbitrator has no powers to investigate and determine a criminal offence or to prosecute or hear a criminal complaint. The question here is whether the police can be stopped or prohibited from carrying out its mandate of receiving, investigating and determining a complaint lodged by individual.

The second issue is whether the Director of Public Prosecution can be prohibited from prosecuting the applicant in respect of any matter arising out of a complaint filed by the interested party in respect of matters concerning the 14 sale agreements concerning the sale and purchase of LR NO.209/19436. It is elementary that judicial review is concerned with decision making process and not with the merits of the decision itself. Judicial review deals with the illegality of the decisions of a public body.

Here it is not the complaint of the applicant that a decision has been made by the police or by the Director of Public Prosecution to undertake a criminal prosecution. What has happened is that the interested party made or lodged a complaint against applicant and that there is no evidence that a decision has been made in respect of the complaints lodged with the police. In essence no decision has not been made by the police or the Director of Public Prosecution as to whether or not, the complaint lodged by interested party discloses reasonable grounds to prefer charges against the interested parties.

Under Article 157 of the Constitution, the Director of Public Prosecution is mandated to institute and undertake criminal proceedings. Article 157(1) provides that the Director of Public Prosecution shall not require the consent of any person or authority for commencement of any criminal proceedings. It also provides that the exercise of the powers of DPP shall not be under the direction or control of any person or authority.

My understanding of the law is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the police under the direction and control of the Director of Public Prosecution. The predominant factor being that they must act in accordance with the law and so long as they do not exceed the limits, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives.

In **High Court Civil Case No.61 of 2006 and 196 of 2006 Bryan Yongo vs Hon. Attorney General, the court, at page 10-11**, had this to say regarding the charge, in this case of forgery.

“It is important to recall the principle in (WILLIAM & OTHERS v SPAUTZ (1993) 2LRC 659) case that the purpose of criminal proceedings generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account is deserving of punishment. In the context of this case, forgery is an offence under our law and it would be necessary to have this determine by a competent court.”

On procedure, the same court had this to say at page 9;

“We find no procedural impropriety on the part of the police in conducting the investigations and in framing the charges. The argument that the criminal proceedings were instituted to exert pressure on the applicant to forego a disputed claim is not born out. The criminal process is clearly aimed at proof of the alleged forgery. If proven forgery constitutes real vide in the criminal justice system.”

The basis of seeking the intervention of the court by the applicant is that the interested party maliciously filed a complaint with police alleging that it obtained money by false pretences. And that as a result of the said complaint the Kenya Police, lodged investigations by applying for and obtaining a warrant to investigate the applicant’s account, therefore there is a genuine apprehension that the interested party may misuse the Kenya Police to institute criminal prosecution in a purely civil matter which is presently under

investigations. **Mr. Chacha** learned counsel for the applicant submitted that the criminal investigation on the complaint filed by the interested party and any intended prosecution initiated on the basis of the same investigations would be an abuse of the criminal justice system and designed to serve collateral purposes. **Mr. Chacha** also submitted that the Kenya police would be acting in excess of its statutory powers in acting or getting involved in a civil complaint which is subject to arbitration.

Mr. Nagpal learned counsel for interested party submitted that his client had a genuine complaint of a serious fraud perpetrated on it by the applicant as a result of which it was induced to part with huge sums of money but the applicant now feigns to know nothing about the payment received from his client. He was of the view that his client quite properly decided to make a report to the police of a possible commission of a criminal offence by the applicant. In my view it is up to the police to investigate the complaint and it is solely for DPP and no one else after the investigation has been completed to decide whether the complaints discloses any criminal offence(s) requiring prosecution. It is also my position that the interested party like any other person in the republic of Kenya is entitled to the full protection of the law and to report any complaint of wrong doing to the police for investigation and determination. The interested party cannot be faulted for lodging a complaint of wrong doing to the Kenya Police and it is within the mandate of the Kenya Police to investigate any such complaint brought to its attention in order to determine whether a criminal offence has been committed.

The applicant has failed to demonstrate that the Police lack or acted in excess of jurisdiction or have not complied with the rules of natural justice. In my view it is outside the jurisdiction of this court to supervise how the police should conduct its investigations unless there is evidence to show that the investigation is being conducted in a manner to prejudice the rights and the interests of the applicant. The police should be allowed to investigate the complaint lodged by the interested party to its logical conclusion and it is now premature for me to determine whether there is any abuse being committed against the applicant.

The applicant contended that the dispute is a civil dispute and the police should not be dragged in a matter where no criminal offence has been committed by any of the parties. My answer is that the existence of civil proceedings or arbitral proceedings does not ipso facto constitute a bar to reporting of a possible commission of a criminal offence and institution of criminal proceedings arising from the same transactions, should the authority charged with the duty of investigating and prosecuting criminal cases decide to institute such proceedings. Section 193A recognizes the fact that the existence of a civil action is not a bar to criminal proceedings arising out of the same set of facts. In essence the law does not prohibit concurrent criminal and civil proceedings.

In conclusion, it is my determination that the complaint lodged by the interested party against the applicant with the Kenya Police does not by any stretch of imagination constitute misuse of power and that the allegations against the respondents are purely speculative and premature. The mere fact that a complaint has been lodged and investigations undertaken does not amount to an abuse of power on the part of the Kenya Police. It is also clear that there is no evidence that a decision has been made to charge the applicant with any criminal offence.

My understanding of the applicant's case is that the complaint lodged by the interested party and the investigations commenced by the Kenya Police is likely to result in criminal charges being preferred against its directors or some of its directors. It is generally based on fears or misapprehension that the police are likely to agree with the complainant that a criminal offence has been committed which requires prosecution. I cannot say that the investigations would result in a prosecution, as I have, no evidence to show that the police are likely to act at the behest and/or direction of the interested party. I have also no evidence to show that police have misused or are likely to misuse their powers against the applicant. There is also no decision or determination either by the police or by the DPP to demonstrate that the applicant will be charged with criminal offence(s).

In the absence of any documentary evidence of any abuse that is likely to be perpetrated against the applicant, I cannot say that the applicant is likely to suffer any prejudice or injuries.

All in all, there is no wrong doing or misuse of powers that was committed by the respondents in respect of the complaint lodged by the interested party. I am in total agreement with the advocates for the respondents and the interested party that the police have only taken the first step in investigations of trying to obtain a bank statement in respect of the transaction which resulted in the complaints lodged by the interested party. No prosecution has been lodged. The whole process is still in an early stage with no decision or determination made against the complaint lodged by the interested party. Consequently, the application has no merit and it is dismissed with costs to the respondents and interested party.

Dated, signed and delivered at Nairobi this 9th day of February 2012.

M. WARSAME
JUDGE