



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.68 OF 2011

MICHAEL MONARI

WILFRED OROKOAPPLICANTS

VERSUS

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

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

AND

MOHAMED ABUBAKAR1ST INTERESTED PARTY

FAZA HOLDINGS LIMITED T/A DOWNTOWN HOTEL..2ND INTERESTED PARTY

RULING

The application for my determination is the Notice of Motion dated 22nd July 2011 brought under section 9 of the Law Reform Act and under Order 53 rule 3(1) of the Civil Procedure Rules. The applicants seek;

“an order of prohibition do issue to prohibit the Director of Public Prosecutions and the Commissioner of Police from arresting, detaining, charging, instituting any criminal prosecution or ordering any of the foregoing to be done against the applicants herein or any other officer of Ecobank Kenya Limited arising out of a complaint by Mohamed Abubakar (the personal representative of Abubakar M. Habib –deceased) or any other person concerning land transaction relating to the property known as Land Reference No.209/4356.”

The application is based on the following grounds;

(1) The applicants have a compelling case of relief in the form of the prerogative order set out above on the grounds more particularly set out in the Statement already filed in this court and the facts set out in the accompanying Verifying Affidavit of Wilfred Orok.

(2) The Applicants are apprehensive that they may be arrested and charged with a criminal offence arising out of a complaint by Mohamed Abubakar and his agents concerning land

transactions relating to the property known as Land Reference Number 209/4356 (“the Property”).

- (3) All land transactions relating to the property and involving Ecobank Kenya Limited (“the Bank”) have been carried out in good faith and on the basis of the Bank’s legal rights as a chargee. Further, the said land transactions have been duly received, noted and registered by the Registrar of Titles, without any interference by the Bank.**
- (4) The complaints concerning the land transactions relating to the Property are in fact civil issues, which are currently pending for determination in various suits and applications before the Court of appeal, the High Court in Nairobi and the Chief magistrate’s Court in Nairobi.**
- (5) Due to undue pressure applied by Mohamed Abubakar and his agents, the Criminal Investigation Department of the Kenya Police force has summoned, interrogated and taken written statements from Michael Monari and Wilfred Oroko and has indicated its intention to arrest and charge the two, as senior officers of Ecobank Kenya Limited, with criminal offences.**
- (6) Mohamed Abubakar and his agents are currently applying pressure on the Director of Public Prosecutions to recommend that the Applicants be arrested and charged with criminal offences.**
- (7) The proposed or intended arrest and institution of criminal proceedings against Michael Monari and Wilfred Oroko is merely aimed at coercing Ecobank Kenya Limited to abandon its defence and possible legal claims in pending cases.**
- (8) Any arrest, charging or criminal prosecution of the Bank’s officers and/or institution of criminal proceedings against the Bank and/or its officers shall constitute irrational and unreasonable use of power on the part of the CID and the Director of Public Prosecutions.**
- (9) The proposed or intended arrest of Ecobank Kenya Limited’s officers and institution of criminal proceedings against Ecobank Kenya Limited and/or its officers is an abuse of the court process and a waste of state resources.**
- (10) It is just and equitable to grant the relief sought as the Applicants have substantial and meritorious grounds for grant of the substantive order of judicial review by way of prohibition sought in this application.**

The application is opposed by the respondents and the Interested Parties. In the replying affidavits of the respondents it is contended that sometimes in the year 2010 police received a report of irregular and unlawful dealing on land registered as IR.9804, LR. NO.209/4356 situate in Nairobi. Upon receipt of the report police recorded statements from various persons and commenced investigations. After investigations police discovered;

- (a) That the lawful and registered owner of LR. NO.209/4356 Abubakar Mohamed Habib passed away on 17th June 2007.
- (b) The deceased person had charged his property to Akiba bank limited now Ecobank Limited.
- (c) That a replacement charge was prepared in respect of the said parcel of land duly signed/executed and subsequently registered on 31st December 2008 after the death of the registered owner.
- (d) The replacement charge was signed on behalf of Ecobank Limited by Wilfred Oroko and Michael Monari.
- (e) Though they signed the replacement charge as the directors of Ecobank they were not directors.
- (f) The replacement charge had purportedly been forwarded to the bank on 25th February 2009 which clearly shows forgery.

- (g) The replacement charge was subsequently reversed by the Land Registrar and all entries removed and the property reverted to the original owner Abubakar Mohamed Habib.
- (h) The exparte applicant allegedly obtained registration by false pretences/forgery.
- (i) Police also confirmed that the dealings on the subject land were procedurally and legally varied from the ministry of Lands.

It was therefore submitted on behalf of the respondents that the foregoing background clearly reveals the commission of criminal offences for which action must be taken.

It is clear that there were two charges in respect of the subject property dated 17th November 1996 and 17th September 1997. The first charge was for a sum of Kshs.5 million while the second was for kshs.2.5 million making a total liability secured in respect of the subject property in the sum of Kshs.7.5 million. It is contended that by the time the chargor died he had paid Kshs.6.5 million. The bank is claiming an additional sum of Kshs.105 million. The issue in this matter is whether the applicants have committed criminal offences. How is a further charge forwarded on 25th February 2009 and is registered on 31st December 2008. **Mr. Muite** learned counsel for the respondent submitted that for there to be a replacement of a charge it must be signed by the chargor and/or his personal representative. The learned counsel submitted that the manner in which a further charge was registered discloses a criminal offence namely uttering false document and forgery. The two applicants said that they were directors of the bank when they were not directors of the bank.

Mr. Omondi learned counsel for the applicants submitted that the complaints raised by **Mohamed Abubakar** and his agents are in fact civil issues which were and have been raised for determination before the High Court, Court of Appeal and the Chief Magistrate's court in Nairobi namely;

- (i) Court of Appeal Civil application No.NAI 123 of 2011 (UR 82/2011)- **Mohamed Abubakar (suing as the personal representative of Abubakar M. Habib (Deceased) vs. Ecobank Kenya Limited, John K. Ngururi and Principal Registrar of titles,**
- (ii) High Court civil suit No.153 of 2001 – **Mohamed Abubakar (suing as the personal representative of Abubakar M. Habib (Deceased) vs. Ecobank Kenya Limited and John K. Ngururi,**
- (iii) High court Civil Suit No.721 of 2008 – **Halima Mohamed Alamin, Mohamed Abubakar and Mohamed Bunu vs Ecobank Kenya Limited (formerly known as Akiba Bank Limited);**
- (iv) High Court Civil Suit No.25 of 2010 – **Faza Holdings Limited t/a Down Town Hotel vs John Kagonye Ngururi and Kang'eri Wanjohi t/a Kindest Auctioneers;**
- (v) Chief magistrate's Court Miscellaneous application No.8 of 2010 **Kang'eri Wanjohi t/z Kindest Auctioneers and John Kagonye Ngururi vs Downtown Hotels.**

I have considered the application and all the documents in support and in opposition to the application for my determination. The issue for my determination is whether the respondents have abused their constitutional and statutory powers in any manner to warrant the intervention of this Honourable court. It is trite law that court procedures and criminal process should not be used for ulterior motives. No doubt **Mohamed Abubakar** has made a complaint to the Criminal Investigation Department of Kenya Police Force concerning alleged impropriety in the registration of land transaction relating to LR. NO.209/4356. It is contended that the said Mohamed |Abubakar has applied pressure on the Director of Public Prosecution to recommend that the applicants be arrested and be charged with criminal offences. The contemplated criminal charges have been disclosed as forgery and obtaining registration by false pretences and/or forgery. That due to undue pressure police summoned, interrogated and took written statements from **Michael Monari** and **Wilfred Orok.**

Mr. Omondi learned counsel for the applicants submitted that;

- (a) Anyone of the ex parte applicants made a forged documents so as to justify an allegation of forgery has not been demonstrated.
- (b) That any of the ex parte applicants made a representation that was false in fact and which he knew to be false or did not believe to be true so as to justify an allegation of obtaining registration by false pretences is also missing.
- (c) There is no evidence that the ex parte applicants made a false document to justify an allegation of obtaining registration by forgery.

In ex parte **Floriculture International Limited High Court Misc.144 of 1997**, the following statements were made;

“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 the 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 existence of other remedies which have either have already been unsuccessfully sought or which may be open and are less drastic and stigmatic than the criminalization of an otherwise civil dispute is indicative of improper and ulterior purposes.

...it is an abuse of criminal process for a person to launch criminal proceedings against the other, in civil matters which are genuinely disputed on substantial grounds by that other person and the civil dispute cannot be reasonably ventilated and decided with a fair finality in the criminal process.”

In **William vs Spautz [1992] 66 NSW LR 585** it was stated;

“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.”

In Ex Parte **Jared Benson Kangwana, High court Misc.446 of 1995 Justice Khamoni** had this to say;

“I think the principle is clear that to institute proceedings to exert pressure for the payment of a debt bona fide disputed where those proceedings are not for the purpose of deciding the disputed debt, constitutes an abuse of the process of the court.”

In **R VS. Attorney General Ex Parte Kipeno Arap Ngeny, High Court Misc. Civil Application No.406 of 2001**, the following statement was made;

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

In **R. vs Attorney General Ex Parte JPL Nyaberi, High Court Misc. Civil application No.1151 of 1999**, the following statement was made:

“prosecution aimed at securing private vengeance or vindictiveness must be stopped as contrary to public policy and the public interest.”

Under Article 157(4) of the Constitution, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any

directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person. It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.

In **William & Others vs Spautz [1993] 2 LRC 659** it was held;

“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 borne out. The criminal process is clearly aimed at proof of the alleged forgery. If proven, forgery constitutes real vice in the criminal justice system.”

It has been suggested by the applicants that **Justice Muga Apondi** in HCC No.153 of 2001 castigated **Mohamed Abubakar** for abusing the court process by filing a multiplicity of suits regarding the same property and the same parties. It is contended that following the delivery of the said ruling Mohamed Abubakar and his agents embarked on a mission to abuse the criminal process by applying undue pressure on the criminal investigation department and the Director of Public Prosecution. In the said case **Mohamed Abubakar** sued **Ecobank Kenya Limited** and **John Kagonye** and applied for an injunction restraining the 2nd defendant from breaking, attaching any property, interfering with a quiet possession and the 2nd defendant to return forthwith any and/or items carried away by the 2nd defendant’s agents and auctioneers. He also applied that the defendant by themselves or their agents be restrained from levying distress at the property known as LR. NO.209/4356 and from breaking into the same attaching any property or interfering with quiet possession of the said property.

After considering the arguments, the Judge dismissed the application for injunction and granted the applicant therein 30 days within which to pay the rents which were due to the new registered owner of the suit property. In the said decision, there is no way why the judge castigated **Mohamed Abubakar** for filing multiplicity of suits. The Judge noted the suit property was sold on 30th September 2008m to the 2nd defendant and the Judge also noted at that time there was no order barring the sale of the property. It is also clear that the Judge noted that the chargor of the property passed on in the year 2007. The Judge also noted that on 17th June 2008 the suit had actually abated. At page 31 of the said ruling the Judge had this to say;

“it should be noted that where allegations of fraud can be proved against the defendants then the applicant would be entitled to appropriate compensation. However allegation of fraud can only be dealt with during a full trial where the aggrieved party would be given an opportunity to give the details of how the fraud was committed. ...if at the end of the trial the court is convinced on a balance of probabilities that fraud had been committed against the aggrieved party then it would

be incumbent for it to grant appropriate orders in terms of damages.”

In making that determination, the Judge was not aware that a new title to the suit property was issued on 18th December 2008 after the death of the chargor on 17th June 2007. Secondly the sale agreement between the bank and the alleged new owner is dated 30th September 2008 and is said to be pursuant to charges dated 4th November 1996 and 17th September 1997 registered against grant No.IR 9804 as entries Nos.47 and 48 respectively. Thirdly as at 30th September 2008 being the date of the sale agreement and as at 15th December 2008 being the date of transfer by the bank as charge, there was no title in existence known as IR9804 as the same had expired in 2002. Fourthly the Judge was not aware that the new title number IR 114860 was only issued on 18th December 2008. It was also not brought to the attention of the Judge that after the death of the chargor, a replacement charge was prepared in respect of the suit property duly signed and executed by two alleged directors of the bank. The replacement charge was signed by **Wilfred Oroko** and **Michael Monari**. Although they signed the replacement charge as directors of the bank, they were not directors of the bank. It is also clear that the replacement charge had purportedly been forwarded to the bank on 25th February 2009 which clearly shows that was not the true position. Most importantly the Judge may not have been aware that since the death of the deceased and since the title to the suit property had expired, then there was no way the bank could exercise its statutory power of sale. Consequently one may be tempted to say that the decision in HCC 153 of 2001 was largely based on non disclosure of material facts by the parties and the law applicable to the trial judge.

Mr. Paul Muite learned counsel for Interested Party raised a pertinent question by asking who is the Interested Party to enable him to pressurize the criminal investigation department and the director of Public prosecution. He answered the question by submitting that his statement from a party would not constitute any pressure upon the DPP and the Director of CID. I am in total agreement with **Mr. Muite** learned counsel for the Interested Party that the personal representatives were fully entitled to lodge a complaint and it is the duty of the police to investigate whether the complaint discloses any reasonable grounds to prefer charges after recording statements from all relevant witnesses. There is no evidence and it has not been demonstrated that the actions of the respondents are motivated by other than the purpose of conducting a fair process. There is no shred of evidence to suggest that by preferring charges against the applicants and others there is gross abuse of the criminal process.

Having considered all the material placed before me, it is my decision that it is not appropriate for this court to intervene on behalf of the applicants. This court cannot weigh whether there is evidence that discloses criminal prosecution or charges. There is also no bar to concurrent criminal and civil jurisdiction and that the evidence available discloses criminal acts and omissions which must be investigated, prosecuted and determined by a court of competent jurisdiction. Consequently, the application dated 22nd July 2011 is dismissed with costs to the respondents and Interested Parties.

Dated, signed and delivered at Nairobi this 28th day of March 2012.

M. WARSAME

JUDGE