



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Miscellaneous Application 351 of 2011

PATRICK KINYUA MUNYITOAPPLICANT

VERSUS

REPUBLIC.....1^SRESPONDENT

JULIUS KIAMBATI2ND RESPONDENT

JUDGMENT

The appellant, **PATRICK KINYUA MUNYITO**, is a director of the company named **ABERDARE MAIZE MILLING LIMITED**. The said company bought 3,822 bags of maize from the 2nd Respondent, **JULIUS KIAMBATI**.

It is common ground that the applicant did not pay the full purchase price.

He attributes his company's delay in paying the balance to a difficult trading year. Notwithstanding that position, the 2nd respondent became so impatient that he involved the police in the task of seeking payment from the applicant. And when the applicant informed the police that he did not have money to pay immediately, the applicant was arrested and was later charged with the offences of Cheating contrary to **section 315 of the Penal Code**.

It is the contention of the applicant that the criminal proceedings against him contravene his right to a fair trial. His reason for so saying is that the dominant purpose for the institution and maintenance of those proceedings was to exert pressure on the applicant to settle a civil claim between his company and the 2nd Respondent.

The applicant believes that the institution and maintenance of the criminal proceedings against him

constitute an abuse of the criminal court process. He therefore asks this court to put a stop to the criminal proceedings.

The Director of Public Prosecution (DPP) swore an affidavit in reply to that of the applicant. The affidavit was sworn by Police constable Salim Mohamed, who states that he received a complaint from the 2nd Respondent that;

“Directors of Aberdare Maize Milling Limited had fraudulently obtained maize from him and that he had not paid.”

PC Salim Mohamed carried out investigations which revealed that on 25th October 2010, the applicant issued a cheque for KShs. 105,000/-. The applicant then told the 2nd Respondent that he (the applicant) would pay the balance on the next day.

However, when the 2nd Respondent went to the premises where Aberdare Maize Milling Limited was situated, on 26th October 2010, the same were closed, and the applicant was not available.

The applicant appears to concede the fact that the Aberdare Maize Milling Limited closed down its operations at Runyenjes Road, Industrial Area Nairobi. He says that the factory relocated to Nyeri in January 2011.

The charges preferred against the applicant are as follows;

1. Cheating contrary to section 315 of the Penal Code. The facts were that on 27th August 2010, the applicant, by means of fraudulent trick induced the 2nd respondent to deliver 119 bags of 90kg maize valued at KShs.170,855, to Aberdare Maize Milling Limited.

2. Counts 2,3,4 and 5 are generally worded like count 1, save for the quantities of the bags of maize delivered, and the values thereof.

3. Count 6 was for the offence of Issuing a Bad Cheque contrary to section 316A (i) (a) (b) of the Penal Code. The particulars were that on 5th October 2010, at Industrial Area, Nairobi, the applicant issued a cheque leaf of Kshs.105,000/- to the 2nd Respondent, with knowledge that his account had insufficient funds.

A close scrutiny of the criminal charges reveals that each of them correlates with a particular delivery of maize by the 2nd Respondent, to the applicant, save for count 5, which the applicant did not cite in his affidavit.

I find that there was a contractual relationship between Aberdare Maize Milling Limited and Julius Kiambati. That relationship is definitely of a civil nature. The applicant's company purchased maize from the 2nd respondent. If the applicant failed to pay for some of the maize that he bought, and which was delivered to him, the right thing to do would be for the 2nd respondent to institute civil proceedings to recover the outstanding amounts.

The police have no role in the process of the recovery of civil debts.

In the case **JOHN MURITU KIGWE & ANOTHER Vs THE ATTORNEY GENERAL & ANOTHER, HCCC NO. 223 OF 2000**, Rawal J. (as she then was) laid down the dictum that ought to govern a court when determining a case such as the one before me. Her Ladyship expressed herself thus;

“Over the period this court has established a well considered dictum of law to govern this kind of application. It is to find out what is the predominant purpose in the institution and prosecution of criminal proceedings. If the predominant purpose of the other party in using the legal process has

been one other than that for which it is designed, the court will intervene.”

In that case, the court did intervene by putting a permanent stop to the criminal proceedings because the same were being used to put pressure on the applicants to pay the claims of Agip (K) Limited, and to prevent the applicants from continuing their 2 civil claims.

It is noteworthy that the criminal cases had been premised on 5 cheques which were issued by the applicants to Agip (K) Limited. The said cheques were dishonoured when presented.

In **VINCENT KIBIEGO SAINA Vs ATTORNEY GENERAL, HIGH COURT MISC. APPLICTIONS NOS. 839 & 1088 OF 1999**, Kuloba J. said;

“On the whole, courts do not, and should not appear to have any responsibility for the institution of criminal prosecutions, nor have the powers to refuse to allow a prosecution to be commenced, maintained and to proceed, merely because they consider, on vague grounds, that as a matter of policy it ought not to have been brought. Subject to the edict that his powers be exercised honestly and in good faith, for the good of the Republic, the Attorney General has a near monopoly to set in motion and maintain or terminate the criminal process to protect the public generally.”

However, the learned Judge also made it clear that if criminal proceedings were instituted with the intention of achieving;

“some collateral undeserved advantage beyond that which the law properly offers, or if they result in exerting pressure to effect an object not properly within the scope of the process of the law and the judicial system, the court will prevent such proceedings being commenced or continued.”

In the case of **SAMUEL KAMAU MACHARIA & ANOTHER Vs ATTORNEY GENERAL & ANOTHER, HIGH COURT MISC. APPLICTION NO. 356 OF 2000**, Mwera, Mitey and Rawal JJs terminated criminal proceedings against the applicants because the case was being used to bring pressure on the applicants to settle 2 civil disputes. The court held that;

“the prosecution of the applicants was an abuse of the criminal process of the court; that the prosecution of the applicants amounts to harassment and is contrary to public policy, and that the prosecution of the applicants is a contravention of their rights under section 77 of the Constitution.”

In this case, I am not concerned with the question as to whether or not the conduct of the applicant renders him criminally liable.

He may or may not have used a fraudulent trick to induce the 2nd Respondent to deliver bags of maize to his company. If he did so, that would constitute a criminal offence, for which he could be lawfully prosecuted.

Also, the issuance of a cheque when he knew that the company’s bank account had insufficient funds, constitutes a criminal offence.

So, how do I determine the predominant reason for the institution of the criminal proceedings?

To my mind the conduct of both the police and the 2nd Respondent are very telling.

The applicant was arrested on 3rd May 2011. That was more than 3 months after the police had established that the applicant was one of the six directors and shareholders of Aberdare Maize Milling Limited.

The arrest was effected immediately after the applicant said that he did not have money that he could use to pay for the maize supplied by the 2nd Respondent. The applicant had also said that there was a need

for his company and the 2nd Respondent to do proper accounting, to establish the correct figures of the outstanding balance.

Three weeks later, the police threatened to arrest the applicant's wife, in Karatina. By that time, the applicant had already been charged in court.

After interrogating the applicant's wife at the Karatina Police Station on 28th May 2011, the police summoned her to appear before them on 30th May 2011, in Nairobi.

On 30th May 2011, the applicant's wife recorded a statement in Nairobi, and was released.

According to PC Salim Mohammed;

“ . investigations established that the wife was a director; On the 28th May 2011 we proceeded to the accused person's place to summon her to our offices in Nairobi to help us in the investigations into the alleged offences”

In other words, although the applicant had been charged on 4th May 2011, the police were still carrying out investigations on 28th May, 2011.

To my mind, as the police had known from as early as 19th January 2011, that the applicant's wife was one of the directors of Aberdare Maize Milling Limited, they could have interrogated her very early, if they were so minded.

By having police officers come from Nairobi to Karatina, in the early morning of 28th May 2011, which was more than three weeks after the applicant was charged; and because the said charges were preferred immediately after the applicant had told SSP Otieno that he did not have cash to use in settling the debt payable to the 2nd Respondent, I find that the criminal proceedings were instituted with a view to bringing pressure to bear on the applicant and his company, to settle the civil debt. In effect, the criminal charges were brought against the applicant for reasons other than to simply enforce the criminal justice.

Accordingly, the respondents must be told very clearly, that they cannot be permitted to abuse or misuse the court process. Therefore, I do now hereby issue an order to permanently stay the proceedings in **REPUBLIC VS PATRICK KINYUA MUNYITU, KIBERA CRIMINAL CASE NO. 1546 OF 2011.**

However, each party will pay his own costs. This decision on costs is informed by the fact that the applicant not only acknowledges being indebted to the 2nd Respondent, but also because he issued a bad cheque, and then closed down his company's Nairobi factory one day after telling the 2nd Respondent to return there for the balance of his money. In other words, the applicant contributed to the 2nd Respondent's decision to distrust him, and thus go to the police to search for him. The applicant did not come to court with clean hands.

Dated, Signed and Delivered at Nairobi, this 10th day of May 2012.

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FRED A. OCHIENG
JUDGE