



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 238 of 2011

SAMUEL NDUNG’U

GITAU.....PETITIONER

VERSUS

THE SENIOR RESIDENT MAGISTRATE, CHIEF MAGISTRATE’S COURT AT KIAMBU.....1ST RESPONDENT

THE OFFICER COMMANDING MUTHAIGA POLICE STATION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

HEATHWAY PROPERTIES LIMITED.....1ST INTERESTED PARTY

VINCENT WAINAINA MBOGORO.....2ND INTERESTED PARTY

JUDGMENT

Introduction

- 1. In the petition dated 8th November 2011, the petitioner seeks orders to restrain the respondents from continuing with the criminal proceedings against him in Kiambu Criminal Case No. 2420 of 2011, Republic -v- Samuel Ndungu Gitau. He also seeks general damages and costs of the suit.
2. The petition is supported by an affidavit sworn by the petitioner on 8th November 2011 and a supplementary affidavit sworn on 23rd January 2012.
3. The petition is opposed. The 2nd and 3rd respondents have filed a replying affidavit sworn by Inspector David Cheruiyot on 15th December 2011. The 4th respondent filed grounds of opposition dated 19th December 2011 while the 2nd Interested Party filed a replying affidavit sworn on 16th December 2011.

Factual Background

4. The criminal charges facing the petitioner arose out of a business transaction between the petitioner and the Interested Parties. From the averments contained in the affidavits before me, it appears that the petitioner contracted to supply to the Interested Parties cement from Bamburi Cement Limited at a rate of Kshs591.00 per bag and was paid Kshs4.018 million to supply 6,800 bags. He however, failed to supply the cement, informing the Interested Parties that Bamburi Cement Limited had cancelled his contract, and undertook to refund the money paid to him. According to the 2nd Interested Party, and this has not been denied by the petitioner, the petitioner undertook to repay the amount in instalments and issued cheques to be deposited in the Interested Party's account on diverse dates. The undertaking to repay was contained in an agreement dated 14th September 2010 between the petitioner and the Interested Parties. The cheques were returned unpaid. According to the 2nd Interested Party, the petitioner never had a contract with Bamburi Cement Limited as he had misrepresented.

5. Upon a complaint by the Interested Parties, the petitioner was arrested and charged at Kibera Law Courts in Kibera Criminal Case No. 268 of 2011 with the offence of obtaining by false pretenses contrary to section 313 of the Penal Code, Cap 63 Laws of Kenya. The charges were however withdrawn under S. 87(a) of the Criminal Procedure Code. Following fresh investigations, the petitioner was charged at the Kiambu Law Courts in Criminal Case No. 2420 of 2011 with several counts of issuing bad cheque contrary to section 316 A(1) (a) and 316 A(1) (c) of the Penal Code, Cap 63 Laws of Kenya. This is the case which forms the basis of this petition.

The Petitioner's Case

6. The gist of the petitioner's case is that the cheques which form the basis of his prosecution were all post-dated cheques and were not issued by him in his personal capacity but by a company of which he was a director known as Transco Trading Co. Ltd. He therefore contends that the charges were null and void for having been brought against him in his personal capacity.

7. According to Mr. Kang'atta, learned Counsel for the petitioner, the petitioner was raising two issues for determination by this court. The first is whether a natural person can be charged for an offence committed by a limited liability company, while the second is whether it is an offence known in law for a person to issue post-dated cheques.

8. He submitted that the petitioner had been charged with issuing post dated cheques in Kiambu Criminal Case No, 2420 of 2011; that the cheques in question were drawn in the name of a company known as Transco Trading Co. Ltd. He contended therefore that the petitioner should not have been prosecuted in his personal capacity, and the law in question, section 316 A(1)(a) and (c) does not talk about post-dated cheques. Mr. Kang'atta further argued that Article 50(1)(n) of the Constitution bars prosecution for offences not known in law.

9. Mr. Kang'atta further contended that the case had been reviewed by the Director of Public Prosecutions and the charges withdrawn, and the petitioner should therefore not be charged for the second time.

10. In his affidavits, the petitioner does not deny issuing the cheques in question. He alleges that it was a term of the agreement dated 14th September 2010 that he shall issue post dated cheques to the Interested Party which shall be returned to him upon settlement of the accounts; that the Interested Party banked the cheques without his knowledge and contrary to the agreement between them and so he wrote to his bank with instructions to stop the payment, as a result of which the cheques were dishonored.

11. He contends that section 316 A (2) of the Penal Code clearly excludes post-dated cheques; that the Interested Parties are using the 2nd respondent to intimidate, harass and coerce the petitioner, thereby abusing the powers conferred on the 2nd respondent and violating the petitioners right to fair administrative action. He alleges that the 2nd respondent, in bringing the charges and proceeding against

the petitioner, had not conducted proper investigations or established the facts of the matter or taken into account the previous findings of the police which led to the withdrawal of Kibera Criminal Case No. 268 of 2011.

12. The petitioner further alleges that in making the complaint to the 2nd respondent, the Interested Parties were acting maliciously and in bad faith especially given the fact that by a letter dated 15th February 2011, the Provincial Police Officer acknowledged that the dispute between the petitioner and the Interested Parties was purely civil in nature. He therefore contended that the Interested Parties were manipulating the criminal justice system to settle personal disputes to the detriment of the petitioner. He therefore alleges violation of his constitutional rights under Articles 27, 29(a), 47, 49 and 50(i) (n) of the Constitution.

The 1st, 2nd and 3rd Respondents Case

13. The case for the 1st, 2nd and 3rd respondents is set out in the affidavit of David Cheruiyot a police officer attached to CID headquarters, Nairobi, and the written submissions dated 8th February 2012. The respondents state that the cheques that gave rise to the criminal proceedings and this petition were not post-dated but had current dates meant to be cashed on the dates indicated on their face; that the Interested Parties duly banked them but they were dishonoured by the bank on instructions of the petitioner. Copies of these cheques were produced in evidence together with a letter dated 18th November 2009 written by the petitioner to his bank, Imperial Bank Ltd, requesting the manager not to pay cheque No. 00548 for Ksh. 500,000/= dated 13th November 2009.

14. Inspector David Cheruiyot depones that after carrying out investigations, he discovered that the stoppage of the cheques by the petitioner was made without the knowledge of the Interested Parties and the cheques were dishonored on the instruction of the petitioner. He therefore established that an offence of issuing bad cheques contrary to section 316A (1)(c) and 316A (1)(a) was committed, and this led to the arrest and charging in court of the petitioner.

15. The 3rd respondent contended that section 193A of the Criminal Procedure Code allowed both civil and criminal proceedings to continue side by side; that the petitioner can only be proven innocent after the criminal trial but cannot bar the police from undertaking the prosecutions; that the police were acting on the complaint lodged by the 2nd Interested Party and there is therefore no malice or bad faith on their part; that in any event, the 1st, 2nd and 3rd respondents were performing their functions as provided for under the Constitution and the National Police Service Act.

16. With regard to the withdrawal of Kibera Criminal Case No. 268 of 2011 under section 87(a) of the Criminal Procedure Code, the respondents submitted that such withdrawal was not a bar to subsequent prosecution and other relevant charges could be preferred against the petitioner if the 3rd respondent was of the opinion that there was sufficient evidence to support such charges.

17. The respondents also took the position that this petition is an abuse of the court process as it had failed to demonstrate how the respondents have violated the petitioners fundamental rights. They relied on the cases of **Matiba -v- Attorney General, (1990) KLR 666, Anarita Karimi -v- Attorney General (1979) KLR 54 and William S.K Ruto & Another -v- Attorney General, Civil Suit No. 1192 of 2005** all of which are to the effect that when one is alleging a violation of constitutional rights, one must plead with precision the section, subsection or paragraphs under which he alleges the breach and spell out the nature of the infringement. They therefore urged the court to dismiss the petition with costs.

The 4th Respondent's Case

18. Learned State Counsel, Ms. Kamande, presented the case for the 4th respondent. She submitted that while the petition seeks to stop proceedings in Kiambu Criminal Case No. 2420 of 2011, the petitioner has not shown any ground why the prosecution should be stopped. She contended that the prosecution is

based on a valid complaint, and if the petitioner feels that he is innocent of the charges, he should wait for a ruling but should not seek to stop on-going proceedings.

19. Ms. Kamande submitted further that the petition discloses no violation or threat to any of the petitioner's fundamental rights; that he has just alleged and brought out issues which he has not substantiated; that it is not enough to make allegations without proof. She contended that contrary to the petitioner's allegations, he had not been tried twice. The first case in Kibera related to a charge of falsely obtaining money from the Interested Party and was withdrawn by the prosecution under section 87(a) of the Criminal Procedure Code while the case which this petition seeks to stop is on a charge of issuing a bad cheque; that what the petitioner was doing was attempting to stop an on-going judicial process; she therefore urged the court to dismiss the petition as it was an abuse of the court process.

The Interested Parties' Case

20. There is no material dispute between the petitioner and the Interested Parties on the facts giving rise to this petition. These facts are set out above in the factual background to the petition.

21. The Interested Party's position on the petition is that it is an abuse of the court process and an attempt by the petitioner to avoid shouldering responsibility for his actions and criminal culpability. They submit that the criminal case in Kibera was withdrawn under section 87(a) of the Criminal Procedure Code after the petitioner lodged a complaint with the Provincial Police Officer, Nairobi Area and made false allegations; that the withdrawal was on the basis that the case would be re-investigated by an independent officer, and should there be overwhelming evidence, the petitioner would be charged afresh.

22. The Interested Parties contend that the criminal case in Kiambu Law Courts has not in any way infringed on any right or freedom of the petitioner as withdrawal under Section 87(a) of the Criminal Procedure Code does not amount to an acquittal; that the institution of the case followed all the legal procedures and investigation by an independent officer and was not commenced out of malice or bad faith and does not in any manner whatsoever infringe on the petitioner's right to fair administrative action.

23. The Interested Parties also contend that the petitioner has failed to clearly and specifically indicate the provisions of the Constitution he alleges have been violated and what constitutes such violation, and that he stands to suffer no prejudice, loss or injustice. If anything, the Interested Parties contend that they are the ones who stand to suffer irreparably as the petitioner obtained monies from them and issued bad cheques. They therefore urged the court to dismiss the petition so that the criminal case can proceed. They relied on the case of *Anarita Karimi Njeru -v- The Republic* (1976-1980) I KLR 1272

Determination

24. In my view, only one issue arises for determination in this matter: whether the prosecution of the petitioner in **Criminal Case No. 2420 of 2011- Republic -v- Samuel Ndungu Gitau** violates his constitutional rights under Articles 27, 29(a), 47, 49 and 50(i) (n). This being a constitutional petition for enforcement of fundamental rights, it is critical for the petitioner to demonstrate how his rights under these constitutional provisions have been violated. The High Court has enunciated the position with regard to the obligation of a petitioner alleging violation of constitutional rights in **Trusted Society of Human Rights -v- Attorney General & Others High Court Petition No. 229 of 2012** when it stated as follows when similar arguments were raised about the petition in that matter:

45. We must point out that Anarita Karimi Njeru was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of Petitions seeking to enforce the Constitution must begin with the provisions of Article 159 on the exercise of judicial authority. Among other things, this Article stipulates that:

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

46. We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

25. In the present case, the petitioner alleges violation of his rights under Articles 27, 29(a), 47 and 50(i) (n) of the Constitution. Contrary to the assertion by the respondents and the Interested Parties, he has, in my view, met the requirement that he sets out with a reasonable degree of precision the provisions of the Constitution that he alleges have been violated. The question, though, is whether he has demonstrated how they have been violated, and if so, whether the court is satisfied that there has indeed been a violation of his rights.

Alleged Violation of Article 27

26. Article 27 contains the non-discrimination provisions of the Constitution. Any party against whom a complaint of having committed a criminal offence is made is subject, should the investigating and prosecuting authorities find that there is sufficient evidence, to prosecution under the criminal law.

27. In this case, the petitioner held himself out to the Interested Parties as being able to supply to them cement from Bamburi Cement Limited. He was paid Kshs 4 million to supply the cement, but he did not. He undertook to repay the amount received and issued cheques, or, as he claims, a company in which he is a director issued cheques in payment of the amount due to the Interested Parties. He then issued instructions to his bank to stop payment of the cheques and the cheques were dishonoured. He has been charged with the offence of issuing bad cheques contrary to section 316A (1)(c) of the Penal Code. The section provides as follows:

316 A (1) any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person-

(a) knows that the account has insufficient funds

(b) knows that the account has been closed, or

(c) has previously instructed the bank or other institution at which the account is held not to honour the cheque

(2). Subsection 1 (a) does not apply with respect to a postdated cheque.

28. I cannot find anything in the evidence before me that supports the contention that there has been a violation of the petitioner's right under Article 27. Any party against whom evidence indicates that there is conduct that violates the provisions of the Penal Code set out above would be arrested and prosecuted. The court seized of the criminal case would evaluate the evidence and if, as the petitioner alleges, the cheques were post-dated and so no crime is disclosed, would doubtless acquit the accused.

Alleged Violation of Article 29(a)

29. The petitioner alleges violation of his right under Article 29(a). This Article provides as follows:

29. Every person has the right to freedom and security of the person, which includes the right not to be

(a) deprived of freedom arbitrarily or without just cause;

The petitioner has not presented anything before me that bears out his contention that this right was violated. He was arrested and charged for a cognizable offence under the penal laws of the land, and so there was just cause for his arrest and charging before the court. In any event, Even if there had been a violation of his rights under his Article, he would only be entitled to damages, but his trial would still be lawful.

Alleged Violation of Article 47

30. The petitioner alleges violation of his right under Article 47 with regard to fair administrative action. He bases this argument on the fact that the charges against him in Criminal Case No 268 of 2011 in Kibera had been withdrawn under Section 87(a) of the Criminal Procedure Code. I think this argument has been adequately answered by the respondents, the documents filed in court, and the law itself. The charges were withdrawn on the basis of the petitioner's complaint that the investigations had not been conducted by an impartial officer, and fresh investigations were conducted which, as deponed by Inspector Cheruiyot, disclosed the offence that led to the charges in the Kiambu Court. Further, Section 87(a) of the Penal Code is clear: withdrawal of a charge under that section is not a bar to subsequent prosecution. The section provides as follows:

'In a trial before a subordinate court, a public prosecutor may, with the consent of the court or on the instruction of the Attorney General at any time before judgment is pronounced withdraw from the prosecution of any person, and upon withdrawal-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.' (Emphasis mine)

Alleged Violation of Article 50(2)(n)

31. The petitioner alleges that he has been charged with an offence not known to the law, thereby violating his right under Article 50(2)(n). The provisions of this Article are as follows:

(2) Every accused person has the right to a fair trial, which includes the right—

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

32. It appears to me that the petitioner wants to pre-empt the findings of the trial court by asking this court to find that there was a violation of his right under the above Article. My reading of the above provision is that the safeguard relates to convictions for actions or omissions that were not, at the time they were alleged to have occurred, offences under national or international law. The petitioner will have an opportunity during his trial to demonstrate to the court before which he will be tried that the acts complained of did not constitute criminal offences in Kenya at the time he is said to have committed the acts. It is not for this court to pre-empt the presentation of evidence and the findings of the trial court.

33. However, the court observes that the copies of the cheques annexed to the replying affidavit of Inspector David Cheruiyot sworn on 15th December 2011 as annexures **DCi - vii - one** of which is drawn

on the account of one Samuel Ndungu in Commercial Bank of Africa, Mama Ngina Branch and the rest on the account of Transco Trading Company Limited in Equity and Imperial Banks respectively- indicate that the cheques were current at the time they were deposited in the respective banks. The date stamp of the receiving banks indicates that they were deposited after the dates on which they were drawn, which casts doubts on the veracity of the petitioner's claim that the cheques were post-dated.

Liability of Directors

34. The petitioner, while not denying that post-dated or bad cheques-whichever version of events one accepts- were issued, contends that he cannot be prosecuted for the criminal acts of a limited liability company of which he is a director. The short answer to this is that this is an argument that he can present in his defence in the Magistrate's Court to the criminal charges facing him. It does not disclose violation of a constitutional right. More importantly however, he may want to bear in mind Section 23 of the Penal Code which provides that

'Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.'

35. A limited liability company, though it has a personality in law, has no mind of its own and acts through its directors who are criminally liable for its acts or omissions. It is not open to a party to hide behind the veil of incorporation to escape criminal culpability.

Civil Nature of the Dispute

36. The petitioner is also aggrieved that he is charged with an offence arising from matters that are purely civil. However, as correctly argued by the respondents, the fact that there is a civil matter pertaining to the same facts is not a bar to criminal proceedings. Section 193A of the Criminal Procedure Code allows both civil and criminal proceedings to continue concurrently. It provides that :

'Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.'

Conclusion

37. The upshot of my findings above is that this petition has no merit and must fail. I must observe, in closing, that parties coming before the court alleging violation of their constitutional rights must also remember that the Constitution imposes rights and obligations: that one has rights, but also, that one has a duty to respect the rule of law and the rights of others. The Constitution is not a one-way street in which the rights of others and other provisions of the law are discarded. It is supposed to safeguard the rights of citizens while upholding other legal processes. Such processes include the criminal justice system to which the petitioner has a duty to subject himself as required by law.

38. This petition is therefore dismissed with costs to the respondents and the Interested Parties.

39. I am grateful to the parties for their submissions and the authorities cited. If I have not referred to them in this judgment, it is not because they were not of assistance to the court.

Dated Delivered and Signed at Nairobi this 22nd Day of November 2012

MUMBI NGUGI
JUDGE

Judgment delivered in open court in the presence of

Kazungu – Court Clerk

Mr. Kangatta instructed by the firm of Muchoki Kangatta & Co. Advocates for the Petitioner

Mr. Mule for Ms Obuo instructed by the Director of Public Prosecution for the 1st 2nd and 3rd Respondent

Ms Kamande instructed by the Attorney General

Mr. Gacheru for Mr. Kirimi instructed by the firm of Kinyanjui Kirimi & Co. Advocates for the Interested Party.

MUMBI NGUGI
JUDGE