



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 215B & 284 of 2011

MITESH MAHENDRAKUMAR SHAH PETITIONER

AND

THE COMMISSIONER OF POLICE 1ST RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

CONSOLIDATED WITH

PETITION NO. 284 OF 2011

BETWEEN

JAGAT MAHENDRAKUMAR SHAH PETITIONER

AND

THE COMMISSIONER OF POLICE 1ST RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction and background

1. Before me are two cases; the first is a reference from the Nairobi Chief Magistrate’s *Criminal Case No. 907 of 2010* where **Mitesh Mahendrakumar Shah** (“Mitesh”) has been charged with certain offences and where the learned magistrate in that court referred certain questions for determination by this court on 18th October 2011. The second case is a petition; *Petition No. 203 of 2010* where **Jagat Mahendrakumar Shah** (“Jagat”) has filed the petition seeking certain declarations against

the Commissioner of Police and Director of Investigation Department. In this judgment, I shall refer to both the applicant and petitioner as petitioners.

2. The petitioners' grievance is grounded on a complaint by one Sachin Shaha ("Shaha"). His application to join the petition was dismissed by a ruling of Justice Ombija delivered on 2nd November 2012. However, he was already an interested party in the reference and as there was no objection to hearing his case, I considered his counsel's submissions.

3. Both matters have been consolidated as they arise from similar facts and raise common issues of law. Despite the long number of prayers and questions framed for determination, I think the only issue raised is whether on the facts of the case this Court should interfere with the decision and discretion of the Director of Public Prosecutions ("DPP") to prosecute the petitioners.

4. Under **Article 157(6)** the DPP exercises the State powers of prosecution and may institute and undertake criminal proceedings against any person before any court. **Article 157(10)** and **(11)** guarantee the independence of the Office and provide as follows;

157 (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

5. The power of the DPP is not absolute and as **Article 157(11)** indicates, the power must be exercised, in ***"the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"*** and the Court is entitled to intervene in an appropriate case to satisfy itself that the power is exercised within those parameters.

The Petitioners Case

6. What then are the facts of the case? The facts are set out in detail in the pleadings and depositions of the parties filed. There is the petition dated 31st May 2010 and the supporting affidavit of Jagat sworn on the same day. One Kartikey Naterverbhai Darji, Senior Credit Manager at East Africa Building Society has sworn an affidavit on 27th September 2010 in support of the petitioners. Sachin Shaha has sworn an affidavit on 17th April 2012 titled, ***"Affidavit of Complainant in Response to Reference."*** The respondents rely on two affidavits by Inspector Justinoh Mutia, the officer investigating the case. The first one in response to the petition is sworn on 26th July 2010 and the second one is response to the reference is sworn on 10th October 2012.

7. It is not disputed that the complainant, Sachin Shaha ("Shaha"), Mitesh and Jagat were at one time business associates as shareholders of Mitsuminet Cables Visions Limited ("the Company") together with one Anton Oloimutie Kinaiya ("Kinaiya") who had one share.

8. At some point the shareholders entered into several business arrangements which culminated in negotiations and subsequent sale of the company's business undertaking to Wananchi Online Limited. It is at this time that Shaha began to frustrate the petitioners.

9. First, a suit was filed in Yatta being ***SRMCC Civil Case No. 179 of 2007 Anthon Kinaiya v Jagat Mahendra Shah, Mitesh Shah, Shital Patel and Sachin Shah***. The order issued by the court purported to stop an extraordinary general meeting and required the petitioner to deposit their passports either in court or with the Kenya Police. When Jagat instructed his advocates to enter appearance in the matter, the file could not be found. It is to be noted that matters of such commercial nature would not be filed in Yatta Court and the said case has also been disowned by Kinaiya who accuses Shaha of

fraudulently using his name.

10. Shaha also filed another suit in *Milimani* being ***HC Misc No. 1213 of 2007 Sachin Shaha v Jagat Shah, Mitesh Shah and Shitel Patel*** seeking orders of the Court to appoint investigators to investigate and report on the affairs of the Company. Shaha also sought orders restraining the petitioners from conducting affairs of the company.

11. The parties then negotiated the suits and entered in a deed of settlement to resolve both the ***Milimani HC Misc. No. 1213 of 2007*** and the ***Yatta CMCC No. 179 of 2007***. The deed of settlement was executed on 20th July 2007. In consideration of ceding all his rights, past, present, future and contingent, Shaha was paid Kshs. 60 million. Shaha then sold all his shares and resigned as a director of the Company. The settlement was duly endorsed by the Court on 30th July 2007. Shaha does not dispute the fact that he was paid in accordance with the settlement.

12. The issue it appears was not resolved, as the Shaha continued to make demands on the petitioners through certain persons and threats were indeed issued to Jagat, who reported the matter to Parklands Police Station on 26th March 2009. On that date once again the Jagat and Mitesh were the subject of another court order purporting to have been issued by the Milimani Commercial Court and which restrained them from operating the Company and requiring them to deposit the passports in court.

13. The said suit did not have a case number though it bore a court seal and magistrate's signature. The petitioners' advocates' efforts to confirm veracity of the order from the Court authorities did not bear any fruit as there was no response from the Court. In any case, no such suit was found to exist to date.

14. The genesis of this case concerns a cheque drawn on the Company's EABS Account. Shaha now complains that his signature was forged in 2007. As a result of the complaint, Mitesh was arraigned in court and charged with the following counts in ***Nairobi Criminal Case No. 907 of 2010***;

COUNT I

FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE

Mitesh Shaha Mahenrakumar ; On the 30th day of April 2007 at parklands area within Nairobi Province jointly with another not before court forged a certain document namely East Africa Building Society Bank Cheque No. 000451 of 12,323,500/= (Twelve million three hundred and twenty three five hundred shillings, purporting it to be a genuine and valid document signed by SACHIN SHAHA.

COUNT II

STEALING BY DIRECTORS CONTRARY TO SECTION 282 OF THE PENAL CODE

Mitesh Shaha Mahenrakumar ; On the 30th day of April 2007 at Mistuminet Cable Limited at Parklands area within Nairobi, jointly with another not before court being a director of Mitsuminet Cable Vision Limited stole Ksh 12,323,500/= (Twelve million three hundred and twenty three five hundred shillings), the property of the said Mitsuminet Cable Vision.

15. By the time the Mitesh was charged, Jagat was out of the country but was likely to be charged. It is for this reason that Jagat filed a petition after the reference to the High Court has been made by Mitesh.

16. Mr Ochieng' Oduol, counsel for the petitioners, submitted that all the facts set out in the deposition show that the criminal case against the petitioners were an abuse of the court process and the court had jurisdiction to halt such abuse. Counsel submitted that the criminal process was instigated by Shaha to his own purposes and so that pressure can be put on them to re-open matters that had already been settled, which settlement was approved by the High Court. Counsel adopted the petitioners written submissions dated 17th November 2012. In the submission, counsel relied on two cases; ***Center for Rights***

***Awareness (CREAW) and Others v Attorney Nairobi* Petition No. 16 of 2011 (Unreported) [2011] eKLR and *Mohammed Gulam Karmali and Another v Chief Magistrates Court Nairobi and Attorney General* [2006] eKLR.**

Respondents' Case

17. The respondents deny the allegations made by the petitioners through the two affidavits sworn by Inspector Justinoh Mutia. It is the DPP's case that there is sufficient and reasonable evidence to mount a case as is demonstrated by the report of Antipas Nyanjwa, a forensic document examiner. In the report prepared on 15th October 2009, the document examiner concludes that the signature on the subject cheque is forgery.

18. Mr Njogu, counsel for the respondents, submitted that the Office of the DPP is an independent office under the Constitution and the power of the DPP ought not to be interfered with by the Court and at least not in this case as no basis had been made by the petitioners. Counsel also contended that complainant has rights which must be taken into account as he is entitled to make a complaint, have that complaint investigated and where there is reasonable evidence to have the perpetrators of the offence prosecuted. The respondents' position is that notwithstanding the existence of civil cases, the DPP is entitled to prosecute the petitioners for criminal infractions. Mr Njogu also submitted that there is no evidence that the petitioners would not get a fair trial in the subordinate court.

19. The interested party supported the respondent's position. The tenor of the Shaha's affidavit sworn on 17th April 2012 was that the petitioners were involved in fraudulent dealings and scheme to deny him his rightful share in the Company. Counsel for the interested party, Ms Obel, submitted that despite all the charges, the issue of forgery is what is before the court and there is evidence of this fact and it was reasonable for the respondents to prefer charges against the petitioners.

Determination

20. I have read the petition, reference, depositions and the material placed before me and as I stated at the beginning of this judgment, the issue is whether the DPP's discretion to charge the petitioners should be stopped in its tracks on account of an abuse of the Court process.

21. The courts have on several occasions pronounced themselves on the extent of the Court's power to interfere with the DPP's power to prosecute any person (see ***William S. K. Ruto and Another v Attorney General and Another Nairobi* HCCC No. 1192 of 2004 (Unreported) [2010] eKLR, *Jacob Juma v The Director of Public Prosecutions and Other Nairobi* HC JR Petition No. 652 of 2009 (Unreported), *Bryan Yongo v Attorney General Nairobi* HCCC No. 61 and 196 of 2006 (Unreported), *Elory Kranveld v Attorney General Nairobi* Petition No. 153 of 2012 (Unreported), *Republic v Amos Karatu Nairobi* HC Criminal Case No. 12 of 1996 (Unreported) and *Ndarua v Republic* [2002] 1 EA 205). In the case of ***Republic v Kenya Revenue Authority exp Aberdare Freight Nairobi* HC Misc. No. 946 of 2004 (Unreported)**, Nyamu J., stated, ***"Abuse of process would involve using the process for a purpose significantly different from its ordinary and proper use. It is an abuse to bring vexatious proceedings."*** Each case must be considered on its merits and in this case I am constrained to find that if the matters proceeds, the court will be giving a seal of approval, to what on the facts, is an abuse of process.**

22. This is because this case must be considered as a whole in light of all the evidence presented and in particular the conduct of the interested party. The two suits instituted in Yatta and Milimani point to serious abuse of the Court process. Serious allegations have been raised against Shaha but there has been no response from the respondent or Shaha himself. Although Shaha had been denied leave to join these proceedings, I think the respondents would have procured specific responses from the complainant. The issues concerning conduct of the suits have been raised with Registrar and regrettably no action has been taken to investigate and or confirm the perversion of the course of justice.

23. Secondly, there is a deed of settlement settling Shaha's grievances of which he was given

substantial consideration. The settlement has a judicial seal of approval on **High Court Misc. No. 123 of 2009**. To permit these criminal proceedings would amount to collateral attack on a court process. As Justice Ombija noted in his decision of 2nd November 2011, *“The applicant is thus estopped by deed from raising the same issues that constituted settlement. If there were any rights left outstanding during the settlement, the applicant [read Shaha] is, in law deemed to have waived the same.”* In my decision in **Kenya Commercial Bank Limited v Commissioner of Police and Benjoh Amalgamated Nairobi Petition No. 218 of 2011 (Unreported)** I stated, *“[34]While exercising jurisdiction to interfere with criminal investigations and the criminal trial process, the court must balance the public interest and private interest. In this case, what is evident is that the parties have been at loggerheads since the first suit was filed in 1992. It is really a matter between two parties and it is in public interest that the integrity of the judicial process is preserved. The opening of a criminal inquiry which would result in impugning lawful court decisions no doubt diminishes the standing of the court.”*

24. Thirdly, the issue of the cheque is intimately connected with the company, in which the Shaha has no interest in after settlement of the matter. The bank confirmed, through its manager, Kartikey Naterverbhai Darji, that the cheque was valid. As the cheque was one concerning the company and was issued prior to the settlement, it is covered by the deed of settlement. In my view, the complaint about the cheque when viewed in light of all the evidence lead me to conclude that it is intended to vex and pressure the petitioners towards meeting the interested party’s demands to re-open a closed transaction.

25. Mr Njogu, emphasised that the Court must consider Shaha’s interest. What then are interests of the complainant? From his own affidavit, it appears that the complainant is aggrieved by what he considers acts of misrepresentation and fraud perpetrated against him by the petitioners so that he can sign away his interests in the Company. If the proceedings were stopped, he will still have legal recourse in the courts. Indeed, counsel for the petitioner and interested party concede that there are proceedings to set aside the settlement. Indeed, I reiterate what Justice Ombija stated, *“Last but not least if the interested party feels that his rights have been infringed then he has a right to apply for review of the settlement [where he will be met with the defence of waiver] to include the issue of the cheque for kshs. 12,325, 500 which forms the basis of the charge in Criminal Case No. 907 of 2010.”*

26. As I stated earlier, this court has jurisdiction to prevent and avoid an abuse of the court process. **Article 157(11)** requires the DPP to have regard to these factors. There was no response to all the allegations of abuse of process by the petitioners, which means, that the DPP did not have regard to these facts or simply by failing to respond to them, he believed they were irrelevant or indeed they were admitted. In the circumstances of this case, I find and hold that the prosecution of the petitioners is intended to achieve an ulterior purpose other than the enforcement of the law.

27. Since **Stanley Munga Githunguri v Republic [1985] KLR 95**, it has been established that the High Court is entitled to exercise its jurisdiction to deal with abuse of power, discretion or process, the Constitution has not taken away this authority (See also **Exparte Jared Benson Kangwana Nairobi HC Misc. No. 446 of 1995 (Unreported)** (Khamoni J), **Samuel K. Macharia and Another v Attorney General Nairobi HC Misc. No. 356 of 2000 (Unreported)**, **Exparte Kipng’eno arap Ngeny Nairobi HC Misc. No. 406 of 2011 (Unreported)**). The policy considerations for halting criminal proceedings where there Court finds an abuse of it process were clearly elucidated in the Australian case of **Jago v District Court of NSW and Others [1989] 168 CLR 30**, quoted with approval by Nyamu J., in **Mohammed Gulam Karmali and Another v Chief Magistrates Court**, where Richardson J, stated, *“the first is that the public interest in the administration of justice require that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way its failure will lead to erosion of public confidence by reason of concern that the courts processes may lend themselves to oppression and injustice. the court grant a permanent stay in order to prevent the criminal processes from being used for purposes alien to the administration of justice under the law. It may intervene in this way if it concludes ... that the court processes are being employed for ulterior or in such a way ... as to cause improper vexation and oppression.”*

28. Abuse of process is one of the parameters the Court may consider in determining whether the DPP is exercising his powers within the four corners of the Constitution. It follows that where there is an abuse of the court process, there is a breach of the petitioners' fundamental rights under **Article 50** as the petitioner will not receive a fair trial.

Disposition

29. In the circumstances, the orders that commend themselves to this court are as follows;

(1) The petition and the reference are allowed to the following extent;

(i) The respondents be and are hereby restrained from arresting, prosecuting or in any way interfering with the liberty of **Jagat Mahendrakumar Shah** on the basis of a complaint by **Sachin Shaha** or any person authorised by him or acting on his behalf on any matter concerning **Mitsuminet Cable Vision Limited** or its associated companies and any other companies and or transactions related thereto.

(ii) The charges and proceedings in *Nairobi Chief Magistrates Court Criminal Case No. 907 of 2010* against **Mitesh Mahendrakumar Shah** are hereby quashed and the respondents be and are hereby restrained from arresting, prosecuting or interfering with the liberty of the said **Mitesh Mahendrakumar Shah** on the basis of a complaint by **Sachin Shah** or any person authorised by him or acting on his behalf on any matter concerning **Mitsuminet Cable Vision Limited** or its associated companies and any other companies and or transactions related thereto.

(2) There shall be no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 17th day of December 2012.

D.S. MAJANJA

JUDGE

Mr Ochieng' Oduol instructed by Ochieng Onyango Kibet and Ohaga Advocates for the petitioners.

Mr Njogu, State Counsel, instructed for the Director of Public Prosecutions for the respondents.

Ms Obel instructed by Rachier and Amollo Advocates for the interested party.