



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 65 OF 2009

**IN THE MATTER OF: AN APPLICATION BY ERASTUS MUTURI KIRONGOCHI AND
SUNTRA INVESTMENT BANK LIMITED FOR ORDERS OF CERTIORARI AND
MANDAMUS**

AND

**IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE (CAP 75) AND CRIMINAL
CASE NUMBER 170 OF 2009**

**REPUBLIC.....APPL
ICANT**

VERSUS

**THE NAIROBI MAGISTRATE'S COURT, CRIMINAL CASE NO. 170 OF 2009.....1ST
RESPONDENT**

**COMMISSIONER OF POLICE2ND
RESPONDENT**

**MILDRED EDITH MACKENZIE.....
INTERESTED PARTY**

**EX PARTE.....SUNTRA INVESTMENT BANK
LIMITED**

ERASTUS MUTURI KIRONGOCHI

JUDGMENT

The ex parte applicants' Notice of Motion dated 5th February, 2009 seeks the following orders:

- “1. An order of prohibition do issue to prohibit the 2nd respondent whether by himself or through his subordinate officers including officers of the anti-banking fraud unit, from harassing, intimidating, arresting or charging the 1st applicant's employees, agents, representatives, directors or shareholders on account of any of the issues arising from or that are the subject of Milimani High Court civil Suit No. 636 of 2007 until the same suit is heard and determined by the High Court.**
- 2. An order of prohibition do issue to prohibit the 1st respondent from continuing with any further proceedings against the 2nd applicant in Nairobi Criminal Case No. 170 of 2009 or any other criminal cases instituted by the 2nd respondent on the basis of a complaint by Mildred Edith Mackenzie, rising from issues that are the subject of Milimani High Court Civil Suit No. 636 of 2007 until the said suit is heard and finally determined by the High Court.**
- 3. An order of certiorari do issue to quash the proceedings in Nairobi Criminal Case No. 170 of 2009 against the 2nd applicant.**
- 4. Costs of this suit be provided for.”**

The application was supported by affidavits sworn by **Erastus Muturi Kirongothi** and **James Murigu**.

In his affidavit, Erastus Muturi Kirongothi, the Assistant General Manager (Finance) of the 1st applicant, stated that his employer is an Investment Bank duly licenced by the Capital Markets Authority as a non-deposit taking institution. It is also a member and licenced stock broker of the Nairobi Stock Exchange. In or about the month of July 2007, a lady describing herself as Mildred Edith Mackenzie instructed the 1st applicant to sell a total of **45,355** ordinary shares of East African Breweries Limited on her behalf. The said lady presented original share certificates to facilitate the sale of the shares and was advised that she would be required to immobilize the shares through the **Central Depository and Settlement Corporation Limited (CDSC)** and opening of a CDS account. The shares were immobilized by the CDSC after confirming from the Share Registrar, **Custody and Registrars Services Limited, (CRS)**, that the share certificate was genuine and that the signature appended on the immobilization form known as CDS2 was indeed that of a lady describing herself as Mildred Edith Mackenzie. As proof of identity, the said lady produced a Kenyan passport number A8792261.

The immobilized shares were subsequently sold by the 1st applicant in several batches. The first batch was sold at a consideration of Kshs.3,754,617.10/= which was remitted to Mildred Edith Mackenzie through a cheque number 1445900. But several days after the cheque was issued the 1st applicant's Managing Director received a telephone call from the Manager of Imara Savings Credit Cooperative Society Limited seeking authority to make payment of the cheque. The 1st applicant's Managing Director, Mr. James Murigu, instructed Mr. Kirongothi to stop payment of the cheque to facilitate further investigations. The 1st applicant contacted Custody and Registrar's Services Limited, the Registrars of East African Breweries Limited, to carry out further investigations and verify whether the person describing herself as Mildred Edith Mackenzie was indeed the proprietor of the shares that the 1st applicant had sold on her behalf. The lady was escorted to the offices of Custody and Registrar Services Limited (CRS) by a representative of the 1st applicant.

On 20th August, 2007 CRS wrote to the 1st applicant and confirmed that the person describing herself as Mildred Edith Mackenzie was indeed the legal owner of share certificates number 347383 for 45,355 shares in East African Breweries Limited. On the strength of the said letter and in the face of threats by the person describing as Mildred Edith Mackenzie to tarnish the 1st applicant's reputation, the 1st applicant issued a fresh cheque, number 147323 for **Kshs.3,754,617.10/=** to the said Mildred Edith Mackenzie on account of 25,000 shares that had been sold on 27th July, 2007.

On 7th August, 2007 the 1st applicant on instructions from the said lady sold another batch of 20,300 shares at a price of Kshs.154/= per share. A cheque number 146811 in the sum of **Kshs.3,068,677.20/=** was issued by the 1st applicant in favour of the said lady.

Sometimes later a lady describing herself as a daughter of Mildred Edith Mackenzie went to the office of Mr. Kirongothi and complained that her mother's shares in East African Breweries Limited had been sold by the 1st applicant without authority. The lady was asked to go and bring her mother to assist the 1st applicant ascertain the facts of the matter. Shortly thereafter, an elderly lady who described herself as Mildred Edith Mackenzie showed up and produced a passport bearing the same names as the passport earlier availed to the 1st applicant when the shares were immobilized and sold except that the photograph in the passport was different. The elderly lady informed Mr. Kirongothi that she had never received her share certificates from the East African Breweries Limited Registrar and had not therefore sold the shares. Mr. Kirongothi advised her to lodge a complaint with the said Registrar, CRS, and with the CDSC Limited.

On 20th November, 2007 the 1st applicant received a demand letter from a firm of advocates acting on the instructions of a Mrs. Mildred Edith Mackenzie in which letter the advocates demanded from the 1st applicant, CDSC Limited and CRS restitution of the 45,355 shares. Before the 1st applicant could respond to the said letter it received summons and a plaint in which the said Mildred Edith Mackenzie had sued the three named parties for restitution of the shares. This is in **Milimani Civil Suit No. 636 of 2007**. While the 1st applicant's advocates were filing pleadings in preparation for the trial of the said suit, Mr. Kirongothi and the 1st applicant's Managing Director were summoned by the Police to record statements following a complaint lodged to the police by Mildred Edith Mackenzie.

On 22nd January, 2009 Mr. Kirongothi was arrested by the police and locked up at Kileleshwa police station without any explanation. The police were keen to know whether the 1st applicant intended to pay the complainant the value of the shares sold, Mr. Kirongothi deposed. On the following day he was charged with the offence of conspiracy to commit a felony contrary to **Section 393** of the **Penal Code** and stealing contrary to **Section 275** of the **Penal Code**. According to him, the said charges are false and a clear attempt to coerce payment and obtain an unjust collateral advantage through the criminal judicial process.

Mr. James Murigu affirmed the facts deposed in the affidavit of Mr. Kirongothi. He added that if the police do arrest and charge him as they did to Mr. Kirongothi his reputation built for over 35 years in the banking sector would be irretrievably ruined whether or not the charges are subsequently dismissed. The reputation of the 1st applicant will also be permanently impaired and ruined. He further stated that the 1st applicant is a reputable solid and financially stable investment bank which stands to benefit nothing by selling shares without authority or unlawful means.

The interested party swore a replying affidavit and stated that she bought the East African Breweries shares from 1967 over a period of approximately 5 years. Up to May 2007 dividend cheques were being

posted to her through her Mombasa address. A statement from CDSC showed that her balance was 54,425 shares. These were made up of 35,355 shares on certificate number 347383 and of 9070 shares on certificate number 389578. In 1998 a consolidated share certificate number 00347383 dated 15th September, 1998 was issued. However that certificate was never received by the deponent but she received a consolidated bonus share certificate number 00389578.

She further stated that at no time did she open an account with a stock broker or bank. She had also never traded in shares nor opened a CDS account. In July 2007 she received a statement from CDSC and noted that 45,355 of her shares had been sold without her knowledge or consent. When she followed up the matter she was told that an alleged Mildred E. Mackenzie had presented a share certificate for 45,355 shares of East African Breweries Limited to the applicant, opened an account and thereafter proceeded to have the shares sold. The lady who sold the shares used a fake passport.

When the interested party met Mr. Kirongothi he explained to her how the sale was transacted. He told her that he had queried the identity of the lady who sold the shares and had rung a Mr. Mbwayo of CRS who confirmed her identity and stated that it was fine to pay her. He further said it would have been the CRS who had records of the actual signature of Mildred E. Mackenzie on their file and the original photographs dating back to 1967. He further advised them to visit the CDSC as they had the responsibility of ensuring the stock market in Nairobi was run responsibly and properly. The passport of the lady who had presented herself to Mr. Kirongothi as Mildred E. Mackenzie showed that she is of Asian origin and was born in 1960 whereas the true Mildred E. Mackenzie is of European descent and was born in 1923.

When the interested party visited the CDSC she saw Florence Kamau, Head of Operations. She was asked to leave the matter in the hands of CDSC to investigate but after three weeks nothing was forthcoming. As a result they instructed a firm of advocates to file a civil suit against CDS, CRS and the 1st applicant.

The interested party further stated that the civil suit ought not to affect fair trial of the applicants. She denied that the charges brought against the applicant are false and an attempt to coerce payment and/or obtain collateral advantage through the criminal justice system.

Mr. Felix Nyamai, a police officer attached to the Banking Fraud Investigation Unit swore a replying affidavit on behalf of the 2nd respondent. Mr. Nyamai is the Investigating Officer in **Criminal Case No. 170 of 2009**. He stated that the interested party lodged a complaint with the police regarding fraudulent sale of her shares. The police commenced the investigations and he wrote to the Ministry of State for Immigration and Registration of Persons requesting for the correct particulars of the purported Mackenzie Mildred Edith. He received a letter confirming that file number 677010 appearing in passport number A8792261 held by the purported Mackenzie Mildred Edith actually belongs to one **Janet Wanjiku Gatuati** of Kiambu District. Mr. Nyamai formed an opinion that the said passport was forged as the photograph thereon is of a different person. He added that the 2nd applicant signed the two cheques in favour of the purported Mackenzie Mildred Edith without verifying the authenticity of the payee's particulars. He further stated that the charges preferred against the 2nd applicant were commenced after an intensive investigation and are not at all aimed at coercing him to make payments to the interested party and nor are they aimed at obtaining an unjust or collateral advantage through the criminal process.

The parties filed their respective written submissions and their advocates addressed the court, albeit briefly, on 2nd December, 2010. I have considered all the affidavits on record as well as the submissions.

The applicants' contention is that the 2nd respondent is acting unlawfully by harassing, arresting and charging the 2nd applicant on the basis of the aforesaid facts relating to sale of the shares belonging to the interested party. They contend that the criminal charge is intended to achieve an ulterior motive, that is, to advance the civil claim filed by the interested party. The charges are also intended to frustrate the legislative purpose codified in the Constitution of Kenya and the Criminal Procedure Code namely; that a citizen of Kenya shall not be denied his liberty and freedom without due process of law. They further contended that the arrest and continued harassment and the intimidation of the applicant is a violation of the cardinal rule of fairness and the applicants' legitimate expectation that the 2nd respondent will respect the law and statutory mechanisms established to ensure due process and consistency in administration of justice. In their view, the 2nd respondent has abused and exceeded his power and authority.

The applicants' contention is denied by the respondents who are of the view that the pendency of the criminal case does not in any way affect a civil suit filed by the interested party against the 1st applicant.

All the parties recorded their statements with the police. The statement of the interested party as the complainant is of particular importance in determining this application. She stated, *inter alia*,

“I feel the CRS has not safeguarded my shares or made any effort to ensure I received notice to collect my real share certificate. I feel the Breweries should have engaged a firm which should have looked after and protected my shares. I feel the CDSC has not safeguarded my rights as a share owner on the Nairobi Stock Exchange. I have all of the necessary documents to prove my identity and the truth of these statements. I do not have any member of my family who shares a similar name with me.”

The interested party did not make any specific complaint against the applicants. She seemed to blame CRS and East African Breweries Limited. She explained in great details how she acquired the shares, the enquiries she made at CRS Limited, CDSC Limited and at the 1st applicant.

For criminal charges to be preferred against a person they must be preceded by thorough and diligent police investigations which, *prima facie*, reveal culpability on the part of the suspect. The interested party as the complainant reported to the police that her 45,355 East African Breweries Limited shares had been sold by the 1st applicant without her authority. The 1st applicant is a well established investment bank which ordinarily handles a multiplicity of transactions on any given day.

The affidavit of Felix Nyamai, the Investigating Officer, did not show that the handling of the shares in question by the applicants was done in a manner that seemed suspect. The lady who identified herself as Mildred Edith Mackenzie had a passport and the Original Share Certificate which bore the same name. It is not clear where the impostor obtained the original share certificates from. Mr. Kirongothi advised her to have the shares immobilized through the CDSC and opening a CDS account. The lady went to the CDSC and had the shares immobilized. She also opened a CDS account. I believe she presented the same passport and the Original Share Certificates to the CDSC. No criminal charges have been preferred against any official of the CDSC.

The immobilization of the shares by the CDSC was done after confirming from the Share Registrar, CRS, that the share certificate was genuine and that the signature appended on the immobilization form was genuine. No criminal charges were preferred against any officer of the CRS. In their letter dated 20th August, 2007, CRS wrote to the *ex parte* applicants as hereunder:

**“Suntra Investment Bank Ltd
Nation Centre
10th Floor
NAIROBI**

Our Ref: EABL/506700/PK

Att: Mr. Kirongothi

Dear Sir,

**45 355 EABL SHARES INO
MILDRED EDITH MACKENZIE**

We confirm that the above named shareholder was the legal holder of share certificate number 347383 for 45 355 EABL shares. The same has already been transferred to the CDSC.

**Yours faithfully,
(Signed)**

**PAULINE KATUA
ADMINISTRATOR
SHAREHOLDER SERVICES.”**

With such assurance, I think, it would have amounted to abdication of duty had the applicants refused to sell the shares on behalf of the person who had been identified as the legal holder of the share certificate. There was exercise of due diligence on the part of the applicants before the shares were sold.

The Investigating Officer did not state the outstanding aspect of his investigations that made him conclude that the 2nd applicant had to be charged with conspiracy to commit a felony and stealing. The second count that was preferred against Erastus Muturi Kirongothi was to the effect that he had stolen 45,355 Kenya Breweries Shares valued at Kshs.6,823,294.30/=, the property of Edith Mackenzie.

From the statement of the interested party, her affidavit, the affidavit of the Investigating Officer and that of the 2nd applicant, the elements that constitute the offence of stealing do not come out. Before the criminal charges were preferred the Investigating Officer was well aware that the interested party had already filed Civil Suit No. 636 of 2007 against CRS, the 1st applicant and CDSC. As was held by Aluoch J (as she then was) in **THE MATTER OF AN APPLICATION BY KAMLESH DAMJI PATNI & OTHERS** and **IN THE MATTER OF THE PRINCIPAL MAGISTRATE’S COURT, KIBERA, MISCELLANEOUS APPLICATION NO. 1296 OF 1998,**

“the criminal charges were being used to further the cause of the civil suit and were not therefore the normal criminal charges. I find that this shows bad faith i.e. “*mala fides*” on the part of the complainant in the criminal proceedings and cannot be for the public interest because they are for extraneous matters and therefore an abuse of the process of court.”

I respectfully adopt the above findings and wish to add that in my view, the criminal proceedings are calculated to give some collateral advantage to the interested party or to exert pressure against the applicants to cause them pay the sum of Kshs.6,823,294.30/= to the interested party.

In MACHARIA & ANOTHER vs. ATTORNEY GENERAL & ANOTHER [2001] KLR 448 it was held that the court can declare a prosecution to be improper if:

- (a) **It is for a purpose other than upholding the criminal law;**
- (b) **It is meant to bring pressure to bear upon the applicants to settle a civil dispute;**
- (c) **It is an abuse of the criminal process of the court;**
- (d) **It amounts to harassment and is contrary to public policy;**
- (e) **It is in contravention of the applicant's rights under Section 77 of the Constitution.**

A similar finding was made by Khamoni J in KANGWANA vs. ATTORNEY GENERAL (High Court Miscellaneous Application No. 446 of 1995). I also adopt those findings in respect of this case.

For these reasons I find and hold that criminal charges preferred against the 2nd applicant in Nairobi Criminal Case No. 170 of 2009 are unsustainable as they were instituted *mala fides*. Consequently, I allow prayers 1, 2 and 3 of the ex parte applicant's Notice of Motion dated 5th February, 2009. The 2nd respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Wanyaga holding brief for Mr. Havelock for the Interested Party

Mr. Ng'nga'a for Mr. Ngatia for the Ex parte applicants

Miss Kithikii holding brief for Mr. Obiri for the 1st and 2nd Respondents