



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 5 OF 2010

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE NAKURU LAW COURTS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

EXPARTE:

MANOAH KIPYEGO KILACH.....1ST SUBJECT

JEREMIAH NJIIRI KARANJA.....2ND SUBJECT

PAUL MURIITHI THEURI.....3RD SUBJECT

MOSES CHERUIYOT RUTO.....4TH SUBJECT

RULING

The ex-parte applicants are in counts one to six charged with Fraudulent False Accounting contrary to **Section 330(b)** of the **Penal Code** and in counts 7 and 8 with stealing by servant contrary to **Section 281** of the **Penal Code**. The first appellant is alone charged in count nine with Fraudulent False Accounting contrary to **Section 330(b)** of the **Penal Code** and in counts 10 with stealing by servant contrary to **Section 281** of the **Penal Code**. They have in their Chamber Summons dated 20th January 2010 and brought under **Order 53 Rules 1(1), (2) and (4)** as well as **Section 3A** of the **Civil Procedure Act** and **Sections 8 & 9** of the **Law Reform Act** sought leave to apply for the judicial order of certiorari to remove to this court for purposes for being quashed the charge sheet dated 4th January 2005 and the proceedings related thereto in Nakuru CM Cr. Case No. 26 of 2005 and an order of prohibition to prohibit the Chief Magistrate’s court or any other court from proceeding with the hearing and determination or in any other manner whatsoever of the said case or any variation thereof or substitution of the said charge.

The application is based on the grounds that the criminal charges are not only mala fides, unfair and oppressive but also an abuse of the process of the court as the Interested Party who initiated them has also filed Nakuru HCCC No. 225 of 2007 (Kenya Anti Corruption Commission Vs Paul Muriithi Theuri).

Nakuru HCCC No. 6 of 2008 (Kenya Anti Corruption Commission Vs Manoah Kipyego Kilach), Nakuru HCCC No. 102 of 2008 (Kenya Anti Corruption Commission Vs Moses Cheruiyot Ruto) and Nakuru HCCC No. 103 of 2008 (Kenya Anti Corruption Commission Vs Jerimiah Njiiri Karanja). The application is supported by the applicants' affidavits to which they have annexed copies of the charge sheet and the complaints in the said civil cases and the accompanying statement.

Arguing the application on behalf of the applicants, Mrs Ndeda submitted that instituting criminal and civil proceedings is not only an infringement of the applicants' constitutional rights under **Section 77(1)** and **77(9)** of the **Constitution** but also harassment of the applicants as they will be fighting two battles at the same time. She also contended that if the two sets of cases are allowed to go on different decisions might be made by the court thus leading to a miscarriage of justice. In support of her submissions she cited the High Court decision in **Republic Vs Attorney General & Principal Magistrate's Court Makadara (ex-parte Durani Hussein Mudobe) Nairobi HC Misc. Apl. No. 898 of 2003, Republic Vs The Chief Magistrate Nairobi and two Others (ex-parte Hasim Jiwa Rajwani) Nairobi HC Misc. Apl. No. 1544 of 2004** and **Republic Vs The Chief Magistrate's Court Nairobi & the Attorney General (ex-parte Muhammed G. H. F. Karmali & Hyundai Motors (K) Ltd) Nairobi HC Misc. Apl. No. 367 of 2005.**

I have considered these submissions and read the above authorities. The authorities are clearly distinguishable. In Misc. Apl. No. 898 of 2003 Mudobe (the tenant) the ex-parte applicant was a tenant of the Interested Party (the landlady). The tenancy agreement between them allowed the tenant to carry out renovations and extensions to the leased premises with a provision that he would remove his fixtures and fittings at the end of the tenancy. After the tenant had carried considerable extensions, the landlady increased the rent from Kshs.90,000/- to Kshs.200,000/- and it would appear a dispute arose between them. The landlady then swore to use her money and teach the tenant a lesson. She caused the police to arrest the tenant, and in spite of the injunction the tenant had obtained in a civil matter relating to the tenancy, he was arrested and charged with malicious damage to property. Later on the landlady filed a suit claiming a sum of Kshs.1,995,840/-. In his defence the tenant counter claimed a sum of Kshs.3,480,445/- being the value of the extensions and renovations he had carried on the premises. When the tenant applied for an order of certiorari to quash and prohibition to prohibit the criminal proceedings, Nyamu J. (as he then was) found no difficulty in holding that the criminal proceedings were an abuse of the court process.

In Misc. Apl. No. 1544 of 2004 the ex-parte applicant and the Interested Party were involved in petroleum products business. A dispute arose between them on the terms of payment, pricing, discounts and deliveries of petroleum products. Despite the ex-parte applicant's request to the Interested Party not to bank the post dated cheques he had given him, the Interested Party went ahead and banked them and when they bounced he got the ex-parte applicant arrested and charged with obtaining by false pretences. Before the applicant was charged he had filed a civil suit on the dispute. Justices Nyamu, Emukule and Dulu had no difficulty in finding that the criminal proceedings were instituted to coerce the applicant to settle a business debt and declaring it an abuse of the court process. Misc. Apl. No. 367 of 2005 related to a contract between the Government of Kenya and the ex-parte applicant for the supply of 520 units of Hyundai vehicles. The ex-parte applicant supplied some and demanded payment before he could supply the rest. Instead of referring to the dispute which arose between them to arbitration in London as stated in their agreement, the Government of Kenya instituted criminal proceedings against the ex-parte applicant. Justice Nyamu again found no difficulty in holding that the criminal proceedings were meant to settle a civil dispute and were therefore an abuse of the court process.

The situation in this case is completely different. In the criminal case the applicants are charged with Fraudulent False Accounting and theft of funds from their employer. In their affidavits in support of this application they have not disputed that fact. They have also not exhibited their defences in the civil cases in which the Kenya Anti Corruption Commission (the Interested Party) is seeking to recover the amount the applicants allegedly stole from their employer, Egerton University. Unlike the above authorities in which there were serious disputes between the applicants and the interested parties on the amounts due under their respective contracts, the applicants in this case have not claimed to be entitled to the amount that is sought to be recovered from them. There was no contract, business or any civil transaction

between them and their employer. If the employer's claim that the applicants stole from it is true I cannot see anything wrong with their prosecution for theft and civil proceedings to recover the amount from them. In my view this is exactly what **Section 193(a)** of the **Criminal Procedure Code** is intended to cover. That section reads:-

“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 civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

For these reasons I find that the applicants have not made a case for leave to apply for the orders of certiorari and prohibition. If anything I think it is their application which is an abuse of the process of the court. Consequently I dismiss this application.

DATED and delivered this 17th day of February, 2010.

D. K .MARAGA

JUDGE.