REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION 1642 OF 2005

REPUBLIC .... APPLICANT

BETWEEN

THE CHIEF MAGISTRATE'S COURT NAIROBI.................1ST RESPODNENT

THE HON. ATTORNEY GENERAL................................... 2ND RESPODNENT

JAMES MUCHENE NGEI.. INTERESTED PARTY

EX-PARTE: JOHN MUNGAI KARIUKI

JUDGMENT

The notice of motion dated 8/12/05 was filed by Guserwa and Co. Advocates on behalf of the ex parte Applicant, John Mungai Kariuki, who seeks an order of prohibition to issue, to prohibit the Chief Magistrate Nairobi Criminal Court or any other magistrate from hearing or continuing to hear or in any manner deal with ***Cr C 2172/05 REP V JOHN MUNGAI KARIUKI AND 2 OTHERS*** or any other criminal proceedings that may be instituted on the basis of the facts on which Nairobi Cr C 2172/05 is founded as regards to John Mungai Kariuki. The Applicant also asks for costs of the application. James Muchene Ngei came into the proceedings as an Interested Party and was represented by Mr. Wachira Advocate whereas the Respondents were represented by Mr. Bryant.

The motion is based on grounds found in the statement, the verifying affidavit of the Applicant dated 16/11/05, further affidavit dated 18/5/06, and 16/5/06 arguments filed in court on 15/5/06. The Respondent opposed the motion and Alphonse Lumosi, the investigating officer in the criminal case swore an affidavit dated 29/6/06. The Respondent also filed their submissions on 2/5/07. The Interested Party filed a replying affidavit dated 28/2/06, skeleton arguments filed in court on 13/3/06 and a list of authorities.

The grounds pleaded in the statement and upon which this application is premised are inter alia;

(1) The institution of the criminal proceedings in Cr C 2172/05 is an abuse of the process of court as it is being used to settle a purely civil dispute in HCC 72/04. ***JAMES MUNGAI V ATTORNEY GENERAL AND JOHN KARIUKI;***

(2) The prosecution is biased and prejudicial against the Applicant;

(3) That the prosecution is unfair oppressive and the Applicant will not get a fair trial as the outcome will have a bearing on HCC 72/04;

(4) That the prosecution by the Attorney General makes the Attorney General a Judge in his own cause and justice will not be done as he will be seeking to adduce evidence in his defence in HCC 72/04.

(5) That the prosecution is malicious and a vendetta intended to settle scores in a long acrimonious relationship between the Interested party and BOC K. Ltd with the motive of pressurizing the employees of the Applicant and shareholders of BOC to view the Applicant as a criminal and a person not fit to be the firm's Managing Director.

The Applicant deponed that he is the Managing Director designate of BOC Kenya Ltd, as from March 2003. He had been working with the Interested Party in the same company upto 2001 when the Interested party was dismissed and he filed HCC 1321/01 against the company vide proceedings (JMK I). From 17/10/03 the Applicant started to receive some unpleasant messages on his phone from phone No.254721837242. The text messages continued to come and some amounted to threats. He suspected they were from the Interested Party because of the contents of the messages. The reasons for the Applicant's suspicions are listed at para. 10 of his affidavit. He reported the matter at Langata police station on 28/10/03 where he recorded his statement. The messages stopped coming in on 30/10/03 and the Interested Party was picked up for questioning on 31/10/04. After investigations police wanted to charge him with the offence of intimidation but he moved to court on 24/5/04 under H CR App. 277/04 where he sought bail pending arrest. The pleadings and Ruling are JMK 7 (1) – (iii).

The Applicant was supposed to investigate further on 15/7/04 and informed that the messages were originating from one Alexander James Ndegwa who had accompanied the Applicant to the police station to make a complaint on 25/10/03. The Applicant was summoned to the police station again on 15/9/05, was bonded to attend court on 28/10/05 to be charged with the charges in Cr C 2172/05 – with offence of conspiracy to injure reputation of the Interested Party and was charged with James Kangethe Ndegwa and Gladys Warui Ndegwa, (Charge sheet is JMK 9). He pleaded not guilty to the charge and he moved this court for Judicial Review orders and stay. That on 18/2/04, the Interested Party filed ***HCC 72/04 JAMES MUCHENE MUNGAI V AG AND JOHN KARIUKI*** in which he seeks general and aggravated or exemplary damages for injury to his reputation based on same facts as the criminal case – JMK 12. It is the Applicants contention that the Cr CC 2172/05 was preferred in order to settle scores or for personal vendetta. That the Applicant and Attorney General are Defendants in HC 72/04 and he will suffer prejudice as Cr CC 2172/05 and 72/04 are based on some facts. That in H Cr C M 277/04, the court gave orders based on a private investigator's report and these are 2172/05 is based on the same report. That the Interested Party is yet to be discharged from the complaint made by the Applicant to prosecute him 2 years after his complaint is abuse of power which is tainted with bad faith. According to counsel, the instigation of Cr C 2172/05 is meant to coerce the Applicant in HC 72/04 to withdraw the matter and is meant to settle a personal score. Reliance was made on the case of ***JEFFERSON LTD V BHETCHA (1979) I WLR 898*** in which the court held that the institution of criminal proceedings after civil proceedings were filed is an abuse of the court process.

In ***DR CHRISTOPHER N MURUNGARU V KACC CA 43/06*** the Court of Appeal said stay was appropriate in such a matter because the court may proceed to give order resulting in imprisonment which would render the application nugatory Ms Guserwa also submitted that there was bad blood between the Applicant and the Interested Party because there is a case Cr c 816/01 where the Applicant was one of the accused and Interested Party was a witness.

Counsel also relied on ***KURIA V AG (2002) 2 KLR 69*** where the court held that the court can halt criminal proceedings if instigated for extraneous purposes and where the prosecution is used to abuse the court process. Other cases cited are ***TIROP V AG 2 (2002) 2 KLR 165*** in which the court held that if the prosecution is oppressive the court can intervene. In ***REP V RM's COURT MAKADARA HM 898/03 –*** court to intervene where criminal, prosecution is used to abuse the court process.

The 1st and 2nd Respondent opposed the notice of motion and Alfonse Lumosi, the investigating

officer swore an affidavit dated 29.6.00. He deposed that he was the Investigating Officer and found that the mobile hand set used to sent the offensive messages was owned by James Ngethi Ndegwa who had accompanied the Applicant to Langata police station to make the false report and that it is the Applicant who masterminded the conspiracy to injure the Interested Party's reputation. That it is after he completed investigation that the DPP decided to prefer charges against the Applicant. That the co-accused of the Applicants were the source of the messages and owner of the mobile handset. His view that this notice of motion was filed to escape justice. Mr. Bryant submitted that there is pending HCC 72/04 was filed against the Attorney General and the Applicant on account of false imprisonment and malice. That it is after the case was filed that the Applicant and Ndegwa conspired and sent messages to each other in order to frame the Interested Party and that there is a complaint report Safari com to that effect. That the decision by the Attorney General to prosecute was based on cogent evidence. Counsel urged that the Applicant has come to the wrong forum for settlement of his dispute because in Judicial Review, it is not possible to cross examine the parties. That there is technical evidence available which cannot be an abuse of court process. He urged that the Applicant has not demonstrated that the Respondent or the police were activated by malice to prefer the charge. As regards pressure mounted by Kenya Human Rights Commission, and KACC, counsel submitted that they are Government bodies and if they detected crime they were entitled to file a complaint with the police.

The Interested Party relies on the affidavit dated 28/2/06 and the notice of motion dated 27/3/06 in which the Interested Party sought to strike out the Applicant's notice of motion, and arguments dated 13/3/07. In his affidavit, the Interested Party narrated what has transpired between him and the Applicant, how he was harassed by police and ultimately filed the application ***MISC App 277/04 and HCC 72/04.***

Mr. Wachira, counsel for the Interested Party submitted that this notice of motion is incompetent because no statement was ever filed along with the chamber summons and verifying affidavit as required by Order 53 Civil Procedure Rule. That failure to file an affidavit renders the application incompetent. He also submitted that there is no evidence that the notice to the Registrar now ever served nor was leave sought to dispense with the notice. Counsel also urged that the prayers sought in the chamber summons should be similar to those in the notice of motion which is not the case here. That prayer 2 of the chamber summons seeks stay of HCC 72/04 pending this matter but that no such prayer appears in the notice of motion. He relied on the case of ***NDUNGU V MUTHOMI (1990) LWR 183*** where it was held that prayers cannot be altered.

Counsel also argued that in light of S 193 A of the Criminal Procedure Code Cap 75 Laws of Kenya, the existence of the civil suit between the parties is not a bar to proceeding with the criminal case.

As regards the involvement of KACC and KHMCR in this matter, counsel submitted that after the Interested Party had been harassed by police, the Interested Party commenced his own investigations and confronted the District Criminal Investigating Officer (DCIO) with it when the DCIO did not act, he wrote to the KACC and KHRC to intervene and requested the matter be moved to CID Headquarters for further investigations and that the involvement of KHRC did not exert any pressure on the police to prefer the charges.

After considering the affidavits, submissions and authorities of both parties, I find that the issues for determination are:

(1) Whether the Applicant's notice of motion is incompetent;

(2) Whether the criminal proceedings in Cr C 2172/05 were commenced for purposes of settling a civil dispute in HCC 72/04, and hence an abuse of the court process;

(3) Whether the prosecution is biased, unfair and oppressive to the Applicants

(4) Whether the Applicant's legitimate expectation that he would be protected by the law was breached.

Is the Notice of motion incompetent? The Interested Party urged that the Applicant did not file any statement with the chamber summons rendering the notice of motion incompetent. Under order 53 Rule 1 (2) Civil Procedure Rules, the chamber summons is accompanied by verifying affidavit(s) and a statutory statement. The statutory statement should contain the name of the Applicant, the relief sought and the grounds upon which it is sought. Under Order 53 Rule 4 (2) at the hearing of the notice of motion, the grounds to be relied upon are those in the statement. The statement is a very important document and an application for Judicial Review cannot proceed without it. I have perused the file and note that the Applicant filed the notice on the registrar, the statement and verifying affidavit on 17/11/05 and a receipt was issued to that effect. I also note that the Applicant then filed a chamber summons on 18/11/05 which was accompanied by a verifying affidavit and it was paid for. There was no statement accompanying it. The Applicant had already lodged a statement with the court. In fact the verifying affidavit filed with the chamber summons is similar to the one filed on 17/11/05. Once there was a statement on record, that was sufficient and the same copy would be served with the notice of motion on the Respondent and Interested Party. Having filed a statement on 17/11/05, failure to file another statement with the chamber summons on 18/11/07 would not render the application incompetent.

Was the notice to the Registrar served? When the Applicant's counsel appeared before J. Nyamu, she indicated that the notice had been served. However, a look at the court file does not confirm whether the notice was served or not, as the notice is not acknowledged by the Registrar and there is no affidavit of service on record. It seems that the Applicant merely filed the notice but did not serve the Registrar. So does failure to serve the notice render the application incompetent? In my view, it does not. Notice to the Registrar was meant to alert the Attorney General of the filing of the application. The Attorney General was notified and he has come into this matter and taken part. Besides, there is a proviso to Order 53 Rule 3 that the court can dispense with the notice for good reason or extend the time for filing it. I find that it is an omission that is excusable and the Respondent has not demonstrated that failure to serve the notice on the Registrar has prejudiced the Interested Party or Respondent in any way.

Mr. Wachira also took issue with the prayer sought. That the prayer in the chamber summons is different from that in the notice of motion and therefore the motion is defective. In Judicial Review prayers sought in the notice of motion should be similar to those in the statement. Order 53 Rule 4, (1) states,

"***Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereinafter in this rule provided be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

The prayer in the notice of motion is similar to that in the statement and the prayer is properly framed. The Judicial Review application is properly before this court and the Interested Party's objection must fail.

Before the Applicant was charged with the offences in Cr C 2172/05, it seems there had been bad blood between the Applicant and the Interested Party which seems to have stemmed from their common place of work, – BOC (K) Ltd though by that time Cr C 2172 was preferred, the Interested party had left that employment.

It seems the genesis of the events leading to the charges in Cr C 2172/05 is the Applicant's report to the police on 25/10/03 after he allegedly received several text messages that were offensive and bordering on threats. Though the Applicant merely states that the Interested Party was picked up for questioning, the Interested Party deposed that he was actually arrested and his property taken away. When he was not

charged for any offence, he filed the civil suit HCC 72/04 on 28/1/04 seeking special and general damages against the Attorney General and Applicant for false imprisonment. According to the Interested Party, when the harassment continued he filed MISC APP. 277/04 seeking bail pending arrest.

With the amendment to the Criminal Procedure Code Cap 75 which introduced S 193 A, the pendency of civil proceedings in substantively similar matters as those in a criminal case is not a ground for stay or prohibition of a criminal case. The 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 substantively in issue in any pending civil proceeding shall not be a ground for any stay, prohibition or delay of the criminal proceedings."***

It means that both civil and criminal matters arising from same set of facts can proceed at the same time. However, if a party can demonstrate that the criminal proceedings have been instigated for an improper motive, maliciously, to settle scores or for personal vendetta, then the court can intervene to stay or quash the criminal prosecution. The courts have held so in the various cases cited i.e. ***KURIA*** case ***SPAUTZ V WILLIAMS (1993) 66 AJR 585; R V AG*** ex parte ***BENSON KANGWANA HC 446/00.*** It is therefore upon the Applicant to demonstrate that the criminal proceedings were commenced for an improper or ulterior motive, are malicious, or intended to settle scores. As already observed, the Applicant and Interested Party are not friends but it would not necessarily follow that because of that relationship, the criminal charges are trumped up. The Investigating Officer has deponed that after the Applicant reported that he was receiving offensive and threatening messages, investigations revealed that the source of the offensive text messages, which were the genesis of the complaint, were sent by none other than the Applicant's own 'investigator', who now his co-accused in Cr C 2172/05. It is noteworthy that the said co-accused, James Ndegwa, and his wife have not challenged the criminal charges. The Investigating Officer based his decision to prosecute on a report from Safaricom, the mobile service provider through which the messages were transmitted. That is technical evidence which can only be challenged or tested by way of cross examination in a criminal court. Judicial Review which proceeds by way of affidavit evidence is not the forum for challenging such evidence. Ms Guserwa, counsel for the Applicant has contended that the evidence was not against the Applicant but his investigator. It is not for this court to determine whether or not the Applicant is guilty of the offence as charged. The basis for charging both the Applicant and his own Investigator Ndegwa, is that Ndegwa's mobile phone was found to be the source of the offensive messages. The said James Ndegwa recorded a statement with police and the police saw it fit to charge him. Judicial Review is only about the fairness of the procedure to charge the Applicant. I find no procedural impropriety on the part of the police in conducting the investigations and framing the charges. There is no evidence that the criminal proceedings were instituted maliciously or in bad faith.

It is the Applicants contention that the Attorney General and Applicant are the Respondents in HCCC 72/04 in which the Interested Party is a complainant and by commencing the criminal proceedings, the Attorney General is a judge in his own cause. In HCC 72/04 the Interested Party has sued the Applicant and Attorney General for damages for false imprisonment and damages following the report that the Applicant had made to police that it was the Interested Party who was sending the offensive text messages. The Interested Party was allegedly detained at the police station from 8.00 a.m. to 11 p.m. on 31/10/03 and released without any charges being preferred. On 28/1/04 the Interested party filed the above civil case.

During the pendency of that civil case the police investigations were on going. I have seen the statement recorded by Alexander James Ndegwa who is suspected to have sent the offensive text messages and who is the Applicants co-accused in Cr C 2172/05. Ndegwa has recorded that he was

interrogated and his mobile seized. The investigating officer deponed that the mobile is held as an exhibit in the Cr C 2172/05. I have already noted that the police also claim to have evidence from Safaricom regarding the source of the offensive text messages. Even though the HCC 72/04 was filed before the criminal case was commenced, there were police investigations going on following the applicant's complaint to police. In light of the findings of the police (AG), the existence of the Civil case cannot be a bar to the prosecution in Cr C 2172/05. The Attorney General has inherent powers to investigate and prosecute and that process had to continue despite the pendency of the civil case. It is only through the prosecution of the criminal case where the police will tender the evidence available that it can be established who the author of the offensive messages was. I do believe the principle espoused in the case of ***JEFFERSON LTD*** (supra) that a criminal proceeding instituted after civil proceedings are instituted, are an abuse of the court process cannot apply in all cases. It depends on the circumstances of each individual case.

The criminal process is aimed at proof of the alleged conspiracy as charged. This court would be overstepping its bounds if it were to delve into what evidence is available against the Applicant. That is for determination by the criminal court. The police have linked the Applicant to the offensive messages that he had complained of to the police while in company of James Ndegwa, the alleged author of the said messages. Whether or not the Applicant was part of the conspiracy to sent messages to himself and implicate the Interested Party is a matter that can only be resolved by the criminal court. The Investigating Officer has sworn that there was good cause to charge the Applicant and this court will not interfere with that decision. The Applicant has not demonstrated that there is malice on the part of the Interested party or that he had a hand in the charge in light of the said evidence from Safaricom. I would not find any good ground to interfere with the criminal proceedings as the Criminal court is better placed to resolve those allegations. It is my view that the Applicant should go back to the criminal court to have his case determined on the merits. The fact that there is an overlap of facts in the criminal case and the civil case does not per se necessitate the issue of orders or the intervention of this court.

The Applicant alleges breach of his legitimate expectation that he would be protected by the law. Legitimate expectation is all about fairness. The public body charged with the decision making is expected to act fairly. But that duty cuts across the board. All the parties who complained before the police should be given fair treatment. The police have a legal duty to protect the aggrieved parties. When the Applicant made a complaint, investigations commenced. He was not denied that protection. It is only that it turned out that he has become the accused in place of the complainant because of the evidence that was unearthed. The Interested Party, too had a right to be treated fairly and protected by the law. I find that the Applicant has not demonstrated that his legitimate expectation was breached.

As to the involvement of KACC and KNHRC in this matter, it has not been demonstrated exactly what role they played or that they exerted any pressure on the police to press the criminal charges. The Investigating Officer has deponed to having technical evidence from Safaricom. That cannot be from KACC or KNHRC and besides the two institutions are in the business of overseeing the upholding of human rights and they cannot be said to be interfering.

Having come to the above conclusion that this matter cannot be resolved by way of this Judicial Review application, and the grounds alleged by the Applicant have not been satisfactorily proved, I hereby decline to grant an order prohibiting the hearing of Cr C 2172/05 in the criminal court. The notice of motion is hereby dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 20th day of November 2009

R.P.V. WENODH

JUDGE

Present:

Mr. Orwa holding brief for Ms Guserwa for Applicant

Mr. Tanui for Respondent

Mr. Wachira for Interested Party

Muturi – Court clerk