



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 1544 of 2004**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
BY WAY OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF KISUMU HIGH COURT CIVIL SUIT NO. 112 OF 2004 M/S QUASAR  
LTD – vs – METRO PETROLEUM LTD**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 LAWS OF  
KENYA**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE LAW COURTS NAIROBI.....1<sup>ST</sup> RESPONDENT**

**METRO PETROLEUM LIMITED.....2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE.....3<sup>RD</sup> RESPONDENT**

**EX PARTE**

**AZIM JIWA RAJWANI**

**(CORAM : NYAMU, EMUKULE, DULU JJ)**

**JUDGMENT**

**AZIM JIWA RAJWANI** (the ex-parte applicant), through his counsel Otieno, Ragot & Company Advocates, filed an application by way of Notice of Motion on 27.8.2004. The application was dated 27.8.2004. The respondents were named as Chief Magistrate Law Courts Nairobi (1<sup>st</sup> respondent), Metro Petroleum Ltd (2<sup>nd</sup> respondent) and The Commissioner of Police (3<sup>rd</sup> respondent). The application was brought under Order LIII Rule 3 of the Civil Procedure Rules and was said to have been filed pursuant to leave granted by the court on 11<sup>th</sup> August, 2004. The orders sought in the application are three, that –

1. An order of judicial review do issue by way of certiorari to bring before this court and quash the criminal trial and proceedings before the Chief Magistrate's court vide **NAIROBI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1912 OF 2004 REPUBLIC – vs – AZIM JIWA RAJWANI**.
2. An order of prohibition do issue restraining and or prohibiting the respondents from continuing with the trial and proceedings in Criminal Case No. NAIROBI CMCCR No. 1912 of 2004 against the applicant and/or commencing or instituting any other criminal proceedings or trial against the applicant or his co-directors of M/s Quasar Ltd in respect of the same set of facts hereof or otherwise continuing with the same.
3. The costs of the proceedings be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

The application has grounds on the face of the Notice of Motion and is supported by an affidavit sworn by the applicant **AZIM JIWA RAJWANI** on 10<sup>th</sup> August 2004, and the statement of facts both of which were filed in support of the application for leave.

The grounds of the application are eight in number. They can be summarized thus –

1. That the applicant as a director of M/s QUASAR LTD had been purchasing petroleum products from the 2<sup>nd</sup> respondent METRO PETROLEUM LTD and there was a disagreement on terms of payment, pricing, discounts and deliveries of petroleum products.
2. That the applicant's company, due to the disagreement, instructed the 2<sup>nd</sup> respondent not to deposit cheques issued by the applicant's company and advised the bank to stop payment, but the 2<sup>nd</sup> respondent maliciously deposited cheques valued at Kshs.103,000,000.00 with the result that the payments against those cheques were stopped by the bank when presented for payment.
3. That on 15<sup>th</sup> July 2004 the applicant's company and the 2<sup>nd</sup> respondent met for negotiations over the dispute but the 2<sup>nd</sup> respondent arbitrarily and without lawful justification opted to institute criminal proceedings on 2<sup>nd</sup> August 2004 as a mode of enforcing payments of the cheques stopped despite the applicant's valid defence to that claim and despite the existence of a previously instituted civil suit filed by the applicant's company on 29<sup>th</sup> July 2004 to resolve the dispute vide **KISUMU HCC NO. 112 OF 2004 – QUASAR LTD – vs – METRO PETROLEUM LTD**.
4. That the 2<sup>nd</sup> respondent maliciously and without any justification whatsoever colluded with the 3<sup>rd</sup> respondent's agents and/or officers and caused the arrest of the applicant on 30<sup>th</sup> July 2004 and had the applicant locked up for 3 days before charging him vide **NAIROBI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 1912 OF 2004** with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code.
5. That the dispute between the applicant's company and the 2<sup>nd</sup> respondent is purely a civil matter and the criminal charges aforesaid have merely been initiated to harass, intimidate and coerce the applicant and his company into surrender of their lawful rights and valid defence to the 2<sup>nd</sup> respondent's claim.
6. That in furtherance of the malicious scheme and abuse of police authority and powers the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have now summoned the applicant and co-directors of M/s QUASAR LIMITED to appear before the investigating officer Inspector LENNY KISAKA on 11<sup>th</sup> August, 2004 over the same issue arising hereof with a view of joining fresh charges against the co-directors.

The affidavit of the applicant sworn on 10<sup>th</sup> August 2004 and filed with the application for leave, gives the background and justification for filing this judicial review application. The statement of facts, also

dated 10<sup>th</sup> August 2004 and filed with the application for leave gives the description and address of service of the applicant. It also lists the reliefs sought as well as the grounds of reliefs sought. The applicant's and the 2<sup>nd</sup> respondent's counsel also filed skeleton arguments before the hearing.

At the hearing of the application, Mr. Otieno and Mr. Makori appeared for the applicant. Mr. Imanyara held brief for Mr. Ngatia for the 2<sup>nd</sup> respondent, while Mr. Gikonyo appeared for the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Mr. Otieno submitted that the application was supported by a statement and a supporting affidavit. The applicant had also filed further affidavits on 7<sup>th</sup> December 2005, and 19<sup>th</sup> January 2005. He submitted that two replying affidavits had been filed on behalf of the 2<sup>nd</sup> respondent, but the 1<sup>st</sup> and 3<sup>rd</sup> respondents had not filed any replying affidavits to the application.

Counsel submitted that the applicant was seeking for orders of certiorari to quash the proceedings of the learned trial magistrate in Nairobi Chief Magistrate's Criminal Case No. 1912 of 2004. The applicant was also seeking for orders of prohibition. It was counsel's contention that the Director of Criminal Investigations intervened in the matter, which is of a civil nature, and issued ultimatums to the applicant before initiating criminal proceedings. Initially, an Inspector Kisaka of the Banking Fraud Unit attempted to arrest the applicant in the presence of a debt collector of the 2<sup>nd</sup> respondent. On the 20<sup>th</sup> July 2004, the applicant was arrested by Chief Inspector Dominic Kisavi who was accompanied by a representative of the 2<sup>nd</sup> respondent. Though an inquiry was made on behalf of the applicant why the Banking Fraud Unit of the police was involved in a matter of a civil debt, no response had been received. When the Provincial Criminal Investigating Officer admonished Inspector Kisaka, the 2<sup>nd</sup> respondent changed tact and reported directly to the CID headquarters and thereafter the applicant was arrested. It was counsel's contention that the criminal process was being used to collect civil debts.

Counsel further contended that on 21.7.2004 the applicant was released on police bond and directed to be reporting to the police. On 30.7.2004, the applicant's bond was extended to 2.8.2004. However, on 30.7.2004 (which was a Friday) at 5.00 p.m., the applicant was arrested. Counsel submitted that it was deponed in the affidavits filed that the arrest of the applicant was made after the applicant refused to negotiate settlement of a civil debt. On the following Monday after arrest, the applicant was charged with several counts of obtaining by false pretences and was released on a bond of Kshs. 30 million with one surety.

It was counsel's contention that the charges were part of intimidation, that is why after the applicant was released on bond, Inspector Kisaka summoned all the directors of QUASAR LTD, with a view of charging them.

Counsel also submitted that in fact the matter in which criminal charges was filed against the applicant was already the subject of a civil suit pending at Milimani Commercial courts, which was initially filed in Kisumu on 29.7.2007. The suit was filed before the applicant was arrested on 30.7.2007. The plaintiff in the civil suit was QUASAR LTD and the defendant was METRO PETROLEUM LTD, the 2<sup>nd</sup> respondent herein. Later, the 2<sup>nd</sup> respondent introduced a counter claim in which they joined the applicant as a defendant in that suit.

Counsel also argued that the 2<sup>nd</sup> respondent had retained a private citizen one NYONGO to carry out criminal investigations. In counsel's contention that was proof that the criminal process was being used to settle civil debts.

Counsel sought to rely on several case authorities, for which he had filed a list. In particular he sought to rely on **NAIROBI H.C. MISC. APPL. NO. 898 OF 2003 – REPUBLIC – vs – ATTORNEY-GENERAL AND ANOTHER** in which he contended, the court held that Section 193A of the Criminal Procedure Code (Cap. 75) did not remove the court's inherent power to prevent abuse of process in contravention of Section 77(8) of the Constitution. Counsel contended that the criminal proceedings herein were instituted mala fides, as there was a pending civil case. Counsel also sought to rely on the

case of **SAMUEL KAMAU MACHARIA & ANOTHER –vs- ATTORNEY-GENERAL & NGENGI MUIGAI - Nairobi H.C.C. Misc. Application No. 356 of 2000.**

Counsel also cited the case of **VINCENT KIBIEGO SAINA – vs – ATTORNEY GENERAL – NAIROB H.C MISC. APPL. NO. 839 OF 1088 OF 1999**, in which he contended the court held that where the criminal process was being used in order to advance a civil claim, the court would hold that it was oppressive and issue orders of certiorari. Counsel also cited the case of **NDARUA – vs – REPUBLIC [2002] 1 EA 204**, in which, he contended, the court held that it was for the State and the complainant to demonstrate that they were acting in good faith.

Counsel urged the court to ignore some remarks in a ruling on an application for adjournment in the matters herein, which was delivered by Hon. Justice Makhandia on 3<sup>rd</sup> December 2004. Counsel sought to rely on **NAIROBI CITY COUNCIL – vs – THABITI ENTERPRISES LTD (1995 – 98) 2 EA 231 (CAK)** to support his contention that Hon. Justice Makhandia erred in deciding on issues, in an application for adjournment, which had not been pleaded.

Learned counsel for the 2<sup>nd</sup> respondent Mr. Imanyara opposed the application. He submitted that they had filed skeleton submissions on 6.6.2005, and also on 18.11.2005. The 2<sup>nd</sup> respondent had also filed grounds of objection.

He submitted that the objections were firstly, that no notice was served on the Registrar at least one day before the filing of the application for leave, contrary to the provisions of Order LIII of the Civil Procedure Rules. Counsel contended that it was a fatal error to the application. He sought to rely on **KARIUKI – vs – COUNTY COUNCIL OF KIAMBU [1995 – 98] 1 EA 90**. Counsel submitted that the second fatal error was that the statement supporting the application contained matters of evidence contrary to the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules. This was also a fatal error to the application.

Counsel further contended that the orders sought were not available. It was his contention that orders of certiorari could not issue as no decision had been made by the subordinate court. Counsel submitted that orders of certiorari could not issue to quash mere proceedings. On orders of prohibition, counsel submitted that the orders sought could not issue as the applicant had not shown that the subordinate court had acted beyond its powers. Counsel submitted that the complaint of the applicant appeared to be between him and police officers, and had nothing to do with the conduct of proceedings by the subordinate court. He contended also that the filing of the civil suit by QUASAR LTD. was not known to the 2<sup>nd</sup> respondent, when a report was made to the police. Counsel also submitted that section 193A of the Criminal Procedure Code (Cap. 75) provided that criminal and civil proceedings could concurrently be prosecuted in court on the same subject matter.

Mr. Gikonyo for the 1<sup>st</sup> and 3<sup>rd</sup> respondents adopted the submissions of counsel for the 2<sup>nd</sup> respondent. He submitted also that the criminal case was between the Republic and an individual. He contended that criminal proceedings could proceed alongside civil proceedings.

In reply Mr. Otieno submitted that notice of the application was served on the Registrar as required by law. In any case, since counsel for all the parties had appeared in court, the issue of notice ceased to be a ground for objection. Counsel also submitted that the Chief Magistrate was enjoined as a respondent because that was a mandatory requirement of law, as they were questioning the process of charging and prosecuting the applicant. Counsel further argued that there was no requirement that the subordinate court should make a decision before orders of certiorari could be issued. He finally asked the court to ignore the submissions of Mr. Gikonyo for the 1<sup>st</sup> and 3<sup>rd</sup> respondents from the bar, as Mr. Gikonyo's clients had not filed any response to the application.

We will start with the issue of whether we should ignore the ruling of Hon. Justice Makhandia delivered on 3<sup>rd</sup> December 2004. Counsel for the applicant has argued that the ruling made decisions on issues not canvassed in the application, as the application before the Hon. Judge was an application for

adjournment.

We observe that objections to the findings in that ruling was dealt with in a ruling delivered on 8/7/2005 by Hon. Justice Nyamu, Hon. Justice Ojwang, and Hon. Justice Kasango. In that ruling the court stated –

**“—we are of the view that it will not be safe for us to entertain preliminary objections again while the matter is already the subject matter of a pending appeal. Entertaining the matter again borders on our sitting on appeal of a brother of co-ordinate jurisdiction and we strongly resist the temptation to rule on any of the points raised for this reason”**

The ruling of Hon. Justice Makhandia has still not been set aside or varied on appeal. Therefore, in our view, we are at liberty to consider the findings in that ruling as much as it may be relevant to our decision.

The second issue is whether certiorari orders may not be issued against proceedings, unless those proceedings are finalized and a decision made. Counsel for the 2<sup>nd</sup> respondent has urged us to find so. We do not agree. In our humble view, proceedings can be quashed at any stage, so long as proceedings are actually in progress. Orders of prohibition can also issue against proceedings before a magistrate, even if the investigator and prosecutors are the police.

The third issue that arises is whether the application is defective. Counsel for the 2<sup>nd</sup> respondent has argued that the application is fatally defective, firstly, because no notice was served on the Registrar at least one day before the filing of the application for leave. Secondly, that the statement contained matters of evidence contrary to the provisions of Order LIII Rule 1(2) of the Civil Procedure Rules. Counsel for the applicant, on the other hand, maintains that the applicant had complied with all the legal requirements. Counsel for the applicant also contended that, as counsel for the respondents had appeared in court for the hearing of the substantive application, the issue of serving the prior notice on the Registrar ceased to have importance.

We will start with the issue of notice to the Registrar. Order LIII Rule 1 (1) and (3) is relevant. It provides –

**“1(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.**

**(2) .....**

**(3) The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits.**

**Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown”**

Our perusal of the file shows that the Notice to the Registrar, which was dated 10<sup>th</sup> August 2004 was filed on the same date. The application for leave, under certificate of urgency, was also filed on the same day (10<sup>th</sup> August, 2004).

We observe that leave was granted by the court to file the application on 11<sup>th</sup> August 2004 at Kisumu. In our view, the court having granted leave without the Notice to the Registrar, we are not entitled to sit on appeal with regard to the leave granted by our brother. The leave having been granted, that issue is spent. The stage of leave is a “filter” and once it is passed it cannot be resurrected in respect of the substantive Notice of Motion. We do not agree with the reasoning in the case of KARIUKI –vs- COUNTRY COUNCIL OF KIAMBU [1995 – 98] IE 1990. We cannot sacrifice the merits of the application on the issue of “leave” which had been given. We dismiss the objection.

We now turn to the objection to the statement. Counsel for the 2<sup>nd</sup> respondent has argued that the statement is defective as it lists evidence, rather than grounds, as required by law. Counsel for the applicant did not respond to this contention.

Rule 1(2) of Order LIII provides –

**“1(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit”.**

The statement filed is headed **“STATEMENTS OF FACTS”**. It has sub-headings. Firstly, the description of the applicant. The second subheading is the reliefs sought. The third sub-heading is the grounds of reliefs sought. The said grounds start from paragraph 6 to paragraph 62. The paragraphs give the description of business dealings between **QUASAR LIMITED** and the 2<sup>nd</sup> respondent, as well as the involvement of the police in this matter. The contents are almost similar to what is deponed in the affidavit in support of the statement of facts.

Under Rule 1 (2) of Order LIII, the law limits what should be contained in the statement to the name and description of the applicant, the reliefs sought, and the grounds on which the reliefs are sought. We are aware of the decision in **COMMISSIONER GENERAL- KENYA REVEVUE AUTHORITY –vs- SILVANO – CIVIL APPEAL NO. 45 OF 2000 (Kisumu)** in which the Court of Appeal stated –

**“The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case”.**

In our view, the applicant did not err. The applicant gave the facts relied upon in the verifying affidavit as required by law. The applicant was entitled to file a statement giving his name and description, the relief sought and the grounds for seeking that relief. The grounds for seeking relief could either be detailed or brief. The applicant chose to give detailed grounds for the relief sought. It was for him to support those grounds at the hearing of the application. We find no defect in the statement which was filed by the applicant.

We now turn to the merits of the application.

The facts do not appear to be in dispute. The applicant is a director of a company known as QUASAR LTD. The 2<sup>nd</sup> respondent is an importer of petroleum products. In or about 2003, the 2<sup>nd</sup> respondent and QUASAR LTD agreed to do business with each other. The 2<sup>nd</sup> respondent was to supply QUASAR LTD with petroleum products on credit. Payment for the supply of petroleum products was to be by cheques. After sometime, QUASAR LTD did not appear to honour the credit terms of payment. Attempts were made by the parties to resolve the issue of delays in payments. Later, QUASAR LTD issued postdated cheques worth more than Kshs.100,000,000/=, but the same were dishonoured by the bank on presentation. The 2<sup>nd</sup> respondent’s directors thereafter involved the police in the matter, and the applicant (who appears to have issued the dishonoured cheques as director of QUASAR LTD) was summoned by the police for questioning. On 29<sup>th</sup> July 2004, QUASAR LTD filed a Civil Suit HCCC No. 112 of 2004 at Kisumu against the 2<sup>nd</sup> respondent, for what they thought were business disputes with respect to the issues herein, to be resolved in the civil court. However, on 30<sup>th</sup> July 2004, the applicant, as a director of QUASAR LTD was arrested and later arraigned in court on 2<sup>nd</sup> August 2004 in Nairobi Chief Magistrate’s Criminal Case No. 1912 of 2004. The applicant thereafter filed this application, claiming that the police were being misused by the 2<sup>nd</sup> respondent to abuse the court process by instituting criminal proceedings on a purely civil matter. He contends that the involvement of the police in the civil matter and the criminal proceedings instituted against him amounted to an abuse of the court process.

The situations where the court will find abuse of process and intervene were considered by Hon.

Justice Nyamu in the case of **REPUBLIC –vs- ATTORNEY – GENERAL & PRINCIPAL MAGISTRATE’S COURT AT MAKADARA – Nairobi High Court Miscellaneous Application No. 898 of 2003**. In that case, the learned Judge traced the basis of the principle of abuse of the court process, and where it is applicable. The learned Judge stated, inter alia –

**“Turning to the facts in the case before the court an action based on a lease and the interpretation of the lease on what fixtures the tenant can take and when, including what damages if any to pay and generally the rights of the parties inter se is clearly regulated by the lease and a civil court is the proper venue to adjudicate on the issues and determine them. It cannot rightly belong to a criminal court yet the police even with the knowledge that the landlord and the tenant were in dispute on this point appear to have been prevailed upon by one side to institute criminal proceedings at a time when those proceedings were clearly aimed by the landlord at facilitating the unlawful termination of the lease or tenancy”**

In our present case, it is clear that both the 2<sup>nd</sup> respondent and the police knew that the issues in question related to disputes in business commitments between two companies QUASAR LTD and the 2<sup>nd</sup> respondent. That notwithstanding, the directors of the 2<sup>nd</sup> respondent went ahead and made a report to the police and the police took action to file criminal charges in court against the applicant, who is a director of QUASAR LTD. This is clearly an abuse of the court process.

In the Australian case of **SPAUTZ –vs- WILLIAMS [1992] 66 AL JR 585**, which was cited with approval by Hon. Justice Nyamu in the case of **Republic –vs- Attorney – General & Principal Magistrate’s Court at Makadara** (supra), it was held –

**“The court’s inherent power extends to preventing an abuse of process resulting in oppression even if the moving party has a prima facie case”**

In our view, the facts as disclosed to us herein justify the exercise of our judicial power to grant the orders of certiorari and prohibition as prayed for. The grant of the orders will prevent the abuse of process to oppress the applicant. The provisions of section 293A of the Criminal Procedure Code (Cap. 75) will not deter us because the criminal proceedings before the Chief Magistrate’s court were instituted for purposes extraneous to the criminal process, that is coercing the applicant to pay a business debt through the criminal process. The civil court is the proper venue to adjudicate on the issues and determine them. We will therefore allow the application and grant the prayers sought.

For the above reasons, the judicial orders of certiorari and prohibition shall issue in terms of prayer 1 and 2 of the application dated 27<sup>th</sup> August 2004. We further award costs in favour of the ex-parte-applicant as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally.

Dated and delivered at Nairobi this 21<sup>st</sup> day of September 2007.

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**NYAMU**

**JUDGE**

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**EMUKULE**

**JUDGE**

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**DULU**

**JUDGE**