



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civ Appli 152 of 2006**

**IN THE MATTER OF AN APPLICATION BY HELMUTH RAME FOR AN ODER OF
PROHIBITION**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI CRIMINAL CASE
NO. 2261 OF 2005; *REPUBLIC VERSUS HELMUTH RAME* BEFORE THE SENIOR
PRINCIPAL MAGISTRATE, NAORIBI LAW COURTS**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATE, NAIROBI LAW COURTS RESPONDENT

MOSES WACHIRA INTERESTED PARTY

EX PARTE

HELMUTH RAME APPLICANT

JUDGMENT

This is a judicial review application brought under O 53 of the Civil Procedure Rules.

The factual background is that on 7th October 2005, the applicant was charged before the Chief Magistrate Court in Nairobi with inter alia the offence of conspiracy with intent to defraud the

complainant Mr Moses Wachira of a sum of US Dollars 122000 by agreeing to sell an aircraft LJ 528 Reg No 54 NBB – in that the accused with others represented that they were in a position to sell and transfer the aircraft in a serviceable condition. The charge sheet is exhibited as “HRI” in the verifying affidavit of the accused.

On 20th January 2006 the complainant filed a civil suit namely, Milimani Commercial Court Civil Case Number 16 of 2006 *Moses Wachira v Nidel Bruel and Helmtl Rame*. In this suit the complaint (plaintiff) seeks to recover a sum of US Dollars 249932 39 inclusive of spare parts injunction orders and damages for loss of user of aircraft King Air C90, LJ – 528 registration number 5Y-NBB. The aircraft is also the subject matter of the criminal case described above instituted nearly four (4) months before the Civil Suit.

The applicant has also deponed that on 22nd July 2005 he was charged with the offence of assault before the Senior Principal Magistrate’s Court at Kibera Criminal Case No. 5513 of 2005. *R v H.B. Rame* and that the complainant is the plaintiff in the suit described above. The case is partly heard.

The applicant has also deponed that the complainant has on several occasions threatened him with police action and prosecution in respect of the same subject matter. In support of this he has annexed emails marked HR10 of 31st July, 2005 HR 11 of 13th October, 2005, HR 12 of 10th October, 2005.

The emails state:

HR10

“I do not owe Aircraft any money as implied in you letter they have been trying to extort money from me and I am going to pursue what is rightfully mine very vigorously including the full refund of my deposit from you. You have until tomorrow to refund me deposit in full size you are the one that cancelled the sales agreement. Apparently you are not aware that Helmuth was arrested and charged and taken to court and he is being investigated on fraud by the police and Criminal Investigations Department Headquarters Moses.”

HR 11

“You have ignored my several demand letters. You are wanted by the Kenya Police. Your name will be submitted to the Interpol and broadcasted worldwide by next week, and we know where you live. Helmuth and his family has applied for citizenship which will be revoked even your lawyers cannot save you soon I will own everything you own in Kenya.”

HR 12

“As you are aware Helmuth has been in prison for the last five days. I demand all my money and airplane back immediately. Failure to refund money I will prosecute you and Helmuth in criminal court and you will end up in prisons and not even your lawyer can save you as you can see and you know I have reach everywhere.”

The case for the applicant is that the complainant intends to ruin his reputation, harass him and have him incarcerated whilst at the same time pursuing civil proceedings against him and that the criminal cases exhibit a glaring hijacking of the due process of the law in order to assuage the spite and desire to settle scores on the part of the complainant. He further states that the complainant claims are purely of a civil nature and the criminal prosecution is merely being used to harass him and expedite settlement of the civil dispute against which he has filed a defence. He believes that under the criminal justice system in Kenya the police do not don the hat of debt collectors and denies owing the moneys alleged to be due from him. He concludes that the harassment is contrary to public policy a flagrant travesty of justice and good order and it is an infringement of his human rights and for these reasons a prohibition should issue.

The Interested Party (hereinafter called the IP) filed written skeleton submissions on 22nd June, 2006 where he states inter alia:

- (i) That the application is malafide, mischievous opportunistic and bad in law. It alleges that the applicant has committed several cognisable offences for which he should be tried and that he is the complainant.
- (ii) That the allegation that the institution of the criminal case was intended to aid the civil suit is factually incorrect in that the criminal case preceded the civil suit. He contends that the alleged fraudulent acts set out in A to E of his written submissions independently constitute criminal conduct and the stoppage would be a threat to the rule of law and any prohibition would mean that the criminal justice system would fall into the wrong hands instead of the usual law enforcement agencies. He further states that in his complaint he raised reasonable and probable cause in respect of the fraud and he sees no good reason why the two parallel systems of justice should not be invoked.

He argues that it is for the court trying the matter to decide the question of whether there is a reasonable and probable cause as a matter of fact and for the applicant to show that he the complainant was motivated by malice.

The Respondent on the other hand relies on the written skeleton arguments dated 25th June, 2006 wherein the respondent states that there is ample evidence disclosing a criminal offence under the Penal Code and that the proceedings were instituted to vindicate criminal justice and that s 193 A of the Criminal Procedure Act does recognize parallel proceedings.

In the recent case of *R v ATTORNEY GENERAL ex parte KARMALI Misc Civil Cause No. 367 of 2005* I reviewed the principles which would entitle the court to intervene by way of prohibition. I have weighed the facts of this case against the above principles and although the complainant did issue what appears to be threats, to the accused and his associates, before the institution of the criminal case they did not affect the prosecutor's ability to make a quasi judicial decision to charge the applicant because the facts set out do on a prima facie basis cast a long shadow that there could be a triable matter capable of being presented to a court for determination. In the circumstances of this case, although the complainant did issue threats, the prosecution appears to have taken a quasi judicial decision to charge the applicant. It is significant that the threats were not addressed to the Prosecution. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of criminal justice. The facts are clearly distinguishable from the facts in *SPATZ v WILLIAMS (1992) 66 AL JR 595* and *THE KARMALI CASE (supra)*. In most cases complainants do have deep feelings and they do vent them. As long as the Prosecution and those charged with the responsibility to make the decision to charge act in a quasi judicial manner a court should not prohibit a prosecution.

The issue of the motive if any and its impact or legal effect is in my view a matter which the trial court should consider upon presentation and evaluation of the evidence. For now, in the view of the court any ulterior motive of the complainant is not the predominant factor in the proceedings.

In the result the application is dismissed with costs and it is ordered that the case in the lower court should proceed.

DATED and delivered at Nairobi this 13th October, 2006.

J.G. NYAMU

JUDGE