



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION 1413 OF 2005

NEPTUNE CREDIT MANAGEMENT LTD & ANOTHER.....APPLICANTS

VERSUS

CHIEF MAGISTRATE'S COURT & 2 OTHERS.....RESPONDENTS

RULING

The Applicants herein pray in the Chambers Summons dated 26.09.2005 and filed today 26.09.2005 for orders

(1) that intended arrest, indictment, detention and

criminal prosecution of the Applicants or the institution of any criminal proceedings arising out of a complaint to the Police and/or the Criminal Investigation Department by Jacob Juma or arising from the subject matter of repossession of motor vehicle registration No. KAR 222s Toyota Land Cruiser be stayed or suspended until the hearing and determination of the Originating Summons herein.

(2) That the costs of this application be provided for.

The application is based upon the Affidavit of the 2nd Applicant, Brian Yongo, sworn on 26.09.2005, and the grounds to the application the principal ones of which are:-

(a) the Originating Summons would be rendered nugatory if the orders prayed for are not granted;

(b) the applicants have a right to secure protection of the law and the right to liberty and protection against inhuman and degrading treatment and against discrimination;

(c) the applicant's fundamental rights and freedom have been and are likely to be contravened.

The other grounds contained in paragraphs (d)-(g) refer to an intended prosecution whereas ground (h)-(k) contain allegations relating to fundamental breach or contravention of the rights of the applicants enshrined under Sections 77(1), 77(2) and 77(5) of the Constitution, the alleged desecration of those rights, the violation of the rights of the applicants as citizens of Kenya, and that Originating Summons filed will raise several serious issues which touch on the fundamental rights and freedoms of the Plaintiff/Applicant and the administration of justice which ought to be determined by the court as a matter of urgency.

Mr. Makori learned Counsel for the Applicants regurgitated these matters and prayed that the matter be certified as urgent, and that the orders prayed for be granted. Having considered this matter, I am of the

firm view that whereas the liberty and fundamental rights of the individual and indeed the citizen as enshrined in the Constitution, must always be protected, that those fundamental rights and freedoms of the individual are enjoyed by the courtesy of the parallel rights and freedoms of the other individuals. In other words the maintenance of the liberty and fundamental rights of the individual are enjoyed only when the rights and freedoms of other individuals and citizens are equally guaranteed and respected by those seeking their rights and freedoms to be so respected and guaranteed.

Once those rights are interfered with by one individual or groups of individuals, it gives rise to unequilibrium which must be restored and enforced by the state, the guarantor, of all rights and freedoms through its agents charged with the duty of the maintenance of law and order. That in my humble view is the foundation of the rule of law upon which the administration of justice in all civilized societies is premised.

In matters of criminal justice and indeed the criminal law therefore the due process of law does not commence from the prosecution in court. The due process has its antecedents right from detection and prevention of commission of crime or offence. So the crime detection and prevention service of the Kenya Police Force or the CID will do its utmost to detect and prevent the commission of both petty and the more serious and sophisticated crimes or breaches of the law including white collar crimes. In carrying out their work they will sometimes detect such crimes or offences through the use of their own sources of information and other technical resources such as fire arm detectors and other devices, and man's best animal friend, the sniffer dogs. At other times their work of detection and prevention will be assisted by direct information as complaints by a member or members of the public.

Where therefore complaints are made to the C.I.D. or the Police, and even before the C.I.D. or the Police have taken any steps to investigate such complaints the question which I ask myself is this . Is it in the interest of the administration of justice that the CID or other arms of law enforcement should be stopped in their tracks?

The Applicant's answer to this question is in the affirmative. And what are their grounds for holding this view of the matter? The Applicants say that unless the CID are stopped from carrying out their investigations, and possibly prosecuting them, their originating summons filed herein would be rendered nugatory, that their rights to secure protection under the law and the right to liberty and protection against inhuman and degrading treatment and against discrimination would be violated. The Applicants also contend that any prosecution which would ensue from such investigation would breach their fundamental rights and freedoms of the individual and that this would be contrary to the provisions of Section 77 (1) and (2) of the Constitution. I do not think so. These are my reasons.

Section 72(1) of the Constitution while providing that no person shall be deprived of his personal liberty as a categorical constitutional guarantee proceeds to cite instances when that personal liberty may be taken away. These instances include where a person is reasonably suspected of having committed or being about to commit, a criminal offence under the law of Kenya (S72(1)(e)) The Applicants say in the sworn Affidavit of Brian Yongo the Chief Executive Officer of the first Applicant Neptune Credit Management Ltd that such investigation is motivated by malice, it would be arbitrary and capricious. I am or the Court is least able to make any such finding until the CID have actually compiled their report, and have been advised by their legal advisers or the State law Office whether the facts disclosed in the investigation amount to commission of any offence under the law. In my very humble opinion, many applicants including these Applicants rush to this Court for orders to stop the law enforcement agencies and other Constitutional offices, like the Attorney-General, charged with statutory duties from carrying out their legitimate duties. This does not mean that the CID or other such agencies are always right but where they are found not be right or not to act in accord with the law, the rights of persons affected are always vindicated by either acquittals or where appropriate the tendering of NOLLE PROSEQUI(S). At the tail end of such process, the persons affected retain the right to vindicate their rights through a further constitutional reference under S. 84(1) of the Constitution and the Court has at that stage a wide discretion to make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive) of the Constitution i.e. Chapter V - Protection of Fundamental Rights and Freedoms of the

Individual) of the Constitution of Kenya.

In the instant case, I am not persuaded that there is any cause or any sufficient cause for interfering with the incept investigations on the allegations or complaints by one Jacob Juma against the Applicants and others perhaps, not before the court. The Applicants have an opportunity to explain themselves to the CID on the falsity of those allegations or complaints.

On the allegations of being subjected to inhuman and / or degrading treatment, I believe the CID are both well informed and advised that all persons suspected of committing any crime or offence are deemed innocent and are entitled to a fair hearing within a reasonable time before an impartial and independent court under the provisions of section 77(1) & (2) of the Constitution. Any inhuman degrading and discriminatory treatment is unconstitutional and is outlawed by many universally accepted human rights instruments.

For those reasons I decline to certify the Chamber Summons dated 26.09.2005 as urgent, and I also decline to give any orders for stay of investigation, arrest or prosecution of the Applicants and strike out the said application with no order as to costs.

Dated and delivered at Nairobi this 28th day of September, 2005

ANYARA EMUKULE

JUDGE