



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION NO.160 OF 2004**

SYLVESTER PATRICK WAMBUA..... APPLICANT

VERSUS

1. THE HON. ATTORNEY GENERAL

2. THE D.C.I.O MACHAKOS DISTRICT

3. COMMISSIONER OF POLICE RESPONDENTS

R U L I N G

The Notice of Motion dated 12/10/04 was brought pursuant to order 53 Rule 3 Civil Procedure Rules seeking an order of stay of the intended arrest and institution of any criminal proceedings against the applicant pending the hearing and determination of this application and that an order of prohibition do issue directed at the Divisional Criminal Investigation Officer Machakos District and Commissioner of Police prohibiting them from arresting and instituting criminal proceedings against the applicant as long as there pends and continues to pend before Chief Magistrate's Court Machakos Civil Suit No. 172/04.

The required notice to the registrar had been served and filed along with the Chamber Summons dated 4/10/04; a statement of facts which contains the grounds upon which the application is grounded; verifying and supporting affidavits.

Briefly stated the background of this case is that the ex parte applicant entered into a sale agreement of parcel of land Machakos/Kiandani/3826 with one Josephat Kiwa Julius. The applicant was the seller. Purchase price was agreed at Ksh. 330,000/=. The buyer did not have cash but was owed money by another and they agreed that the applicant gets an advocate to pursue the money from the debtor which he did. The applicant was paid the said money and informed the said Josephat Kiwa.

The purchaser changed his mind and demanded the Ksh. 170,000/= back. He filed a suit in Chief Magistrate's Court Civil Case 172/04 demanding a refund of the Ksh. 170,000/=. On 8/9/04, the Divisional Criminal Investigation Officer Machakos summoned the applicant to appear before him on 9/9/04 and after interrogation he was asked to pay the 170,000/= to the purchaser by 27/10/04. On fearing such arrest he filed this suit seeking prohibitory orders. It is the counsel's contention that the Divisional Criminal Investigation Officer is acting sub judice as the civil suit still pends and he has filed defence and counter claim to the said suit.

The learned state counsel Mr O'mirera did not per se oppose the application because police should not be used as debt collectors but qualified his concession that the court cannot grant a stay to investigate the applicant from any offence that might arise from the subject matter. He submitted that the powers of the police cannot be fettered barring them from investigating where an offence is disclosed. He cited Section 26 of the constitution which confers powers on the Attorney General to investigate and prosecute. The same powers are delegated to the police by the Attorney General.

Before even delving into the merit of the application prayer two of the Notice of Motion seeks an order of stay of the intended arrest and institution of criminal proceedings. The Notice of Motion is specifically brought under Order 53 Rule 3 Civil Procedure Rules. Rule 3 does not provide for issue of order of stay. It is Rule 1 (4) that provides that the court can order that an order of prohibition or certiorari do operate as stay. The applicant has not moved the court to have the order of prohibition operate as stay. Counsel seemed to be seeking an order of stay independent of the order of prohibition. That prayer for stay cannot be granted as prayed.

Section 26 of the constitution provides:

“There shall be an Attorney General whose office shall be an office in the public office.

(3) The Attorney General shall have power in any case in which he considers it desirable so to do;

(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person; (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority and

(c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted and undertaken by himself or another person or authority

(4) The Attorney General may require the Commissioner of Police to investigate any matter which in the Attorney General’s opinion relates to any offence or alleged offence or suspected offence and the Commissioner shall comply with the requirements and shall report to the Attorney General upon investigation.

(8) In exercise of the functions vested in him by Sections (3) and (4) of this section and Sections 44 and 55 the Attorney General shall not be subject to the directions or control of any other person or authority.

The above provisions gives the Attorney General unfettered discretion in investigations and prosecution and the Attorney General is subject to authority or control of nobody when it comes to these matters. The constitution being the supreme law of the land cannot be challenged.

Further to the above provision Section 193 A of the Criminal Procedure Code provides as follows:

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

The above provisions means that even though a civil suit is pending before the court, criminal proceedings can also be preferred against the applicant and the police are not in breach of sub judice rule as alleged by the applicant. Both civil and criminal proceedings regarding a similar issue can co-exist in a court of law.

So, can an order of prohibition issue in the circumstances?

Halburys Laws of England 4th Edition Vol. 1 Page 37 Para 128 provides this regarding the scope of prohibition.

“It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings that are in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie, to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.”

In considering the above principles, the Police Commissioner obviously has the power or jurisdiction to investigate and prefer criminal charges against the applicant. Since Judicial Review does not concern itself with the merits of the decision, the question would be how that jurisdiction is to be exercised. The only reason given by the applicant for seeking an order of prohibition is because a civil suit exists between the same parties regarding the same issues but Section 193 A of the Civil Procedure Code does give the police powers to prefer criminal charges irrespective of civil proceedings pending before court. So far there is no evidence that the police have acted in bad faith, unreasonably or capriciously or in breach of any rules of natural justice. The applicant annexed a letter from the Divisional Criminal Investigation Officer summoning him to his office regarding allegations made in a case of obtaining money by false pretences. A report had been made to the Divisional Investigation Officer and he has a duty to investigate. If indeed the police found a case made against the applicant and asked him to pay up or face prosecution, in my view that would not amount to debt collection but giving the applicant a chance to settle in lieu of criminal proceedings. So far the applicant has not laid basis to warrant the court to issue an order of prohibition against the police commissioner or Divisional Criminal Investigation Officer Machakos and the application is, therefore, dismissed with costs.

Dated at Machakos this 25th day of November 2004

R.V. WENDOH

JUDGE