



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 671 OF 2002

FRANCIS KIHONGE NG'ANG'A

& ANOTHER } PLAINTIFF

VERSUS

THE ATTORNEY GENERAL DEFENDANT

JUDGMENT

By his amended application of the 31st July, 2002 the Applicant seeks an order that

1. THAT the Senior Principal Magistrate, Kibera or any other court be and is hereby prohibited from hearing or in any other manner proceeding with Criminal Cases NO.1040 of 2002 (Republic v. George Gitahi Wanjohi & Another) and and 4086 of 2002 (Republic versus Francis Kihonge Nganga) and the said cases be terminated forthwith.

2. That costs of this application be provided for.

The grounds for the application are that

(a) That the actions of the police in arresting and charging the applicants are unfounded, unlawful, ill motivated, malicious, abuse of due process, waste of public resources and without jurisdiction and or any justification.

(b) That the dispute involved is one of a civil nature.

The Affidavit relied on is that in support of the chamber summon seeking leave to file this Judicial Review and the Statement of Facts filed.

In the affidavit the defendant purports to make the affidavit on behalf of himself and George Litchi Wanjohi. In his affidavit he states that one Dominic Nyanjui Nga'ng'a who wanted to purchase a Toyota Hiace but could only pay Shs.470,000/= of the purchase price of Shs.870,000/= which he did. The balance of the purchase price was to be paid by instalments. In the event of default the Company of which the Deponent was the Managing Director had the right to repossess the vehicle. The purchaser defaulted and the vehicle was seized.

The Deponent stated that three Police Officers from Provincial Criminal Investigation Department Officer in Nairobi came, claimed the deponent had illegally claimed the vehicle, but on being given copies of the written agreement, they left.

The affidavit does not refer to any exhibits but attached to the affidavit are various documents including a sale agreement dated and signed on the 21/9/2001. The agreement provides for payment by instalments and states the vehicle could be repossessed in default of any of the instalment.

Sergeant Henry Lihanda swore two affidavits in Reply on the 3/6/2003 and 10/6/2003. It is alleged that Gitahi, one of the Applicants herein told the complainant Dominic, referred to above, that the Housing Finance Company of Kenya would finance the balance of the purchase price.

The Three Applicants were charged with obtaining money by false pretence contrary to section 313 of the Penal Code. The particulars of the charge in respect of Francis Kihonga Ng'ang'a is as follows:

“Francis Kihonge Nganga: On diverse dates between 17th September, 2001 and 21st November, 2001 in Nairobi within the Nairobi Area Province of the Republic of Kenya with others before court jointly obtained cash Kshs.615,000/= from Dominic Nyanjui Nganga by falsely pretending that they had they had arranged for the said Dominic Nyanjui Nganga to be financed by Housing Finance Company of Kenya Limited to buy a motor vehicle Registration KAN 275T on hire purchase, a fact they knew to be false”

Mrs. Ngugi for the Applicants relied on the case Kenya National Examination Council V. Republic C.A. 266 of 1969 in which the case of Stanley Munga V Githunguri Cr.App.No.271 of 1985 is referred to.

In this latter case, the court consisting of Simpson CJ Sachdeva J and Mbaya J, at page 12 of the Judgment stated

“Mr. Chunga conceded that the High Court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that Judges of the High Court have a similar discretion in respect of offence triable before them. (Connelly V. D.P.P. (1964) 2 All E.R. 40 1 cited by both counsel). It is a power to be exercised very sparingly however.

In D.P.P. v. Humphreys 1976 2 All E.R. 497 Lord Salmon said (at p. 527 –8)

“I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a Judge has not and should not appear to have any responsibility for the institution of prosecution; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as matter of policy, it ought not have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the Judge has the power to intervene. Fortunately such prosecutions are hardly ever brought but power of the court to prevent them is in my view, of great constitutional importance and should be jealously preserved”

The court held that a delay of 9 years in bring a prosecution rendered the proceedings both vexatious and an abuse of the process of the court.

What is alleged to be vexatious and an abuse of the process of the court is that “the Applicants are being harassed and made to defend a criminal trial whilst the issue is civil in nature and therefore the police are acting beyond the limits of their prosecution powers” See Statement of Facts.

It is not for this court to determine whether or not the prosecution will succeed nor is it part of this courts duty to consider if the Applicants have a good defence to the Charge; that is solely a matter for the Magistrate trying the case.

In this matter the police allege that the accused represented to the complainant that they would obtain finance from Housing Finance Company Ltd. If as a result of that representation (that representation being false) and they obtained money from the applicants that would be sufficient prima facie to charge

the applicant with an offence. If the accused can show that no such representation was made or that nothing was obtained from the complainant as a result of such representation then the accused are entitled to be acquitted.

However I do not see at this stage that of the proceedings they are an abuse of the accused rights under the Constitution. They have a right to a fair trial but there is nothing to show they will not get one. In the result I refuse this Application, which is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 11th day of July, 2003

P.J. RANSLEY

JUDGE