



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 935 OF 2002

REPUBLIC APPLICANT

V E R S U S

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIBERA.....2ND RESPONDENT

AND

EX-PARTE..... (1) JOSEPH NGINDARI

(2) YAGNESH DEVANI

(3) WILLIAM MUNDIA

(4) M.G. SRIRAM

(5) JOSEPH K. LAGAT

(6) TRITON PETROLEUM

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

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KIBERA CRIMINAL
CASE NUMBER 4421 OF 2002**

R U L I N G

The amended Notice of Motion dated 1st October, 2003 is premised under Section 8 (2) of Law of Reform Act (Cap 26 Laws of Kenya) order LIII Rules 1, 2, 3 and 4 of Civil Procedure Rules Cap 21 of Laws of Kenya, Judicature Act (Cap 21 of Laws of Kenya) and all other enabling Laws.

It seeks orders which are as under:-

1. **THAT** an order of prohibition to issue to the Senior Principal Magistrate Kibera Court or any

other Magistrate from hearing or further hearing and determining the Senior Principal Magistrate Criminal case Number 4421 of 2002 **REPUBLIC VER SUS YAGNESH DEVANI, WILLIAM MUNDIA, M.G. SRIRAM, JOSEPH K. LAGAT AND TRITON PETROLEUM COMPANY LIMITED.**

2. **THAT** an Order of Prohibition prohibiting Commissioner of Police from prosecuting or further prosecuting or preparing and prosecuting Counts 1 to 7 or any variation thereof or any charge or charges in substitution thereof or any charge or charges akin to the same in Kibera Criminal Case Number 4421 of 2002 **REPUBLIC VERSUS YAGNESH DEVANI, WILLIAM MUNDIA, M.G. SRIRAM, JOSEPH K. LAGAT AND TRITON PETROL EUM COMPANY LTD.**

3. **THAT** an order of Certiorari be granted to the Applicants to bring in and quash the charge sheet in Kibera Criminal Case No. 4421 of 2002 **REPUBLIC VERSUS YAGNESH DEVANI, WILLIAM MUNDIA. M.G. SRIRAM, JOSEPH K. LAGAT AND TRITON PETROLE UM COMPANY LIMITED.**

4. **THAT** there be a temporary stay of the said Orders made on 19th August, 2002 and or any other subsequent orders of the Commissioner of Police against **YAGNESH DEVANI WILLIAM MUNDIA, M.G. SRIRAM, JOSEPH K. LAGAT AND TRITON PETROLEUM COMPANY LIMITED** until the determination of this Notice of Motion.

5. Any other order or relief that this Honourable court may deem fit to grant.

6. **THAT** the costs of this Application be costs in the cause or be provided for.

The application is supported amongst other things on affidavits sworn by **Yagnesh Devani, William Mundia, M.G. Sriram and Joseph K. Langat** all sworn on 1st October, 2003 and grounds stated on its face.

As the learned counsel for the ex-parte applicant has based his submissions on those grounds we may also quote them in extenso:-

1. **THAT** the respondents are and continue to abuse the Court Process.

2. **THAT** the dispute is purely of a civil nature.

3. **THAT** the Police are being utilized as debt collectors for purely a civil dispute in nature.

5. **THAT** the applicants have been harassed and intimidated.

6. **THAT** rights and freedom of the applicants have been interfered with. 7. The Criminal Proceedings are oppressive and/or actuated by Mala Fides .

8. The Court process is being used to prejudice and defend the applicants through Media Coverage.

9. Other reasons and grounds to be addressed at the hearing hereof.

Affected party Petro Oil (K) Ltd has filed and relies on an affidavit sworn by one Omesh Narain Bhargara in opposition to this application.

In short summary of the background, it can be stated that Petro Oil (K) Ltd, the affected party herein (hereinafter referred to as 'Petro Oil') and Triton Petroleum Company Ltd. 6th Applicant herein (hereinafter referred to as *Triton*) both were importers of Petroleum products and their imports like oil were being stored by Kenya Pipeline Limited. Over some deliveries to Triton of the products of Petro Oil a dispute arose. Petro Oil through their Advocates addressed letters to Triton claiming interlia those deliveries were made but there was no contract for such deliveries between the parties. The letters were

not responded and in June, 2002 under further legal advice Petro Oil filed a complaint to the Police. On 11th June 2002 Triton and five others (2nd to 5th Applicants) were charged with seven counts of theft contrary to Section 275 and in alternative of Handling suspected stolen property, contrary to Section 322 of the Penal Code in Criminal Case No. 4421/02 before Chief Magistrate's Court, Kibera.

During investigation, search and warrant for seizure were issued and Triton filed a H.C.C.S. No. 1069/02 against the Attorney General and Petro Oil claiming damages in respect of malicious Prosecution of Search and Seizure warrant. In response to that plaint, Petro Oil filed its defence in November, 2002 and denying the allegations against it stated inter alia in the said defence that it is reserving its right to claim Kshs.120,000,000/= against Triton for theft pending Criminal case already lodged. Triton and five applicants filed application for leave and stay of Criminal proceedings on 19th August, 2002 before the aforesaid defence was filed. Thereafter as per the orders of the court present application (*amended*) was filed.

It is admitted by all concerned that after such leave and stay were granted, an order to attach Triton's products was obtained on an application and affidavit filed by a police officer named Jack Agai. However, it is also on record that the order was challenged and the Trial Magistrate agreeing with the applicants' contentions quashed or set aside the order. This has been the basis, we think of first and fourth grounds which speak of harassment and intimidation. However, we may note that there is not a hint of any involvement of Petro Oil in filing of the application. Attorney General and Petro Oil have decried it as a mistake and, without anything more before us, we may incline to believe it to be so.

Ground No. 2, to the effect that the dispute is of a Civil nature, is the primary ground of this application and we shall deal with it along with all other grounds as they seem to be intertwined.

In short the contentions raised are to the effect that the dispute being of Civil nature, the institution of Criminal Proceedings against Triton and other ex-parte applicants by the Attorney General is to use police to act as a debt collector, to harass and intimidate them and to take away their freedom. Hence it is an abuse of court process and is *mala fide*.

They rely on the demand letters sent on behalf of Petro Oil before the Complaint was made to the Police to prove that the dispute is of a civil nature. They also heavily rely on a ruling of the High Court in Criminal Application No. 570 of 2002 filed in respect of an order made in the Criminal Proceedings on hand.

That ruling is a part of the record of this application. The said Criminal Application was made by Triton under Section 364 (1) (b) of Criminal Procedure Code. It is observed on page 13 of that ruling delivered by late Tuiyot (J) and we quote:-

“Some of the annexures to this application are letters exchanged between the applicant and the complainant and these reveal that the dispute between the applicant and complainant over the Petroleum products is of Civil nature. Even the learned counsels (sic) to this application submitted that the dispute is of a civil nature. My observation is that the dispute is purely of a civil nature.”

With respect to the learned counsel of Triton and other ex-parte applicants we cannot uphold the aforesaid observations as a finding of fact, by the court, as first of all, it was not the issue to be determined before the court and secondly going through the ruling, it becomes apparent that the submissions were not made on that issue. Other issues like failure to hear the applicants before making the order and the nature of the oil products which cannot be produced as tangible exhibits were really emphasized and contended and order to lift the seizure was thereupon given. The opinion of the court, in our humble opinion, cannot be relied as a conclusion over a matter of fact.

We have also perused the letters of demand heavily relied upon by Triton and others. We note the opening paragraph of the letter of 25th March, 2002 from Advocates Shapely and Barract Advocates which states that there was no contract of delivery of Oil between Petro Oil and Triton. None of those

letters seem to have been responded by Triton as none has been brought to our attention. **Petro** on further legal advice made a complaint to the police. It is also noted that no quantified sum has been mentioned in any of those letters which are relied by **Triton**.

Triton also relies on an affidavit of one Morris Okumu Sakwa which avers that vehicles belonging to Petro Oil were used by police during investigation of the matter as well as some lunch money were also paid to investigators. We can only frown upon this usual practice of the police while investigating a crime in our country.

With these facts and submissions, we are asked to find that the dispute is purely of a civil nature and thus criminal proceedings brought against Triton and Others is an abuse of court process, mala fide and it is in the form of an arm twisting to serve civil purpose. Thus it has to be prohibited as prayed in the application.

Contentions raised in response to the above submissions on behalf of Attorney General and Petro Oil are, in short, that it is not shown that the purpose of Criminal Proceedings predominantly is to harass the applicants or to arm twist them to pay the disputed civil claim and that it is not shown that it is purely a civil case and no more.

Authorities like famous case known as **Floriculture's case** Misc. Criminal Application 114 of 1997 (**Unreported**), **Kamlesh Mansukh Pattani and two others V/S Principal Magistrate court and another** Misc. Application No. 1296 of 98 (Unreported) and Jared Benson Kangwana V. Attorney General Misc. Application No. 446 of 1995 (Unreported) were cited amongst others. We have carefully considered all authorities cited and relied upon by both sides.

The principles of Law as to what constitutes an abuse of court process or mala fide employment of court process, are in our view, by now trite and well settled and that is:

“Where the sole dominant purpose of the criminal proceedings is to get from the same something other than that for which the proceedings were properly designed and do exist or to achieve for the person instituting or maintaining the proceedings some improper collateral advantage beyond that which the law under which the proceedings are commenced or to exert undue pressure to effect an object not within the legitimate scope of the process.”

To decide whether the proceedings are to obtain any of the aforesaid object, the court has to decide what is the dominant purpose of the proceedings under question. In other words the court has to be given materials from which to ascertain the predominant purpose.

We have been shown the three letters of intention to sue from the Advocates of the affected party. Those letters are not responded. In the meantime, as is averred by the Petro Oil, on further legal advise, the complaint was lodged with the Police.

Thereafter, investigations were carried out, of course, with aid of some material help from the affected party like providing vehicles and some lunch money. The charges were then levelled against Triton and others. True a misguided action to ask for warrant of attachment was made by the Prosecution but it has been rectified by the same Court process which is being complained against, we cannot infer, without any allegation of the participation of the affected party, that the same was malicious or mala fide. Mildly stating we do not have dearth of occasions when the office of Attorney General in its prosecution side has taken improper actions not authorized by law.

We are also not properly satisfied from the facts which are brought to our attention that the predominant purpose of these criminal proceedings is to harass or intimidate the applicants or to allow the police to act as debt collectors. We are not yet been told what is the amount which is demanded and disputed by the exapplicants, apart from a reserved claim of Kshs.120,000,000/= in the statement of defence by the affected party and that too after the criminal prosecutions have been instituted.

We once again visit those letters and reiterate that no quantified demand is made. Those letters are simply ignored by Triton.

At this juncture we shall quote a passage from the case of Kangwana (supra), at page 6 thereof it is observed.

“But I think the fact that the Criminal offence can be constituted in any civil transaction, should be more reason to make the state extra alert to ensure that Criminal proceedings are not used for the collection of civil debts bona fide disputed (emphasis provides). When those Criminal proceedings are not for the purpose of deciding the disputed debts as where the Criminal proceedings are not under the law which makes provisions for deciding the disputed debts.”

We observe none of the aforesaid two ingredients specified by the court is present in this case and that although the said case is a persuasive authority, so far as this court is concerned, we do concede to the principles initiated by the court.

Under common law of tortious liability also there are wrongs which could be both Civil and Criminal in nature simultaneously and without trying to determine the nature of dispute between the parties, we cannot conclude that the present case is purely of a civil nature.

In any event the burden is on the ex-parte applicants to satisfy us that the nature of the case is such that the dispute can be better resolved in the civil courts than it can be in Criminal proceedings and we are of an opinion that they have not discharged that burden. The cases relied upon are replete with blatant facts of ulterior motive of pressuring the applicants to pay civil debts which the complainants were unable to or had difficulty to recover. That is not the case in present proceedings.

In the present case, apart from letters of intention to sue addressed we observe that the Petro Oil has not initiated any civil proceedings and as per further legal advice it chose to file the complaint to the Police, and after investigation, the charges were leveled in the Prosecution instituted by the Attorney General.

It was emphasized before us that the loss of Oil cannot be substantiated by any evidence as the same oil cannot be exhibited before the court. We shall emphasise that the sufficiency or otherwise of the evidence in any particular case cannot be scrutinized by us at this stage. That is the task of the trial court.

But is it necessary for the police to institute any proceedings only when there is a Prima facie case? We say it is not, and we are supported by an English authority which was cited with approval in the case between Emmanuel Kuria Gathoni and another and Attorney General. H.C. Misc. Application 1384/101. The English case is that of Shaaban Bin Hussein and Others Versus Chang Took Kam and another (1970) A.C. 942.

We quote the following passage from the said case.

“and that the police were not called before acting to have anything like a prima facie case for conviction but only to be satisfied that there did in fact exist reasonable grounds for suspicion of guilt.”

We also note that in the said case of Kuria Gathoni the Constitutional Court consisting of three Judges also observed that sufficiency or insufficiency of evidence cannot be basis for ascertaining abuse of court process or process with mala fide. In short before determining whether the prosecution process in any given instance is an abuse of the process of Court, the court has to consider.

(a) Whether the Criminal process is for a purpose other than the purpose for which it is properly designed.

(b) Whether the person against whom a Criminal Process is commenced has been deprived of his fundamental rights of a fair trial as per provisions of the Constitution and

(c) Whether the Criminal process is against the public policy.

We do not find that the present Criminal process has been tainted with any of the aforesaid principles.

Having found as per above, we have to direct that the application dated 18th October, 2002 cannot be allowed and is dismissed.

As the parties shall have to proceed with further legal process we do not intend to make any order on costs.

Dated and delivered at Nairobi this 25th day of September, 2003

J.L.A. OSIEMO

JUDGE

K. H. RAWAL

JUDGE.