



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL CASE NO 476 OF 2003

REPUBLIC APPLICANT

VERSUS

COMMISSIONER OF POLICE RESPONDENT

EX PARTE

TARUS T/A TARUS & COMPANY ADVOCATES

RULING

The Court granted leave to the applicant to make an application for Judicial Review which he has done under this Motion. The facts behind the complaint are as follows:

The applicant is a practicing advocate in this Court. He has a practice in Mombasa. Sometime not long ago he was approached by one Motatiro Mathias Nyamohanga (client) with instructions to institute proceedings against one Hassan Ali Seif. The applicant in pursuance of the said instructions filed a suit being Mombasa HCC No 68 of the year 2001.

The suit was determined by negotiations between the parties in favour of the client. The amount of settlement is shown as shs 338,190/= all inclusive.

On 8/7/2003 the cheque was forwarded to the applicant in the total sum in the name of the applicant. 21/7/2003 the client called on the applicant's office and demanded the payment of the money. There was disagreement as to the amount due to client. On 24/7/2003 the applicant wrote to client insisting that payment will only be made to him after the client/advocate bill has been taxed to ascertain the amount to be deducted as professional fees. It is clear the cheque from the insurance company was in the name of the applicant (advocate).

On 25/7/2003 the client made complaints to the insurance company and to the police and the police (CID officer Iganatus Loya) commenced investigations. The applicant was arrested and taken to police station on 29/7/2003 and was released after spending 5 hours in police detention. In the meantime applicant had filed a client advocate bill scheduled to be taxed on 5/9/2003. In the meantime the applicant was advised to pay to the client shs 228,190/= pending taxation. The client rejected this proposal.

That consequently the applicant on advise of his advocates deposited the full amount being shs 338,190/= into this court. The receipt (photocopy) is exhibited. The leave granted on 4/8/2003 operated as a stay of further actions by police. On 29/7/2003 the applicant was granted bond to appear at police station

31/7/2003. This bond was extended to 1/8/2003. The charge sheet which was stamped 5/8/2003 was prepared and was taken to criminal court on 5/8/2003. The learned magistrate did not take any plea after being informed of the stay order made in this case but said "case temporarily closed". It is to be noted that the police acted speedily in this case which would be commendable in the ordinary course of their business but here it is to be said they were overzealous.

The applicant then seeks orders for *certiorari* to quash the decisions to prosecute him and to stop any criminal proceedings initiated in this case in criminal case No 2155 of 2003 against him.

I have looked at the charge sheet exhibited. The charge is "stealing by agent contrary to section 283(b) of the Penal Code". The particulars are stated as follows:

"On the 8th day of July 2003 at Makina House in Mombasa District within the Coast Province being an agent of Motatiro Mathias Nyamohanga stole a cheque of shs 338,190/= which has been received by him on account of the said Motatiro Mathias Nyamohanga".

Therein the complainant is stated to be Motatiro Mathias Nyamohanga. It is clear then that the client is using the process of criminal law to enforce payment to him by his advocate of the funds paid to the advocate in settlement of the clients case. The respondents are represented by State Counsel Mr Okello.

In support of the application Mr Mabeya leading Mr Muniyithya addressed the court at length emphasizing that the applicant is an advocate of High Court of Kenya and that he is carrying on business under the Advocates Act Chapter 16 Laws of Kenya. A dispute as to costs due and payable by the advocate to client has arisen and a Client Advocate bill has been filed in court. The proper procedure to be followed is by invoking the procedure laid down under Advocates Act. Firstly the bill has not been taxed to ascertain the costs of the applicant for services rendered to the client. In the meantime the advocate has deposited the full amount involved into the court pending the taxation.

Secondly Mabeya argued the proper procedure to resolve disputes between advocate and client is set out under the Advocates Act. Section 53 is relevant. Complaints are to be filed with Complaints Commission established there under and not to the police. It is only after exhausting the procedure set out and only if a criminal offence is found to have been committed can the matter be referred to Attorney General with recommendation to prosecute. Section 61 and 80 are also relevant. Counsel submitted that until the issue is dealt with under the Advocates Act the police are usurping the power given by statute to another body and have no jurisdiction to charge an advocate before the proper procedure is exhausted. To this submission the State Counsel pointed to the Criminal

Law (Amendment) Act No 5 of 2003 section 193A dealing with

"concurrent criminal and civil proceedings" which states:

"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. He submitted that even if there is a proceeding pending of civil nature the criminal proceedings should proceed.

This proposal may be the correct interpretation but here the criminality of the client's complaint does not arise until the procedure under the Advocates Act is exhausted. It is trite law that an advocate has lawful lien for his fees on his client's assets held by him including money. Therefore in this case where the bill is pending taxation the advocate shall be entitled to take his costs out of the money held by him and only after that event will he be required to pay out to the client the balance. That stage has not been reached yet and therefore the applicant cannot be said to have committed any crime."

Furthermore the applicant has deposited the money into court to be released when the dispute over fees is resolved. As it is the charges were brought before the applicant was given a chance to explain, right granted to him under the advocates Act.

I have considered the submissions of both counsel. I have also perused the authorities submitted by both counsel. The facts of this case which are not disputed show clearly that the client is using the criminal process to compel the advocate to give up his entitlement to his fees and waive his lien on the amount in question. This is oppressive and despicable behaviour on the part of the client. The applicant has followed the right procedure of seeking taxation of the advocate/ client bill to resolve the dispute as to his entitlement of his professional fees.

In the case of *Kigoroglo v Ruesherika* [1969] EA 426 the Court said:

“Where a remedy is elsewhere provided and available to a person to enforce an order to a criminal court in his favour I see no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved”.

The quotation is contained in the HCC Misc Application 8 of 1997 *Ex parte Johnson Knassnima Simiyu*.

The authority of *Ex parte Kipngeno Arap Ngeny* HCC Misc. No. 406 of 2001 deals with criminal prosecution and abuse of court process. The two judge bench of High Court stated:

Quoting Kuloba J

“The criminal law is not to be used oppressively to punish acts which, in truth, might be technically a breach of criminal law, but which contain no real vice and which can only be best handled under a process other than the criminal process namely any of different systems of civil redress applicable if a case is more suitable for a trial in the civil courts than it can be resolved in a criminal tribunal then a decision to pursue criminal option must be suspect for ulterior motives other than search for justice ... It is not in the public interest to criminalize what is essentially a civil controversy over civil demands and obligations”.

Elsewhere in the judgment (page 15) the judges had this to say:

“A prosecution that is oppressive and vexatious is an abuse of court process. Although we must constantly remind ourselves that the Attorney General is not subject to control in the exercise of his power to prosecute criminal offences we are of the view that he must exercise that power upon reasonable grounds it is an affront to our sense of justice as a society to allow the prosecution of individuals on flimsy grounds ... where the material on which the decision is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it”.

In the present case I find the basis of the charge against the applicant frivolous and it would be unfair for the applicant to be put through a criminal trial. He has everything to lose by such a prosecution while the complainant has absolutely nothing to lose. He will receive his proper share of his judgment after he has paid for professional services he has incurred in obtaining the judgment. Regarding Criminal Law Amendment section 193A there is here no case for stay or delaying criminal proceedings. It is clear that the lower court criminal case was closed. No plea was taken. This is according to the record. Therefore the matter does not lie under the section. After full consideration of the authorities and the facts of this application I am convinced that this Court is empowered to grant orders sought the decision to charge the applicant on material laid before the Court is oppressive in bad faith and in excess of jurisdiction of the respondents. In the circumstances I allow the application and grant orders sought.

Dated and delivered at Mombasa this 1st day of September, 2003

J.N. KHAMINWA

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JUDGE