REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO 64 OF 2001

REPUBLIC…….....…….APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT MOMBASA ……RESPONDENT

***EX PARTE* GANIJEE & ANOTHER**

RULING

Leave was granted on 10.4.2001 for taking out Judicial Review proceedings seeking an Order of Prohibition. The grant of leave was not going to operate as a stay. The substantive motion was then filed on 18.4.01 seeking the order in these terms:-

> "1. An order of Prohibition directed to the Chief Magistrate's Court at Nairobi prohibiting that court and/ or any other Magistrate or Magistrate's Court from hearing or further hearing and determining the Chief Magistrate's Court Mombasa Miscellaneous Criminal Case No.19 of 2001, Republic versus Ijaz Hussein Ganijee on the grounds set out in the statement served herewith used on the application for leave to apply for such an order."

The prosecution that is sought to be prohibited was not instituted by the Attorney-General. The applicant says that after a formal complaint was made to the Police and investigations were carried out, it was found that the issue was basically a civil matter between the applicant and the Interested Party and the Attorney-General advised against prosecution. The Interested Party however went ahead and instituted a private prosecution between the Chief Magistrate Mombasa which Prosecution is sought to be prohibited. He presented a charge-sheet preferring counts of Obtaining execution of Security Documents by False Pretences, Stealing by Agent, and Obtaining Credit by False Pretences. All these purported charges however, according to the applicant, were made in bad faith and for the sole reason of harassing and exerting pressure on the applicant to submit to his demands of a civil nature.

The nature of the transactions complained of is stated in great detail in the statement in support of the application. Essentially it started with some purchase of some 29 plots of land in Kilifi by the Interested Party who was an estate agent. They were for speculation and he wanted to sell them for profit. So he involved his old friend, the applicant, and they formed a partnership. Agreements were reached and money changed hands between the two. Promises were made and broken and cheque payments are said to have been dishonoured. The story told on both sides is of a business venture gone sour. The Interested Party however started demanding payments from the applicant and accused him of criminal activities when payment was not forthcoming. He made admissions about guaranteeing some loans at the behest of the applicant and being induced to execute securities for the wrong reasons.

Learned counsel for the applicant Mr. Lumatete who held brief for the applicant's lawyers on record M/s

Waruhiu K'owade & Ng'ang'a, submitted that the matters complained of by the Interested Party are purely civil and may effectually be adjudicated upon by a civil court. There are allegations of fraud, dishonoured cheques, and partnership shares. Those are within the purview of Civil Law so long as they are clearly pleaded and particularized. At all events he submitted, the Interested Party had not sought the consent of the Attorney-General before embarking on the private prosecution. He cannot file the charges first and then seek consent of the Attorney-General. A citizen cannot plead to a charge, and then be given bond to await consent of the Attorney-General. The proceedings were therefore a nullity and unconstitutional.

In Mr. Lumatete's view the Interested Party was merely actuated by a desire to settle scores with the applicant and it is an abuse of court process to resort to the criminal process. He cited several authorities among them: H.C.Misc. Appl.839 and 1088/99 *Vincent Kibiego Saina v. The Attorney-General* where Kuloba, J., expressed himself at length on a similar matter. He said in the normal course of things criminal prosecutions should not be hindered or frustrated by judicial intervention unless there are compelling reasons of justice. Where however in the process of detecting and punishing crime and redressing wrongs and violations of the law, people are persecuted and bashed about with a resultant disrespect for the law and where there is reckless or ill-timed or disproportionate indulgence in an excessive criminal process, the courts will interfere and stop the process.

In particular he held that where the criminal process was being used for ulterior motives then the High Court will intervene. Then H.C. Misc. Civil Appl. 8/97 *R. v. Chief Magistrate, Mombasa, Ex-parte Johnson Knassiuma Simiyu,* (UR) where I found that the criminal prosecution was *mala fides* and the process was being abused since the matters complained of were essentially civil.

For his part learned counsel for the Interested Party Mr. Kabuki saw nothing wrong with the institution of the criminal private prosecution. It is a procedure that is allowed by s.88 and 89 of the Criminal Procedure Code and all that one does is to seek leave of court. The consent of the Attorney-General is not necessary. So long as a party chose one jurisdiction to proceed with a case which may give rise to civil or criminal liability he cannot be faulted. The flaw in the *Saina case* cited above was the galloping from one jurisdiction to another. The *Knassiuma case* was also not applicable because it involved a bank which was found to have acted *mala fides*.

Mr. Kabuki submitted that there was a clear criminal offence committed when the applicant induced the Interested Party to sign securities for a loan intended for one business only to be diverted to another. Cheques were issued by the applicant and were dishonoured and there was a clear fraudulent intent. There is dishonesty perpetrated by the applicant in all complaints made but the police would not hear of it. That is why the Interested Party went before the Chief Magistrate who should be left alone to decide on the issues.

I have carefully gone through the voluminous material placed before me on both sides. I have also considered the submissions of counsel. Upon going through the material, it seems to me that the two friends turned foes are substantial men of commerce who were dealing in high-stakes business transactions involving millions of shillings. One may therefore be excused for expressing some skepticism on allegations that one of the parties was led by the nose by the other in those transactions. The Interested Party in particular appears to cast himself in this light when he concedes that he guaranteed some loans and was induced to execute some securities without knowing or finding out some crucial but basic details.

The procedure adopted for instituting the private criminal prosecution apart, I think the crucial decision to make is whether the prosecution is *bona fide*. The purpose of a criminal prosecution was aptly put forth by my brother Kuloba, J., in the *Saina case* and I may quote him as I cannot improve on his flowery turn of phrase:

> "So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand

> if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice. No one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of court, oppressive or vexatious, prohibition and/or *certiorari* will issue and go forth."

In the *Knassiuma case* I relied on the Ugandan case of *Kigorogolo vs Ruesherika*, [1969] EA 426:-

> "When a remedy is elsewhere provided and available to a person to enforce an order of a civil 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.....
>
> If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment there under, such an object is unworthy to say the least and cannot be countenanced by this court."

It seems to me, whichever way I look at it, that the Interested Party in this matter is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive. And that is when the High Court steps in.

In this case it is asked to step in to grant an order of prohibition. Prohibition however looks into the future and can only stop what has not been done. It is *Certiorari* that would be efficacious in quashing that which has been done. But it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one.

What is done will have been done. If there is anything that remains to be done in those proceedings however, the order of prohibition will issue to stop further proceedings.

It is on those conditions that I grant the application as prayed.

Costs to the applicant.

Dated and delivered at Mombasa this 15th day of November 2002

P. WAKI

JUDGE