



Change v Director of Criminal Investigations (DCI) & another; Law Society of Kenya (Interested Party) (Petition E009 of 2024) [2024] KEHC 13514 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION E009 OF 2024
DO CHEPKWONY, J
OCTOBER 18, 2024**

BETWEEN

JAPHETH RUPIA CHANGE PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS (DCI) 1ST RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(ODPP) 2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA INTERESTED PARTY

JUDGMENT

1. The Petitioner herein, Japheth Rupia Change, vide a Petition dated 5th April, 2024, seeks the following orders against the Respondents: -
 - a. A declaration that, as pleaded, the Respondents’ impugned actions and omissions contravened Articles 1, 2, 3(1), 4(2), 10, 24, 27, 28, 29(a) & (f), 30(a)&(b), 40, 47(1), 73, 75, 232(e) & (f) and 259 (1) of the Constitution of Kenya, 2010.
 - b. A declaration that the Respondents’ impugned actions and omissions violated the obligations imposed on them by Chapter Six of the Constitution, specifically Articles 73(1) & 2(b to e) and 75 (1) of the Constitution, and the following provisions of statute:
 - i. Sections 3, 4, 5 and 6 of the Fair administration Act, 2015.
 - ii. Sections 3, 4(1), 6, 7,8,10,11 and 13(1)(a), (b) & (c) of the Leadership and Integrity Act, 2012; and



- c. A declaration that the criminal investigation under ECCU Inquiry File No. 124/2023 was a sham, unconstitutional, unprocedural, illegal and unmerited.
 - d. The Honourable Court be pleased to issue an order of certiorari bringing into the court to be quashed and quashing the criminal investigation under ECCU Inquiry File No. 124/20231 and any charges thereunder.
 - e. The Honourable Court be pleased to issue a permanent order of prohibition permanently prohibiting the Respondents and their agents, howsoever from charging the petitioner pursuant to criminal investigation under ECCU Inquiry File No. 124/2023.
 - f. The Honourable Court be pleased to issue an order compelling the Respondents to bear the costs of this Petition or, in the alternative, each party should bear their costs.
2. Alongside the Petition, the Petitioner filed a Notice of Motion application dated 5th April, 2024, seeking among others, a conservatory order to the effect of suspending his plea taking on the charges of Stealing by Agent contrary to Section 283(c) and forgery contrary to Sections 349 as read with Section 345 of the Penal Code or any other charges relating to DCI file ECCU inquiry file No. 124/2023.
 3. The Petitioner's case revolves around a complaint filed by the late Mr. Muturi Yongi and Mr. Todd A. Smith regarding the recovery of certain monies paid to the Petitioner following a Client-Advocate relationship between the Applicant, as the advocate, and the Late Mr. Muturi Yongi, as the client. The Petitioner asserts that he received Kshs. 1,445,086.70, out of which he transferred Kshs. 1,000,000.00 to Mr. Muturi and retained the remainder as legal fees, as per a fee agreement between his law firm and the late Mr. Muturi Yongi. The dispute over the legal fees was subsequently elevated to court and is currently pending vide Milimani Commercial Case No. E129 of 2022, Arwa & Change Advocates LLP –vs- Francis Yongi & Another, where both parties have raised claims regarding the monies from the Client-Advocate relationship.
 4. In a nutshell, the Petitioner seeks the sum of USD.980,000.00 as legal fees while the Estate of the Deceased filed a counter-claim for USD.445,086.70. The Applicant avers that Mr. Todd Smith who was representing the deceased as an advocate in the United Kingdom has demanded so due to the complexity of the matter. The Petitioner also alleges that Mr. Todd Smith, representing the deceased's estate from the United Kingdom, conspired with one Ralph Nguma to recover the entire amount paid to the Petitioner, including what he retained as legal fees.
 5. The Petitioner argues that, given the pending suit, charging him with Stealing by Agent and Forgery is premature. He contends that the prosecution and arraignment before court for plea taking are merely intended to harass him while he is legitimately pursuing his legal fees due to the unfair termination of his services.
 6. The Petitioner further states that before the complaint was filed with the Respondents, it was litigated as a commercial dispute before the Advocates Complaints Commission, which ruled that the complaint against him lacked merit. The Applicant asserts that he has also filed several complaints against individuals who conspired to deprive him of his legally earned fees. He urges the court to stop the criminal proceedings, which are aimed at intimidating him, as they violate his constitutional rights to a fair hearing and undermine principles of proper governance as set out in the [*Leadership and Integrity Act*, 2012](#).
 7. The Respondents opposed to the Petition and Application through grounds of opposition dated 10th April, 2023 and an affidavit sworn by CPL Brian Musau on the 14th May, 2024. They argue that the Petition and the Application are based on a misunderstanding of the law, and that the



criminal investigations were conducted in a lawful and constitutional manner that does not violate the Applicant's constitutional rights. They assert that the existence of a civil dispute on legal fees does not preclude the ongoing criminal proceedings.

8. In their Replying Affidavit, the Respondents assert that the late Mr. Muturi Yongi filed a complaint against the Petitioner on 15th June, 2022, alleging that the Petitioner had on his behalf received USD 1,445,079 on behalf of the deceased's estate following the Ethiopian Airlines Flight ET302 crash, but unlawfully retained USD,445,079.00. The Respondents explained that the complainant had instructed Mr. Todd A. Smith and the Petitioner herein to pursue the compensation after the accident by filing a case before the Federal Republic of Chicago Illinois, United States of America. Accordingly, Mr. Todd prepared a contract on how the complainant would get the compensation and the same was signed by both Mr. Todd and the Petitioner as well as the complainant. That contract indicated that both advocates would be paid 28% of the Total Compensation to the estate and divide it equally. That, in any event, the victims were in any event paid following an agreement culminating to Crash-Victim Beneficiaries Compensation Fund. That allegedly, monies payable to from the compensation fund was not to be subject to any legal fees since it had been agreed that the services would be granted on pro bono basis. The Petitioner having failed to account for the funds withheld, the Respondents were convinced that the evidence presented supported the offense to which the Petitioner is charged with.
9. In his further affidavit sworn in response to the Respondents' Replying Affidavit, the Petitioner/Applicant clarifies that the criminal complaint is based on allegations that he unlawfully retained 28% of the compensation monies payable to the deceased's estate. He contends that these funds were his legal fees and denies the Respondents' claim that his services were offered on pro bono basis. He notes that a complaint was filed with the Advocates Disciplinary Commission, which dismissed the complaint and did not order him to return the 28% of the compensation funds. Therefore, the Applicant argues that it would be illogical to accuse him of theft when he had a valid fee agreement. Furthermore, he believes the complaint should be considered as having abated, as it was lodged by an individual who is now deceased.
10. According to the Petitioner, the Respondents' actions of conducting sham investigations with a pre-determined outcome while disregarding his evidence and explanations and then substituting a complainant in the intended criminal proceedings disregard the provisions of Articles 1, 2, 3(1), 4(2), 10, 24, 27, 28, 29(a) & (f), 30(a)&(b), 40, 47(1), 73, 75, 232(e) & (f) and 259 (1) all of the Constitution of Kenya, 2010.
11. As directed by this court, the Petition was canvassed by way of written submissions and the record shows that the respective advocates for the parties filed their respective submissions which were highlighted before court on the 6th August, 2024.

Petitioner's Submissions

12. In his submissions dated 29th April, 2024 and 30th May, 2024, the Petitioner/argues that the complaint abated upon the demise of the sole complainant, and therefore without a complainant, there can be no criminal proceedings instituted. In this regard, he has urged the court to be guided by the provisions of Sections 88, 89, 202 and 209 all of the Criminal Procedure Code which expressly provide for how and when criminal proceedings can be constituted. There must be a complainant and the complaint must be written and signed. He considers the intended criminal proceeding to be a disguised mechanism by Mr. Todd to frustrate the civil proceedings for the recovery of his legal fees. According to the Petitioners, the investigations and or criminal proceedings are intended to put pressure on him to withdraw the civil proceedings between Todd Smith and himself and a complaint he has lodged against one Ralph Nguma.



13. The Petitioner/Applicant submits that he has established a prima facie case, as the issues raised concern ethical and procedural impropriety, as well as abuse of the *Constitution*, the Fair Administrative Actions Act, the *Advocates Act*, the Penal Code, and the Rules of Natural Justice by the Respondents. He argues that, since the facts outlined in his affidavit remain unchallenged, the court should consider him as having established a prima facie case. It is the Petitioner's contention that it has not been disputed by the Respondent that he is an advocate of the High Court of Kenya, that he rendered equal services for the deceased, Muturi Yongi and there are on-going proceedings in Milimani HCCC No.E129 of 2022 in respect of the fees owed to him.
14. The Petitioner/Applicant further contends that the criminal investigations are a sham, unconstitutional, illegal, and baseless. He argues that if the investigations are not halted. he will be prosecuted based on facts that are also in dispute before the commercial court and his individual rights will have been infringed upon by the same.. He further argues that the Respondents have not shown any prejudice they would suffer if the orders sought are granted and urges the court to protect constitutional values and his rights by granting the orders sought.

The Respondents' Submissions

15. In their submissions dated 5th June, 2024, the Respondents argue that the Petition is based on contested evidence, which can only be resolved by a trial court. They contend that, for the court to review the Respondents' decision to prosecute, the Applicant must demonstrate that the criminal proceedings amount to an abuse of process, whether halting the proceedings would serve the interest of justice, whether the allegations do not support the offence, and whether the evidence is insufficient to support the charges. The Respondents have cited and relied on the Supreme Court of Kenya's decision in the case of Edwin Harold Dande & 3 Others –vs- The Inspector General, National Police Service & 5 Others.
16. The Respondents submit that although the Petitioner alleges a dispute over legal fees, they believe that the Applicant, as an advocate and agent of the deceased, unlawfully retained 28% of the compensation fund payable to the deceased's estate. Given these contested facts, the Respondents argue that the dispute should be left to a trial court to resolve. They further contend that the court should decline the Applicant's invitation to review the merits of the contested evidence and grant the orders sought.
17. The Respondents argue that the decision to prosecute the Applicant is supported by evidence and a complaint filed by the late Mr. Muturi and Mr. Todd A. Smith. They maintain that criminal proceedings do not abate upon the death of the complainant and cite cases, including cases of Kamau John Kinyanjui -vs- Republic and Joseph Muriithi Nyaga & 2 Others -vs- Republic, to support this position.

Interested Party's Submissions

18. On the other hand, the Interested Party, the Law Society of Kenya, filed submissions dated 12th July, 2024, identifying the following issues for determination by the court:-
 - a. Whether all the factual allegations made against the Petitioner by the Respondent –even if they are all taken as true – constitute the offence of theft of clients' money?
 - b. Whether any evidence whatsoever has been adduced by the Respondent linking the Petitioner with the alleged forgery of documents.
 - c. Whether there is any legal barrier(s) to the institution of criminal proceedings as against the Petitioner.



- d. Whether the institution or continuation of criminal proceedings against the Petitioner will amount to abuse of process of the court.
19. On the first issue, it was submitted that the Petitioner received money on behalf of his client, deducted his legal fees, and remitted the balance. That the decision to charge him is based on the assumption that he was not entitled to any fees, that he should have deducted the fees from the final amount, or that he deducted more than he was entitled to. The Interested Party have argued that these grounds are insufficient to support a charge of theft by agent, as the Petitioner was entitled to charge legal fees, hence the dispute between parties is a fee dispute between an advocate and client which is being criminalized against the Petitioner. It has also been submitted by the Interested Party that while the court should not interfere with the Respondents' discretion in discharge of their constitutional duties, it has the responsibility of upholding people's rights and freedoms and should not be shy from interfering where the Respondent in exercise of their discretion, and unlawfully irregularly and unconstitutionally.
 20. The Interested Party further submitted that a complaint is a finding document of criminal proceedings and yet, the Respondents have not presented any complaint lodged against the Petitioner to demonstrate the genuineness in the investigations or criminal proceedings against him. They have not even presented an OB Number to demonstrate the complaint.
 21. The Interested Party also joined the Petitioner in submitted that there is a no complaint or recorded statement since the alleged complainant, one Yongi is deceased. And even if they were to indulge the Respondent and have this criminal investigations and proceedings go on, would the case survive under Section 202 of the Criminal Procedure Code? The answer given to this is NO! and Interested Party submits that this would amount to putting the Petitioner through an unnecessary process without regard to the administration of justice.
 22. It was further argued that the allegations that the Applicant was supposed to offer pro bono services are misguided, as the protocol cited by the Respondents allows advocates to charge reasonable fees. The Interested Party then submitted that a dispute over legal fees should not be resolved through criminal proceedings since the *Advocates Act* has established a complaints commission for this purpose, which in the proper forum where prosecution of an advocate, if necessary, would be recommended.

Analysis and Determination

23. Upon considering the pleadings, affidavits, and submissions of the parties, the following issues arise for determination:-
 - a. Whether the Respondents violated the Petitioner's constitutional rights in conducting the criminal investigations and initiating the criminal charges.
 - b. Whether the court should grant the orders of certiorari and prohibition to quash the criminal investigation and restrain the Respondents from charging the Petitioner.
 - c. Whether the criminal proceedings amount to an abuse of the legal process in light of the ongoing civil dispute.
 - d. Whether the prayers sought in the Petition can issue.

(a) Whether the Respondents violated the Petitioner's Constitutional Rights

24. The Petitioner alleges that the actions of the Respondents violated his rights under numerous provisions of the *Constitution*, particularly Articles 27 (Equality and Freedom from Discrimination), 28 (Right to Human Dignity), 29 (Right to Freedom and Security of the Person), 40 (Protection of



the Right to Property), and 47 (Right to Fair Administrative Action). He contends that the criminal proceedings initiated against him were unlawful, unprocedural, and aimed at frustrating his claim for legal fees in an ongoing civil suit, being Milimani Commercial Case No.E129 of 2022, Arwa & Change Advocates LLP –vs- Francis Yangi & Another.

25. It is well established that the initiation of criminal investigations or proceedings, if conducted in a manner that is arbitrary, oppressive, or aimed at achieving an ulterior motive, can constitute a violation or infringement of one’s constitutional rights. In the case of Director of Public Prosecutions –vs- Crossley Holdings Limited & 4 Others [2018] eKLR, the court held that criminal proceedings could be stayed if they are found to be an abuse of process or instituted for improper purposes.
26. In this case, the Petitioner has demonstrated that the subject matter of the criminal proceedings which is the retention of legal fees is directly linked to a pending civil dispute. The dispute concerns whether the Petitioner was entitled to retain 28% of the compensation received on behalf of the deceased’s estate or if his fees should be higher than that. Although, the Respondents aver that the Petitioner withdrew the case, the Complainant could have pursued the counterclaim of event and filed a different cause of action. This Court says so because in its view, the dispute between the parties is a legal fees dispute that can be best addressed through civil or commercial recourse, or the Advocates’ Complaints Commission, as the issues at hand revolve around a contractual dispute between an Advocate and client over legal fees. The appropriate forum for resolving such disputes would be through civil litigation and not criminal prosecution. Any claims or disagreements over an advocate’s entitlement to legal fees should be pursued in the civil courts or advocates internal dispute resolution mechanism and not through criminal charges so as to ensure that the dispute is resolved fairly, justly and in a manner that upholds the rights and fundamental freedoms and dignity of an advocate as a professional. This does not preclude an advocate found to have committed criminal offence by the Complaints Commission, from being recommended for prosecution to the Attorney General (See Section 618 of the [Advocates Act](#)).
27. From the evidence on record, the Petitioner has been shown to have a valid claim to the retained funds, and what remains unresolved is the question of whether or not he was entitled to them. This court is of the view that subjecting the Petitioner to criminal prosecution over the same issue, while the question on whether he was entitled to legal fees remains unresolved, violates his rights to fair administrative action and fair trial as provided for under Articles 47 and 50, both of the [Constitution](#). Therefore, in the court’s view, the intended criminal proceedings appear to be aimed at coercing the Petitioner into relinquishing his claim for legal fees, which constitutes an abuse of process.

(b) Whether the Orders of Certiorari and Prohibition should issue

28. The Petitioner seeks an order of certiorari to quash the criminal investigations and a prohibition order to restrain the Respondents from preferring any charges against him in relation to ECCU Inquiry File No. 124/2023. The remedy of certiorari is available where there has been a violation of the principles of natural justice, or where a public authority has acted outside its powers or abused its discretion.
29. In the present case, from the foregoing findings that the criminal investigation were initiated in bad faith and amount to an abuse of process, the court is satisfied there was a violation of the principles of natural justice. The Petitioner’s claim that the complaint had already been dismissed by the Advocates Complaints Commission which claim was not rebutted by the Respondents, lends credence to his assertion that the criminal charges are being used as a tool to harass him.
30. Additionally, the court reiterates that the appropriate forum for determining the question of whether the Petitioner was entitled to the legal fees he retained would be through civil litigation and in that



sense, the Complainant, if any, can still pursue the Counter Claim filed in Commercial Case No. E129 of 2022, or file a fresh cause of action to that effect.

31. It is this court's view that it is improper for the Respondents to pursue criminal charges over a legal fee dispute between an advocate and client which is yet to be resolved, especially where the advocate rendered legal services and attempt to coerce a settlement of the dispute through the criminal system of justice. In the case of Republic –vs- Chief Magistrate's Court, Milimani Ex Parte Tusker Mattresses Limited [2020] eKLR, the court held that criminal proceedings should not be used to interfere with a civil dispute or to undermine a party's right to pursue a legitimate claim. Therefore, the court finds that in the circumstances of this case, the orders of certiorari and prohibition are warranted.
32. The court is also convinced that allowing the criminal proceedings to continue against the Petitioner would not only compromise the proper resolution of the ongoing civil dispute before the court at Milimani but would also create a significant risk of injustice. The issue at hand, involving the retention of legal fees, is inherently civil in nature, and its resolution falls squarely within the purview of the Advocates internal dispute resolution mechanism or the civil and commercial justice systems in Kenya. Proceeding with criminal charges which arise from the same set of facts currently under litigation in the civil court, would prejudice the Petitioner's ability to fully and fairly pursue his claim and defense in the civil proceedings over the legal fee he alleges is owed to him. It would also unduly exert pressure on him if he has to defend himself against criminal charges in a matter that is, at its core, a contractual and financial dispute. Such parallel criminal proceedings, based on the same facts as the civil dispute, risk creating conflicting outcomes and would ultimately hinder the resolution of the dispute through the proper legal channels provided for.
33. In light of these considerations, the court finds that the criminal proceedings in this case constitute an abuse of process. The issues in question should be fully ventilated and resolved as civil dispute. Allowing the criminal case to proceed would only serve to complicate and prejudice the fair resolution of the pending civil dispute that is before Milimani Commercial Court. Therefore, it is in the interest of justice that the criminal proceedings be stayed to enable the parties resolve their legal fee dispute through the appropriate civil and commercial forums, where a comprehensive and just determination can be made. By finding so, this court is mindful of the need to preserve the integrity of both the criminal and civil justice systems and ensuring that each system addresses the matters properly within its jurisdiction.

(c) Whether the prayers sought in the Petition can issue

34. Having found that the criminal proceedings violate the Petitioner's constitutional rights and amount to an abuse of process, the court is satisfied that the Petitioner has made out a case for the grant of the reliefs sought.
35. Therefore, the prayers for a declaration that the Respondents violated the Petitioner's constitutional rights, as well as the orders of certiorari and prohibition, are merited. However, the court declines to issue a permanent order restraining the Respondents from ever preferring charges against the Petitioner because such an order would be overly broad and could preclude legitimate criminal investigations against the Petitioner in the future, where there may be genuine need to.

Disposition

36. In light of the foregoing, the court makes the following orders:



- a. A declaration is hereby issued that the criminal investigations under ECCU Inquiry File No. 124/2023 and the intended prosecution of the Petitioner violate his constitutional rights under Articles 27, 28, 29, 40, and 47 of the Constitution.
- b. An order of certiorari is hereby issued quashing the criminal investigations under ECCU Inquiry File No. 124/2023.
- c. An order of prohibition is hereby issued restraining the Respondents from preferring any charges against the Petitioner in relation to ECCU Inquiry File No. 124/2023, pending the resolution of the dispute through the civil and or commercial justice systems given that the dispute revolves around breach of contractual terms.
- d. Each Party shall bear its own costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 18TH DAY OF OCTOBER, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gichangi counsel for Petitioner

M/S Ndeda holding brief for Mr. Owiti counsel for Respondent

Court Assistant - Sanja

