



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 372 OF 2018

RAPHAEL GERVACE OTIENO KOPIYO.....1ST PETITIONER

JANET OSEBE GECHUKI.....2ND PETITIONER

DAVID KIPRONO RUTTO.....3RD PETITIONER

PRUDENCE ODHIAMBO OCHIENG.....4TH PETITIONER

BENJAMIN TARRUS KIPKORIR.....5TH PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

CENTRAL BANK OF KENYA BANKING FRAUD

INVESTIGATION DEPARTMENT.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS....3RD RESPONDENT

JUDGEMENT

1. Raphael Gervace Otieno Kopiyo, Janet Osebe Gechuki, David Kiprono Rutto, Prudence Odhiambo Ochieng, and Benjamin Tarrus Kipkorir are the respective 1st to 5th petitioners. The 1st, 2nd and 3rd respondents are the Inspector General of Police, Central Bank of Kenya Banking Fraud Investigations Department, and the Director of Public Prosecutions.

2. Through their petition dated 29th October, 2018 the petitioners seek the following reliefs:-

“a) An order of permanent injunction staying any further proceedings as against the 2nd Petitioner in Chief Magistrate (Milimani) Criminal Case No. 2018 of 2018 Republic vs Janet Osebe Gechuki.

b) An order of prohibition do issue against the Respondents whether by themselves, their agents, officers or employees from summoning, intimidating, threatening, harassing, arresting or preferring charges against the Petitioners herein emanating from or in connection with the alleged loan advanced by Sidian Bank to the Petitioners’ Company known as “Energy General (EPZ) Ltd”.

c) An order of this Court compelling the Officer Commanding Police Division (OCPD) and Officer in Charge (OCS) Central Police to ensure the compliance of these orders.

d) That this Honourable Court be pleased to grant any other orders that it would deem just.

e) Costs of this Petition be awarded to the Petitioners herein.”

3. Through their pleadings, the petitioners who introduce themselves as the directors of a company known as Energy & General (EPZ) Limited (hereafter simply referred to as the Company) assert that the respondents have unfairly and discriminatively deprived and dispossessed them of their rights in total contravention and contrary to the provisions enshrined under Articles 24; 27(1), (2), (3), (4) and (5); and 50 of the Constitution of Kenya which stipulates that every person is entitled to be treated equally before the law without any discrimination, afforded expeditious and fair trial, be treated with dignity and respect and be addressed and referred to in a manner that is not demeaning.

4. The facts of the matter as disclosed in the petitioners' pleadings indicate that on 17th November, 2017 the Company was awarded a tender of Kshs.1.5 billion by Huawei Company for installation of fibre optic. In February 2018 the Company approached Sidian Bank (hereinafter simply referred to as the Bank) for funding and after negotiations the Bank gave them a letter of offer dated 23rd April, 2018. As the money was needed urgently in order to avoid cancellation of the tender, the Bank advanced the Company Kshs. 15 million pending the registration of a charge.

5. It is the petitioners' case that their Company proceeded to perform the tender but due to the failure by the Bank to advance the remainder of the agreed sums the tender was cancelled. According to the petitioners, as a result of the delay and negligence by the Bank, the Company suffered a loss of Kshs.600 million being 40% of the profit margin from the tender award of Kshs.1.5 billion.

6. It is the petitioners' case that the Bank complained to the 2nd Respondent who kept intimidating, harassing and threatening to arrest them. Further, that on 24th October, 2018 the 1st Petitioner was summoned by the 2nd Respondent and he went and explained how the transaction arose and that the Company had suffered huge losses. It is the petitioners' case that despite the explanation, the 2nd Petitioner was arrested and subsequently charged on 24th October, 2018 at the Chief Magistrate's Court at Milimani Law Courts in Nairobi in Criminal Case No. 2018 of 2018. The 1st, 3rd, 4th and 5th petitioners' case is that they are apprehensive that as the other directors of the Company they will also be arrested and charged.

7. The respondents opposed the petition through a replying affidavit sworn on 26th October, 2018 by Inspector of Police Alphonse Liposhe who is attached to the 2nd Respondent. Through the affidavit Inspector Liposhe avers that he is the investigating officer in a case of conspiracy to commit a felony contrary to Section 393 and forgery contrary to Section 350(2) of the Penal Code which crimes resulted in the theft of Kshs.15,916,400/-.

8. Inspector Liposhe avers that the directors of the Company approached the Bank and requested for a loan of Kshs.70 million on the strength of invoice discounting. Upon negotiations the Bank agreed to advance Kshs.30 million to the petitioners. The Company then requested for a drawdown of cash Kshs. 15 million and was indeed advanced this amount as due diligence was being carried out by the Bank. His deposition is that when the Bank went for an official search of the presented land title for L.R. No. 2951/340 (ORIG. No. 2951/29/53) Kitusuru West, it was discovered that the file was missing and the invoices, purchase orders and contract between the Company and Huawei Technologies were not genuine documents.

9. It is Inspector Liposhe's deposition that investigations conducted after the matter was reported to the 2nd Respondent revealed that there was no contract awarded to the Company nor did the purchase orders and invoices used to secure the loan exist between the Company and Huawei Technologies. He concluded that the Company had forged the purchase orders, invoices and contract documents which were presented to the Bank leading to the theft of Kshs.15,916,400/-. According to Inspector Liposhe, he had arrested and charged the 2nd Petitioner in Milimani Chief Magistrate Court Criminal Case No. 2018 of 2018 but plea had not been taken owing to applications made by counsel for the 2nd Petitioner.

10. Inspector Liposhe averred that the loan obtained from the Bank had been transferred to various accounts in the names of different persons and that the 2nd Petitioner was indeed arrested at the Karen Branch of Eco Bank while withdrawing money from one of those accounts. It is his deposition that the charges in the criminal trial relate to the documents placed before this Court by the petitioners. He asks the petitioners to present themselves to the 2nd Respondent so that they can be taken to Court for prosecution.

11. The petitioners supported their case through submissions dated 11th April, 2019. The respondents did not file any submissions. When the matter came up for highlighting of submissions on 28th January, 2020, counsel for the petitioners told the Court that he was relying on the written submissions and requested for a judgment date.

12. According to the petitioners, the dispute between them and the Bank is a pure commercial dispute as disclosed in their pleadings. It is their case that they have provided all the evidence in support of their averments. They assert that the arrest and prosecution of the 2nd Petitioner without preparation of proper charges and lack of investigation is a violation of her fundamental rights and equal protection and equal benefit of the law. Their case is that the actions of the respondents have violated Articles 22, 23, 24, 27, 28 and 50 (1) (a) of the Constitution. They place reliance on the decisions in **Republic v Chief Magistrate's Court at Mombasa Ex-parte Ganijee & another [2002] 2KLR 703; Kuria and 3 others v Attorney General [2002] 2 KLR 69; and Republic v Attorney General exparte Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001**. The petitioners ask the Court to allow their petition with costs.

13. A perusal of the pleadings and submissions discloses that this petition challenges the investigative powers of the police and the prosecutorial powers of the Director of Public Prosecutions (DPP).

14. All the decisions cited by the petitioners speak to the legal principle that criminal proceedings should not be used to settle civil disputes neither should they be used to abuse the court process. In **Ex-parte Ganijee & another** (supra) P. Waki, J (as he then was) quoted Kuloba, J as having held in **High Court Misc. Appeal 839 and 1088/99 Vincent Kibiego Saina v Attorney General** that:-

“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 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 so forth.”

15. P. Waki, J (as he then was) went ahead and concluded that:-

“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.”

16. The same principles were laid down in Kuria (supra). In **Ex-parte Kipng’eno Arap Ng’eny** (supra), it was held that the High Court will interfere with a criminal trial in a subordinate court if it is determined that the prosecution is an abuse of the process of the court and/or because it is oppressive and vexatious.

17. It is the petitioners’ case that the criminal process is being used to settle a purely commercial dispute between it and the Bank. The onus is on the petitioners to demonstrate abuse of process. In **Kuria** (supra), it was held that:-

“There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.”

18. In my view, it is not even enough to establish the existence of a civil dispute because Section 193A of the Criminal Procedure Code, Cap. 75 allows for concurrent criminal and civil proceedings over the same subject matter. He who seeks to stop the exercise of the respective investigative and prosecutorial powers of the police and the DPP must go an extra mile. If, the claim is that the matter that is being subjected to the criminal process is purely a commercial or civil dispute, then it must be shown why and how this is so. It is not enough to just assert that the matter is civil in nature.

19. The respondents have placed evidence before this Court that the purported contract between the petitioners’ Company and Huawei Technologies was not genuine but was only meant to defraud the Bank of its money. The petitioners did not rebut these serious allegations. The respondents have therefore demonstrated that the petitioners may have committed an offence known to the law. The theatre for a criminal trial is the trial court-see the Court of Appeal decision in **Meixner & another v Attorney General [2005] 2 KLR 189**.

20. The petitioners have not in any way demonstrated abuse of power by either the police or the DPP. As was held in **Meixner** (supra), this Court can only exercise its power to halt a prosecution where it is established that fundamental rights and freedoms have been violated in the process of the prosecution. The petitioners have not shown such abuse. In short, this petition is without merit. It is therefore dismissed with no orders as to costs.

Dated, signed and delivered through video conferencing/email at Nairobi this 4th day of June, 2020.

W. Korir,

JUDGE OF THE HIGH COURT