



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO.98 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 8,10,11,19,20,21,22,23,27,28,29,47,73,157 (6 (c), 157 (10), 232 AND 249
OF THE CONSTITUTION OF KENYA 2010**

IN THE MATTER OF THE FAIR ADMINISTRATION ACT Nos.4 OF 2015

SECTION 4

BETWEEN

SAMUEL OULULA WANGUBA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

AND

SAICARE ENTERPRICES LIMITED.....INTERESTED PARTY

JUDGMENT

Petitioner's Case

1. The petitioner through a petition brought pursuant to Articles 8,10,11,19,20,21,22,23,27,28,29,47,73,157 (6) (c), 157(10), 232 and 249 of the Constitution of Kenya 2010 and the Fair Administrative Actions Act No. 4 of 2015 seeks the following orders:-

- a) A Declaration that the intended prosecution infringes on the Petitioner's fundamental rights and amounts to an abuse of the Respondents' constitutional mandate.
- b) This Honourable Court be pleased to issue an order of prohibition, prohibiting the Respondents from causing the apprehension of the Petitioner, considering and/or preferring any criminal charges against the Petitioner in any Court.
- c) Any other relief that the Court deems fit and expedient to so grant.
- d) Costs of this Petition to be awarded to the Petitioners.

2. The petitioner relies on the supportive affidavit dated 13th March 2019; and supplementary affidavit sworn by the petition on 18th April 2019.

3. The brief facts of the petitioner's petition, is that, the petitioner and the interested party had been in business for some time, in which the

petitioner was a medical practitioner while the interested party was in the business of medical supplies. The petitioner was approached by the Busia County Government to supply them with medical supplies and he sought supplies from the interested party. The interested party agreed to supply the petitioner with medical supplies. The agreement between the two was a gentlemen's agreement.

4. The petitioner upon receipt of the medical supplies from the interested party he transmitted them to Busia County Government as required but his dues were not processed and he relayed the position to the interested party, who insisted on being issued with postdated cheques, which cheques the petitioner contend he had asked the interested party to be informing him before banking so as to confirming the availability of funds.

5. It is petitioner's case, that the interested party paid no heed to the petitioner's request and went ahead to bank the cheques and bank released Kshs. 600,000/-. The petitioner further took an overdraft with which he repaid part of the amounts owed to the interested party.

6. The petitioner contends, that failing to pay the outstanding amount owing to the interested party, the interested party went ahead and reported the matter to the Embakasi Police, who have been harassing and intimidating the petitioner to pay the amounts owed to the interested party. That the police have been to the petitioner's place of work and his residence threatening him with arrest and detention if the amounts owed to the interested party are not paid. The petitioner contends, that the 1st and 2nd respondents have violated his constitutional and human rights in threatening to arrest and detain him. It is his contention the 1st and 2nd Respondents are in contravention of the petitioner's rights as enshrined in the constitution as the matter between him and interested party falls under the purview of civil matters and not criminal matters and that the matter had been settled by the appropriate court with appropriate and mandated jurisdiction.

7. It is further averred by the petitioner that the 1st Respondent has surpassed its mandate as per **Article 157(1) of the constitution** by engaging the 2nd Respondent in his mission of frustrating the petitioner in paying the amount owed to the interested party.

The 1st and 2nd Respondent's Case

8. The 1st and 2nd Respondents are opposed to the petitioner's petition. In doing so they filed grounds of opposition. It is the 1st and 2nd Respondents contention that the 1st Respondent received the investigation file together with the report and recommendation from the Director of Criminal Investigations and independently analyzed the evidence. That upon independent review of the evidence the 1st Respondent was satisfied that there was sufficient evidence and directed the petitioner be charged with several offences as per the charge sheet. It is contended the decision to charge was made independently based on sufficiency of evidence and the public interest.

9. The Respondents case is further, that the petitioner has not demonstrated, that the 1st Respondent's in arriving at the decision to charge has abrogated any provision of the constitution or any written law or any rules made there under or that the said decision was arrived at in breach of rules of natural justice.

10. The 1st and 2nd Respondents further contend the petitioner has not demonstrated, that the Respondents have committed any violation of his fundamental freedoms and rights or any infringement of any law or regulation or any abuse of the discretion and Rules of Natural justice.

The Interested Party's Case

11. The interested party is opposed to the petitioner's petition and in doing so relies on Replying affidavit sworn by Minaxi Bhupendra Bhala on 19th April 2017 and 29th March 2019. The interested party accuses the petitioner of material non-disclosure and/or blatant attempt at postulating alternative facts with intent or misleading the court as regards facts that led to filing of this petition. The interested party admits, that it engaged in business over considerable period of time whereby the petitioner would requisition for medical supplies and equipment from the interested party and payments would be made as and when they fall due. The Mana Pharmacy, in which the petitioner is a director, requisitioned for medicines and other assorted medical accessories to be delivered as per the petitioner to Busia County Government to which todate there is no evidence or contract or tender documents to show that the petitioner is doing business with Busia County Government.

12. The interested party delivered consignment, invoiced the same on diverse dates as from February 2018 through to May 2018 (*see annexure marked "MBB-1" being invoices and delivery notes*), whose total value of the merchandise requested and delivered to the petitioner is worthy Kshs.29,484,958.16, out of which petitioner paid on 8th February 2018 Kshs.600,000/- through RTGS/Money transfer leaving a balance of Kshs.23,484,958.16 to which as agreed the petitioner issued post-dated cheques worth the said balance. Seventeen (17) of the said post-dated cheques issued by the petitioner to the interested party dated 31st May 2018 and which were to be banked within six (6) months from the said date, thus by the end of November 2018 being cheques Nos. 105442; 105444; 105446, 105447, 105448; 105449; 105450; 105451; 105452; 105453; 105481; 105482; 105484; 105486; 105487 and 105485. The petition issued second set of seven (7) batches of posted cheques being 105501; 105502; 105504; 105505; 105506 and 105507.

13. That the petitioner requested the same not to be banked as he was yet to get funds. The interested party directors agreed to give the petitioner more time; however it became apparent the petitioner had become evasive and failed to attend scheduled meetings and return the interested party's calls (*see annexures ("MBB-2")*). The first batch of cheques issued meanwhile expired forcing the interested party's to bank the 2nd batch of cheques since they were equally about to expire. That only cheque No. 105506 for Kshs.900, 000/- was honoured but the rest were not honoured.

14. The petitioner then called claiming that his accounts have been flagged since the cheques were banked. That following the cheques having bounced the petitioner decided to engage authorities and sought legal redress. The interested party filed complaint at Embakasi police station recorded as OB/41/13/02/2019.

15. It is interested party's contention, that it is surprising for petitioner to file this petition alleging, that this was a commercial transaction,

that he ought not to be prosecuted when clearly it is unlawful to issue bounced cheques in accordance with section 316A of the penal code and contending further the remedy available to the interested party include instituting criminal proceedings.

Analysis and Determination

16. I have very carefully considered the Petition, the Replying affidavit, the Grounds in opposition, the Counsel rival submissions and list of authorities and from the above the issue arising for consideration is one thus:-

i) Whether the intended prosecution infringes on the petitioner's fundamental rights and whether the same amounts to an abuse of the Respondent's constitutional mandate?

17. The petitioner in this petition seeks a declaration, that the intended prosecution following raising of a complaint at Embakasi Police Station recorded as OB/41/13/02/2019 infringes on the petitioner's fundamental rights and amounts to an abuse of the Respondent's constitutional mandate. The petitioner contention is, that the deal between himself and the interested party was a commercial transaction out of which he issued bouncing cheques and as such he ought not to be prosecuted notwithstanding the bouncing cheques. **Section 316A of the Penal Code** provides:-

"(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person—

(a) Knows that the account has insufficient funds;

(b) Knows that the account has been closed; or

(c) Has previously instructed the bank or other institution at which the account is held not to honour the cheque.

(2) Subsection (1) (a) does not apply with respect to a post-dated cheque.

(3) Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanour. CAP. 63 Penal Code.

(4) A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both."

18. From the above section it is clear, that it is unlawful for anyone to issue a bounced cheque whether it is of commercial transaction or any other, where he knows, that the account has insufficient funds or the account has been closed or where the issues of the cheque has advised or instructed bank not to pay. It should be understood, that in most of the times one's rights may be not absolute as one's rights and freedoms end at the point at which one steps onto someone else rights and freedoms.

19. The office of the 1st Respondent herein (**DPP**) is an independent prosecution office established under Article 157 of the Constitution of Kenya 2010. Article 157(6) vests upon the Director of Public Prosecution the power to institute and undertake criminal proceedings. The decision to institute criminal proceedings by the Director of Public Prosecution is discretionary and such exercise of the said powers is not subject to the direction or control of any authority. **Article 157(10) of the Constitution of Kenya** clearly address this issue, where it is provided:-

"(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

20. On part of the 2nd Respondent; Inspector General of the police, **section 6 of office of the Director of Public Prosecution Act**, it is provided:-

"Pursuant to Article 157(10) of the Constitution, the Director shall-

a) Not require the consent of any person or authority for the commencement of criminal proceedings;

b) Not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and

c) Be subject only to the Constitution and the law."

21. The office of the Respondent (**DPP**) being an independent institution, established under the constitution, the court can only interfere with or interrogate its actions where it is clear that there is contravention of the constitution. In the case of **Paul Ng'ang'a Nyaga vs AG & 3 others (2013) eKLR** it was held that:-

"This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence and they acted in contravention of the Constitution."

22. In **Francis Anyango Juma vs The Director of Public Prosecutions and another** the Court observed that:-

"Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself."

23. From the aforesaid authorities it's clear, that the court should be slow in interfering with the constitutional mandate of the **DPP** and the **I.G** as the intention of the constitution is clear, that the two should be allowed to carry out their constitutional mandates without interference, from any party or direction of any one, unless there is clear evidence of violation of a party's rights under the constitution or violation of the constitution or statute as by doing so would amount to usurping their constitutional mandates.

24. In **Republic vs Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, it was held that:-

"Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the 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...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

25. Of great concern herein is the question under what circumstances the court will grant an order prohibiting commencement or continuation of criminal proceedings. In the case of **George Joshua Okungu and Another vs Chief Magistrate Court Anti-Corruption Court at Nairobi and Another (2014) eKLR** the Court summarized some of the considerations that will not form the basis for the court to interfere with the **DPP's** Constitutional mandate thus:-

"The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has held time and again, is not a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defense is always open to the Petitioner in those proceedings. The fact however that the facts constituting the basic of a criminal proceedings may similarly be a basis for a civil suit, is not ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim."

26. In the instant petition the facts of this case should be considered in determining whether the intended prosecution infringes on the petitioner's rights and whether the same amounts to an abuse of the Respondents' constitutional rights. In this petition it has been established as a fact, that the petitioner issued bounced cheques and thus I find is prima facie violation of **section 316A of the Penal Code**. The aforesaid offence has to be read with section 23 of the Penal Code dealing with liability of officer of corporations for offences committed by the corporation; which provides:-

"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission." This provision is relevant since the Petitioner herein drew the said cheques on behalf of Mana Pharmacy Limited, a company he is a director."

27. In the instant suit, the interested party lodged a complaint at Embakasi Police Station and following the complaint the same has to be investigated and a decision to charge or not to charge has to be made. In the case of **Republic vs. Commissioner of Police an Another ex-parte Michael Monari & Another [2012] eKRL:-**

"The police have a duty to investigate on any complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

28. Further in the case of **Samuel Ndung'u Gitau Ndungu Gitau vs. The Senior Resident Magistrate, Chief Magistrate's Court At Kiambu & 3 others [2012] eKLR Hon. Mumbi J.** stated that:-

"The petitioner is also aggrieved that he is charged with an offence arising from matters that are purely civil. However, as correctly argued by the respondents, the fact that there is a civil matter pertaining to the same facts is not a bar to criminal proceedings. Section 193A of the Criminal Procedure Code allows both civil and criminal proceedings to continue concurrently. It provides that:

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."

29. From the facts of this petition, the fact that the Respondents intend to charge the petitioner with an offence arising out of commercial transactions, as argued by the petitioner; the same is not a bar to criminal proceedings as **section 193A of the Criminal Procedure Code** allows both civil and criminal proceedings to continue concurrently. The provision provides:-

"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."

30. The petitioner alleges, that the intended prosecution is a violation of his rights to equality and freedom from discrimination as enshrined under Article 27 and Article 25 of the constitution. Under Article 27 of the Constitution of Kenya 2010 every person is equal before law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 25 of the constitution on the other end sets out the fundamental rights and freedoms that may be limited. It provides thus:-

"Despite any other torture and cruel, inhuman or degrading treatment or punishment:-

- a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b) Freedom from slavery or servitude;**
- c) The right to a fair trial; and**
- d) The right to an order of habeas corpus."**

The petitioner in the instant petition has not presented facts supporting his allegation, that he has been treated in a discriminatory manner or has been discriminated by the Respondents in course of their exercise of their constitutional functions nor has he demonstrated to the court, that his rights to equality and freedom has been violated in anyway. The respondents after being satisfied with the investigation, intend to arrest and charge and prosecute the petitioner with the offence disclosed after investigating on the interested party's complaint. In a situation where a complaint is lodged with the police, the law requires investigation and if sufficient evidence to charge is established, the Respondents are mandated to do so; in accordance with the provisions of the law as everyone is equal before the law. No one is above the law. Both the complainant and the suspect has the right of protection of the law and equal benefit. This means where an offence is disclosed the suspect will be prosecuted and where no offence is disclosed the suspect will not be prosecuted. I find that in applying Article 27 of the constitution the rights and freedoms of the petitioner and that of the interested party are recognized and protected; as the court position is that each party's rights and freedoms are subject to the law; where one's rights and freedoms ends, that is the point at which, one steps on the other's rights and freedoms.

31. In the instant petition, I find the petitioner has enumerated several Articles of the constitution in his petition being Articles 10,19,22,23,25,27,48,50 alleged to have been infringed or violated, however he has failed to enumerate how, and by whom, and in what manner, the said violation occurred or would occur if the intended prosecution was to proceed as it should. I wish to observe, that parties seeking relief before court on alleged violation of constitutional rights should be aware, that the constitution imposes rights and obligations; that one has rights but also has duty to respect the rule of law and rights of others. The petitioner should know his rights are subject to rights of others and are subject to the provisions of the law. Petitioner's rights are subject to process which include criminal justice system to which he has a duty to subject himself to as required by law. The rule of law requires respect from all who are entitled to fundamental rights and freedoms and it would be wrong and unjustified to insist on one's fundamental rights and freedoms while at the same time one is out violating the rights and freedoms of others. The maxims of equity asserts that he who comes to equity must come with clean hands. I find that he who would insist on his rights should respect and not violate others rights.

32. The petitioner in the instant petition has failed to demonstrate, that the intended prosecution of the Petitioner by the Respondents infringes on the petitioner's fundamental rights and amounts to an abuse of the Respondents constitutional mandate. The 1st Respondent received recommendation forwarded by the 2nd Respondent and in exercise of its constitutional mandate as conferred by **Article 157 of the Constitution of Kenya 2010**, is obligated to make a decision to charge or not to charge the petitioner based on sufficiency of evidence and the public interest underlying prosecution of cases. That it is the mandate of the 1st Respondent to make such a decision and in doing so; the 1st Respondent would not be abrogating, breaching, infringing or violating any constitutional provision or any human and fundamental rights of the petitioner or any written law or regulations made thereto. I find other than the petitioner having alleged violation of his fundamental rights and freedoms, he has not demonstrated any breach of any constitutional provision or fundamental and human rights or any other provision of the law by any of the Respondents. That if the petitioner is eventually charged and prosecuted, it should be noted, that there are sufficient constitutional safeguards to the petitioner during the process of the impending trial in the subordinate court. He will be able to raise the defence as enumerated in his petition in those proceedings including his defence that the transaction was a commercial as facts constituting a civil suit, is not sufficient grounds to warrant stay of the intended prosecution. He will produce evidence which will be considered. He may be acquitted, if not, he will have the opportunity to appeal. I find the intended prosecution do not amount to infringement of the petitioner's fundamental rights nor does it amount to an abuse of the Respondents' constitutional mandate.

33. The upshot is, that the petitioner has failed to demonstrate violation of his fundamental freedoms and rights and/or infringement of any law or regulation or abuse of discretion and breach of the Rules of Natural Justice. I find the petition to be without merit and the same is accordingly dismissed with costs to the Respondents and Interested party.

Dated, signed and delivered at Nairobi this 11th day of December, 2019.

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J .A. MAKAU

JUDGE