



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 10 OF 2018

ROBERTO CIAVOLELLA PETITIONER

VERSUS

THE MALINDI DISTRICT CRIMINAL

INVESTIGATION OFFICER 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

GLADYS NASERIAN KAYONI INTERESTED PARTY

RULING

[NOTICE OF MOTION DATED 14TH FEBRUARY, 2018]

1. The Petitioner/Applicant Roberto Ciavolella filed his notice of motion dated 14th February, 2018 together with his petition. He named the Malindi District Criminal Investigation Officer, the Director of Public Prosecutions and the Attorney General as the 1st Respondent, 2nd Respondent and 3rd Respondent respectively. Gladys Naserian Kayoni is an Interested Party.
2. When the Applicant first came to court on 14th February, 2018 he obtained interim orders restraining the respondents from arresting and prosecuting the Appellant in respect of a complaint laid against him by the Interested Party. The advocates for the parties later filed and exchanged submissions in regard to the said application.
3. In short, the Applicant seeks an order restraining the respondents from arresting or prosecuting him in respect of a share purchase agreement entered between him and the Interested Party on 20th May, 2017.
4. The Applicant's case is that by a share purchase agreement dated 20th May, 2017 he sold his 200 shares in Karen Blixen Company Limited to the Interested Party for Kshs. 3 million. The money was paid in full. According to him, a clause of the agreement provided that a valuation would be conducted at a later date to confirm the value of the company. His averment is that a valuation conducted on 22nd May, 2017 placed the value of the company which is made up of 1000 shares at Kshs. 24 million, meaning that the Interested Party's 200 shares were valued at kshs. 4.8 million.
5. The Applicant contends that instead of paying the sum of Kshs. 1.8 million being the balance of the purchase price to the company, the Interested Party started harassing staff, directors and guests at the company's restaurant. The Petitioner details incidences in which the Interested Party misbehaved after taking one too many. Further, that the Interested Party had incurred a bill of Kshs. 461,063 in the process.
6. The Applicant avers that he was arrested and locked up by the police and threatened with prosecution for the offence of obtaining money by false pretence. His case is that this is a civil dispute and no investigation has been conducted. He therefore seeks orders restraining the respondents from arresting and charging him.
7. The respondents' position is that the arrest of the Petitioner with a view to charging him in court was constitutional and lawful.

8. That this court has power to prohibit a criminal prosecution based on extraneous matters is not in doubt. A criminal prosecution instituted to settle civil disputes is subject to prohibition – see **Kuria & 3 others v attorney General [2002] 2 KLR 69**. Nevertheless, disputes which can attract both civil and criminal litigation at the same time are authorized by Section 193A of the Criminal Procedure Code, Cap. 75.

9. The Applicant relies on Clause D of the share purchase agreement to show that the Interested Party has not completed the payment of the purchase price. Clause D states:

“The Transferee agrees [to] pay Three Million Shillings (3,000,000/=) as full consideration of the shares and the parties agree to conduct a valuation of the Company by an independent valuer at a later date.”

10. The Applicant relies on this clause to claim that the Interested Party is in breach of the sale agreement as she is yet to pay Kshs. 1.8 million that became due after the valuation. This argument is without merit. The said clause is clear that the Kshs. 3 million was paid **“as full consideration of the shares”**. The price was not to be affected by the valuation.

11. In the Botswana case of **Therego v The State 1991 BLR 292 (CA)** it was held that:

“The phrase “false pretences” is inherently tautologous as the word “pretence” connotes some falsity. Be that as it may, the relevant sections of the Penal Code are easily understood; the crime consists in the making of a representation by an accused which is false in a material respect with the intention of inducing another person to part voluntarily with some or other property belonging to that person which is capable of being stolen. Of course, a necessary ingredient of the crime is that the accused should have the requisite mens rea; that is the knowledge both that the representation is false and the intention to induce the other person to part with his or her property as a consequence of the misrepresentation.”

12. In selling shares to the Interested Party knowing that he never intended to complete the transaction after full payment, it is possible that the Applicant’s intention was to obtain money from the Interested Party by false pretence. It is the trial court which will determine whether the Applicant committed an offence in his transaction with the Interested Party. The respondents have not crossed their legal boundaries in deciding to investigate the Applicant and probably eventually charge him.

13. The impression I get from the Applicant’s affidavit is that the Interested Party is a drunkard and not fit to be a director of the company. May be the Applicant ought to have conducted some due diligence on the Interested Party before accepting to sell the shares to her. However, the character of the Interested Party should not deny her the protection of the law.

14. There is an allegation that the police demanded bribes from the Applicant. The allegation is not, however, backed by any evidence.

15. The end result is that there is no good reason for stopping the respondents from carrying out their duties. I find the notice of motion dated 14th February, 2018 without merit and dismiss the same. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Malindi this 19th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT