



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.127 OF 2015

BETWEEN

THOMAS BAZAAR.....PETITIONER

AND

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

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

OCS KILIMANI POLICE STATION.....3RD RESPONDENT

THE ATTORNEY GENERAL4TH RESPONDENT

CHARLES ASWANI.....5TH RESPONDENT

ANNE WANJIRU MURAGE.....6TH RESPONDENT

OWEN MUINDI.....7TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner Thomas Bazaar, is a businessman dealing with the importation, purchase and sale of motor vehicles for profit. The 5th, 6th and 7th Respondents were his customers who had employed his services to import motor vehicles on their behalf.

2. The Petitioner claimed that the 7th Respondent, Owen Muindi, ordered for a motor vehicle through him being a Mercedes C class (250) from and agreed in writing to pay the cost of importing the motor vehicle in the sum of Kshs.300,000.00 That after the motor vehicle arrived, Owen Muindi declined to pay the said sum and instead insisted that his down payment of Kshs.270,000.00 ought to be refunded to him. Similarly, he states that the 6th Respondent, Anne Wanjiru Murage, ordered for a Mercedes C 250 to be imported at a cost of Kshs.200,000.00 and paid a deposit of Kshs.100,000.00 When the vehicle docked at the Port of Mombasa, she declined to complete the transaction and demanded for the refund of her deposit. In regard to the 5th Respondent, Mr. Charles Aswani, the Petitioner states that he had ordered for a Subaru Outback and agreed to pay Kshs.200,000.00 as its cost. He made a down payment of

Kshs.90,000.00 and was to pay the rest on a later date but declined to do so.

3. The Petitioner was then arrested on 21st March 2015 by police officers and taken to Kilimani Police Station. The 5th, 6th and 7th Respondents thereafter availed themselves at the police station and it is the Petitioner's case that he was coerced and compelled to enter into agreements accepting claims that he allegedly owed the monies paid to him by the 5th, 6th and 7th Respondents in regard to the importation and sale of the aforesaid motor vehicles.

4. He has therefore filed this Petition claiming that the police did not have any powers to coerce him to enter into any agreement and in that regard their actions are unconstitutional, irrational and illegal.

The Petitioner's case

5. The Petitioner claims firstly, that the aforesaid agreements were obtained by duress and are therefore not enforceable in law.

6. Secondly, that the police did not conduct any investigations on the matter and that the criminal justice process was used for extraneous purposes not anticipated in law i.e to pressurize him to settle a purely civil debt and that the only reason the police got involved in the dispute was in order to force him to refund monies not due to the complainants and also to intimidate him to abandon his profits, commission and expenses incurred in the importation of the motor vehicles aforesaid.

7. Thirdly, he submits that the 5th, 6th and 7th Respondents are perverting the course of justice by creating an unlawful conspiracy so as to indict the Petitioner for an offence that does not exist in law.

8. Fourthly, that the 2nd Respondent's intention to prosecute him is discriminatory, unjustifiable and constitutes an abuse of the Court process and is being carried out in violation of the Petitioner's fundamental rights and freedoms.

9. The Petitioner in his Petition 2nd April 2015 has therefore sought the following orders:

a. A declaration that the acts of the 5th, 6th and 7th Respondents through the police of arresting and pressuring the Petitioner to sign a refund agreement dated the 21st March 2015 violated the Petitioner's fundamental rights and freedoms under Articles 10, 19, 20, 21, 22, 23, 27, 29, 31, 47 and 50 of the Constitution were arbitrary, unconstitutional, unreasonable, irrational and cannot stand. The same be quashed.

b. A declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents use of the criminal law to settle and /or put pressure on the Petitioner to settle a civil matter amounts to an abuse of the process and extraneous use of power and consequently has no place and the said acts are hereby quashed.

c. A declaration to issue declaring that the acts of the 3rd Respondent of arbitrarily arresting and compelling the Petitioner to enter into agreements were arbitrary, unconstitutional, unlawful, null and void and of no effect. Indeed, no court can enforce an illegal contract where an illegality has been brought to its notice.

d. An order of permanent injunction restraining the respondents from arbitrarily arresting, intimidating and coercing the Petitioner or in any other manner from engaging in acts of the breach and or violation of the Petitioner's fundamental rights and freedom regarding the said agreements.

e. An order of prohibition do issue to prohibit the OCS Kilimani Police Station or any other police station, Inspector General of Police and Director of Public Prosecution from arresting,

charging or otherwise dealing with the Petitioner with regards to the issue as the matters herein which are civil in nature, governed by civil transaction and therefore ultra vires the Respondent's powers.

f. An order for compensation to the Petitioner to alleviate the Petitioner's loss, suffering and damage as a consequence of the Respondent's unconstitutional acts above in such amount or amounts or damages as the court may access and/or determine and payable by the Respondent.

g. The Petitioner be awarded the costs of the Petition.

2nd Respondent's case

10. In response to the Petition, the 2nd Respondent, the Director of Public Prosecutions (DPP), filed a replying affidavit sworn on 16th July 2015 by the Investigating Officer, PC Victor Omondi Juma.

11. Mr. Omondi states that a complaint was made at Kilimani Police Station on 20th February 2015 by the 7th Respondent who stated that the Petitioner had agreed to import a motor vehicle, Mercedes Benz C class Engine Number 5437685421004, silver in colour, year of manufacture 1996/7, capacity 2790CC and that the motor vehicle was to be registered with a Ugandan number plate. That the complainant also informed him that the Petitioner had presented the 7th Respondent with a pro-forma invoice on 21st October 2014 and the latter then paid Kshs.2,666,580.00 on 23rd October 2014 relating to the costs for importing the aforesaid motor vehicle and it was agreed that the motor vehicle was to be handed over to the 7th Respondent on 23rd November 2014. Later, he was informed by the Petitioner that there was a delay in the shipment and the motor vehicle only arrived at the port of Mombasa on 13th December 2014. Upon the arrival, the Petitioner requested for a sum of Kshs.100,000.00 from the 7th Respondent which would allegedly cover import duty which money the 7th Respondent sent to him via Mpesa. However, the 7th Respondent did not receive the motor vehicle on the agreed date and upon inquiry, he discovered that the aforesaid motor vehicle had been sold to a third party. Subsequently, the 7th Respondent was served with Court summons in a case for alleged breach of contract allegedly filed against him by the Petitioner being *Milimani Civil Suit No 792 of 2015, Thomas Bazar v Owen Muindi*. It is against this background that the 7th Respondent alleged that he had been fraudulently treated by the Petitioner.

12. Further, that upon the 7th Respondent's complaint being filed, police officers undertook their investigations and discovered that the Petitioner was a Ugandan national; there existed an agreement between him and the 7th Respondent; the 7th Respondent had paid the Petitioner a sum of Kshs.370,000.00 for the importation of the said motor vehicle; the documents presented to the 7th Respondent by the Petitioner were forgeries and that there did not exist any relationship between the Petitioner and the purported clearing agents in Mombasa. PC Omondi thus claims that the investigations revealed that the Petitioner had committed an offence known to Kenyan law.

13. It is also the 2nd Respondent's case that the Petitioner was subsequently arrested and was presented at the Kilimani Police Station before being released on a cash bail. He was required to report to the police station on 27th March 2015 to record his statement but has failed to do so to date and PC Omondi denies that he ever forced the Petitioner and the 5th, 6th and 7th Respondents to enter into any agreement at the said police station.

14. Ms. Kithiki presented the 2nd Respondent's case and submitted that the 2nd Respondent has the constitutional mandate to ensure that breaches of Kenyan laws are investigated in accordance with the provisions of **Article 245** of the **Constitution** and **Section 24** of the **National Police Service Act**. Further, that the 2nd Respondent has prosecutorial mandate under **Article 157** of the **Constitution** and **Section 4** of the **DPP Act**.

15. She added that the basis upon which charges could be preferred against the Petitioner would be purely

on the evidence collected during investigations and therefore the investigations were not undertaken with any ulterior motives as alleged by the Petitioner. She also claimed that the Petitioner had completely failed to demonstrate that the investigations and the intended prosecution amount to an abuse of the criminal justice system.

16. She further contended that **Section 193A** of the **Criminal Procedure Code (Cap 75 Laws of Kenya)** permits concurrence in the undertaking of both criminal and civil proceedings and therefore that ground alone is no bar to his intended prosecution.

17. Lastly, Ms. Kithiki submitted that the Petition is misconceived and is merely intended to obstruct the rightful course of justice and is an abuse of the Court process. That therefore the Petitioner is not entitled to the reliefs sought in the Petition.

18. I note that from the record, the 1st, 3rd, 4th, 5th, 6th and 7th Respondents did not file any response to the Petition.

Determination

19. From the facts as presented before me, it is not disputed that the Petitioner had entered into an agreement with the 5th, 6th and 7th Respondents for the purposes of importing motor vehicles on their behalf. It is also not controverted that the Petitioner was arrested by police officers and taken to Kilimani Police Station upon a complaint being filed against him by the 7th Respondent. This Petition is therefore limited to the determination of one issue – whether the act of police officers, in arresting the Petitioner and allegedly coercing him to enter into an agreement with the said Respondents, violated the Petitioner’s fundamental rights and freedoms as enshrined in the **Constitution**.

20. In that context, the Petitioner’s chief complaint is that the subject matter for which he was arrested is a civil matter and the police had no reason to intervene at all and I note that the **Constitution** at **Article 243** establishes the National Police Service. Its objects are set out under **Article 244** which states that;

“ The National Police service shall –

- a. Strive for the highest standards of professionalism and discipline among its members;*
- b. Prevent corruption and promote and practice transparency and accountability;*
- c. Comply with constitutional standards of human rights and fundamental freedoms;*
- d. Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and*
- e. Foster and promote relationships with the broader society.*

Further to the above, in the **National Police Service Act, Act No. 11A of 2012**, the functions of the police are set out in **Section 24** as follows;

- “a) Provision of assistance to the public when in need;*
- b) Maintenance of law and order.*
- c) Preservation of peace;*
- d) Protection of life and property;*
- e) Investigation of crimes;*

f) Collection of criminal intelligence;

g) Prevention and detection of crime;

h) Apprehension of offenders;

i) Enforcement of all laws and regulations with which it is charged; and

j) Performance of any other duties that may be prescribed by the Inspector-General under this Act any other written law from time to time. (Emphasis added)

21. It is clear therefore that the National Police Service is the organ through which the State discharges its duties of preventing and investigating crime as well as apprehending offenders. In that regard, once a complaint is made at a police station, police officers have a constitutional obligation to investigate the complaint and apprehend the person responsible. To that extent therefore, I do not find any violation of the **Constitution** in the arrest of the Petitioner as alleged.

22. I have made the above finding notwithstanding the complaint made by the Petitioner that the subject matter under investigation is of a civil nature and I agree with Ms. Kithiki that **Section 193A** of the **Criminal Procedure Code** permits concurrent proceedings of both a criminal and civil nature. For avoidance of doubt, this provision states;

“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.”

23. It cannot therefore be contestable that if an offence has been committed and even if the subject matter is of a civil nature, nothing stops the police from investigating the crime allegedly committed, and the DPP from prosecuting, if there is sufficient evidence to sustain the charges and this Court in any event does not have the powers to direct the DPP on how to undertake his constitutional mandate - See the cases of *Dr. Alfred Mutua vs Ethics and Anti-Corruption Commission and 4 others Petition No. 310 of 2015* and *Joshua Kulei v Attorney General Petition No. 65 of 2010*.

24. Having said so, I heard the Petitioner to claim that his rights were violated by the Respondent and he invoked **Articles 27, 29, 31, 47 and 50** of the **Constitution** in that regard. However, he did not plead with any degree of precision neither did he set out the manner in which those rights were violated. It is a well-established rule in constitutional litigation that a party must plead his case with some degree of precision and set out the manner in which the constitution has been violated. See *Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 14* and *Trusted Society of Human Rights v Mumo Matemu and Another Petition No. 279 of 2012*.

25. The only fundamental right that he attempted to explain was his right to privacy under **Article 31** of the **Constitution**. In that regard, he stated that the 7th Respondent who allegedly works at Safaricom Ltd tracked his mobile phone movement hence violating the said right. However, he failed to substantiate his allegation by providing evidence of the same and it is not enough for him to make such an allegation and fail to specifically prove how the right was violated.

26. He also claimed loosely that he was being discriminated against by the police contrary to **Article 27** of the **Constitution** but again he failed to substantiate the same. In any event, I did not hear the Petitioner to allege that he has been charged in any Court with a criminal offence while any other person who was culpable was not charged. His complaint against the DPP in that regard cannot therefore stand.

Conclusion

27. Turning back to the prayers in the Petition, it is obvious that the chief complaint made by the Petitioner is that the dispute between him and the 5th – 7th Respondents was a civil one and could not

attract any criminal sanction. I have said that the said argument has no basis in law and cannot stand. Similarly the allegations of violations of the Bill of Rights were casually made and cannot be sustained in the context of the fact and the law. It therefore follows that none of the prayers in the Petition can be granted.

28. Having found as I have, it is obvious that I do not see any merit in the Petition. The same is dismissed with no order as to costs.

29. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE