



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 9 OF 2015

**IN THE MATTER F: ARTICLES 10, 19, 20, 22, 23, 25, 27, 29, 157, 165 AND 259 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 25, 27, 29, 39, 47, 48 AND 232 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
ACT NO. 2 OF 2013 SECTION 1, 2, 3, 4, 5, 6, 23 AND 26 AND SECTION 313 OF THE PENAL
CODE CAP 63 LAWS OF KENYA**

AND

**IN THE MATTER OF: MALINDI HCCC NO. 94 OF 2012 CATHERINE WEMBRIDGE
BAUMGARTE V ANDREW MCGHIE**

BETWEEN

ANDREW MCGHIE PETITIONER

AND

CATHERINE WEMBRIDGE BAUMGARTEN& 5 OTHERS....RESPONDENTS

JUDGEMENT

Introduction

The petitioner and the first respondent entered into an agreement on 1st February, 2011. The agreement involved a building project on Plot number 755, Block 1, Lamu County. Under the terms of the agreement, the petitioner was to be paid a fee of Kshs.2.5 million by way of five equal instalments. On 15th September, 2011, the first respondent terminated the contract. This led to the filing of Malindi High

Court Civil Suit Number 94 of 2012 by the first respondent against the petitioner. Subsequently, the Director of Public Prosecutions preferred criminal charges against the petitioner. This led to the filing of this petition. Parties agreed to determine the petition by way of written submissions.

The Petitioner's Case

The petitioner's case is premised on the petition itself as well as the petitioner's supporting affidavit sworn on 10th June, 2015. The petitioner states that he has been a project manager in Lamu and Nairobi for over thirteen (13) years. The first respondent is his acquaintance and friend. The parties entered into a construction agreement on 1st February, 2012. Subsequently disputes arose relating to the implementation of the project. This led to the termination of the contract by the 1st respondent on 15th September, 2011. The 1st respondent detained the petitioner's tools of trade at the premises until 5th March, 2012 despite the fact that the petitioner had reported the issue to the police.

It is the petitioner's position that upon termination of the contract, the 1st respondent filed a complaint against the petitioner before the Lamu Criminal Investigation Department alleging that the petitioner had obtained money from her by way of false pretences. Counsels for the two parties were engaged in correspondences and the petitioner was assured that the matter was civil in nature and the 1st respondent was to pursue her claim in a commercial court. The petitioner considered the matter as closed. However, every new CID officer sent to Lamu County has been summoning the petitioner due to pressure exerted by the 1st respondent.

According to the petitioner, the 1st respondent filed Civil Case Number 94 of 2012, **CATHERINE WEMBRIDGE BAUMGARTEN (alias KATE BARAKA) V ANDREW MCGHIE**. The 1st respondent is seeking special damages of Kshs.5,206,197, damages for loss of anticipated rent totaling Kshs.1,080,000/=, Kshs.1,320,000/= being loss of income from operations of the restaurant and general damages. The petitioner responded to the suit and raised a counter claim of Kshs.1,500,000/= and general damages. The petitioner contends that the suit has been adjourned several times at the instance of the 1st respondent.

The petitioner maintains that at one time he visited the director of Internal Affairs, Kenya Police, Mr. Leo Nyongesa, in Nairobi and narrated his problems arising from Lamu police harassment. He was assured that the harassment will stop. However, due to pressure from the 1st respondent, the 4th respondent has initiated Criminal Case Number 124 of 2014. The criminal case will subject the petitioner to a criminal process in a dispute which is purely civil in nature. According to the petitioner, the 1st respondent is using the criminal process to exert pressure on the petitioner. In his supporting affidavit, the petitioner avers that the 1st respondent vowed and promised to use every means available to her to ensure that the petitioner is arrested and prosecuted. The 1st respondent is using the criminal process to settle personal scores.

Petitioner's submissions

Mr. Ole Kina, counsel for the petitioner submit that the intended criminal prosecution of the petitioner is in breach of the petitioner's constitutional rights. The petitioner is threatened with imprisonment and this will be a breach of his fundamental right to freedom of movement contrary to Articles 29 and 39 (1) of the Kenya Constitution. Counsel relies on the case of **GITHUNGURI V REPUBLIC [1985] KLR, 91** where the court stated as follows in regard to the right of the Attorney General to charge a person: -

We take the view that to institute proceedings now is both vexatious and an abuse of the process of the court. In the present proceedings however we can do no more than answer the questions contained in the reference. The incumbents the office of the Attorney-General are one but just as one incumbent may, having reached a decision not to prosecute, change his mind in the light of subsequent events, so may a later incumbent. We think the right to change the decision may be lost if as in the present case the accused has been publicly informed that he will not be

prosecuted and property has been restored to him. ... As a consequence of being led to believe that there would be no prosecution, the accused may have destroyed or lost evidence in his favour.

Counsel further relies on the case of **COMMISSIONER OF POLICE & THE DIRECTOR OF PUBLIC INVESTIGATION DEPARTMENT & ANOTHER V KENYA COMMERCIAL BANK AND 4 OTHERS**. The court in that case dealt with the issue of the DPP's prosecutorial powers and had this to say: -

*By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See *Githunguri v. Republic* [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent powers to interfere with such investigation or prosecution process. See *Ndarua v. R.* [2002] 1EA 205. See also *Kuria & 3 others v. Attorney General* [2002] 2KLR 69*

Counsel for the petitioner further maintains that the petitioner's right not to be subjected to cruel and degrading treatment as enshrined under Article 25 of the Constitution shall be violated. The petitioner is a law abiding resident. The dispute arose as a result of the termination of the agreement by the 1st respondent. Despite having opted to pursue a civil claim, the 1st respondent has put pressure on the criminal justice system to have the petitioner prosecuted. This has subjected the petitioner to harassment, threats of arrest and a criminal process yet the matter involves a simple claim of breach of contract. The constant police summons have caused the petitioner mental torture and this has affected both his health and work. Counsel also relies on the case of **COMMISSIONER OF POLICE AND DPP & ANOTHER V KENYA COMMERCIAL BANK & 4 OTHERS** (supra) where the Court of Appeal, while dismissing the appeal noted as follows: -

While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power.

The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.

In the result, and for the reasons stated, we can see no reason to disagree with the reasoning and

conclusions of the learned judge.

Counsel for the petitioner submit that the court is not called upon to interrogate the quality of the evidence to be preferred in the subordinate court in determining whether to intervene. However, the court has to examine the pleadings in the civil case against the preferred charges and notice the complete variance in those documents. It is further submitted that Article 27 of the Constitution on equality and freedom from discrimination was breached. The petitioner reported to the police the detention of his working tools by the 1st respondent. No action was taken. The police are now giving in to pressure from the 1st respondent to charge the petitioner.

The petitioner's view is that having been promised that no criminal action will be taken since the dispute is civil in nature, the petitioner's right to fair administrative action under Article 47 (1) and 50 (4) of the Constitution have been breached. Further, the petitioner's right of access to justice under Articles 48 and 50 of the constitution are likely to be breached. The petitioner urges the court to allow the petition with costs. The petitioner is seeking a sum of Kshs.10 million as damages.

1st Respondent's Case

The 1st respondent filed a replying affidavit sworn on 11th August, 2015. The respondent maintains that the petition is misconceived, frivolous, vexatious, incompetent, bad in law and generally an abuse of the court process. The petition offends the provisions of Article 157 (6) and (10) of the Constitution. The fact that there are civil proceedings cannot be the reason to stop criminal prosecution. Section 193A of the Criminal Procedure Code allows parallel criminal and civil proceedings.

According to the 1st respondent, the police have a duty to investigate any complaint brought before it as they have a constitutional mandate to detect and prevent crime. Further, the 6th respondent (Attorney General) is not subjected to the control of any other person or authority in exercising its discretion under article 26 of the Constitution. The issue is purely a criminal case that ought not to be elevated into a constitutional matter. The summons by the police cannot be held to be harassment of the petitioner. The petitioner was summoned so that he could be taken to court to answer to charges of receiving money by false pretenses. This is not harassment.

The 1st respondent maintains that under Article 157 (10) of the Constitution, the DPP does not require the consent of any person or authority for the commencement of criminal proceedings. The office of the DPP is independent and is not under the direction or control of any other person. The prosecution of the petitioner is not oppressive, vexatious or an abuse of the court process.

Counsel for the petitioner submit that the general principle and policy is that courts should not interfere with prosecutorial discretion. Counsel relies on the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS HUMPHREYS [1976] 1 ALL ER 497** where Lord Viscount stated as follows: -

A judge must keep out of the arena. He should not have appeared to have any responsibility for the institution of a prosecution. The function of prosecutors and of judges must not be blurred. If a judge had powers to decline to hear a case because he does not think it should be brought then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

Counsel for the 1st respondent also relies on the case of **KURIA & 3 OTHERS V A.G. [2002] 2 KLR, 69** where it was held that the court should not stop criminal prosecution unless the continued prosecution of a criminal case manifests an abuse of judicial process.

Counsel submit that the petitioner is charged with the offence of obtaining money by false pretence contrary to section 313 of the Penal Code. The petitioner falsely pretended that he was a licensed contractor. Section 2 of the National Construction Authority Act No. 41 of 2011 defines a contractor to mean a person registered under section 15 of the Act. Section 15 of that Act provides that no person shall

carry on the business of a contractor unless the person is registered by the Board under that Act. The petitioner is not a registered contractor. The promises made to the petitioner that he will not be prosecuted as per the letter dated 15th September, 2012 were replaced by the DPP's decision to prosecute. The DPP is an independent office and can decide to prosecute. The officers of the 2nd and 3rd respondents were merely trying to effect arrest in pursuant to warrants of arrest issued by the court since the petitioner ignored court summons. It is the office of the DPP which makes the decision as to whether or not to prosecute after the National Police Service carries out the investigations. There is no correspondence from the office of the DPP promising the petitioner that he shall not be prosecuted. Counsel also relies on the case of **KEUNG SIU WAH V ATTORNEY GENERAL [1990] HKCA 246**.

4th Respondent's Case

The 4th respondent filed a replying affidavit sworn by P.C. LEONARD OCHOLA on 6th July, 2015. The 4th respondent maintains that the 1st respondent paid the petitioner a sum of Kshs.5,260,962/= to carry out an extension to a building called Baraka House situated on plot No. 755 Block 1 Lamu. The petitioner did not carry out the works and the 1st respondent filed a complaint with the police this being OB No. 22/1/11/2013. The former Lamu DCIO, Chief Inspector Hussein Bakari carried out investigations and opened an inquiry file No. 2/2012. The file was forwarded to Nairobi head office for necessary advice. The Nairobi office devised that the file be referred to the state law office for assistance. The Malindi state law office advised that the petitioner records his statement. On 31st May, 2013 the state law office recommended that the petitioner be charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The petitioner was summoned to attend court but declined to honour the summons leading to the issuance of a warrant of arrest.

The 4th respondent contends that the petition raises only one issue; whether there has been a violation of the petitioner's rights in recommending that the petitioner be arrested and prosecuted for the offence of obtaining through false pretences contrary to section 313 of the Penal Code. It is submitted that promises made by the police not to prosecute the petitioner cannot bar the 4th respondent from carrying on the prosecution. The promises were made before the file was taken to the 4th respondent. According to the 4th respondent, the evidence against the petitioner is overwhelming. The prosecution is based on the evidence and not on any other factors or considerations. According to the 4th respondent, the case of **GITHUNGURI V REPUBLIC** (supra) relied upon by the petitioner can be distinguished in the sense that it was the Attorney General who had publicly assured the petitioner that he would not be prosecuted but the Attorney General later changed his mind and went on to prosecute him. The police had formed the opinion that the case was civil in nature because they were informed about the existence of the civil case. Issuance of warrants by the court cannot be cruel and degrading treatment. It is submitted that none of the petitioner's rights have been violated.

Analysis and Determination

The issues arising from the petition are: -

(a) Whether or not a Constitutional issue has been raised?

(b) Whether or not the fundamental rights and freedom as enumerated by the Petitioner have been breached or are likely to be breached?

(c) Whether the dispute is civil in nature

I will deal with all the issues together. The issue as to "Whether or not a Constitutional Issue has been raised?" is a jurisdictional issue. Jurisdiction is overall and in the famed and time tested Court of Appeal case of **OWNERS OF MOTHER VESSEL "LILIANS" -VS- CALTEX OIL (K) LTD 1989 KLR 1 (CAK)** Nyarangi JA stated that: -

“Jurisdiction is everything. Without it, a court has no power to take one more step..... A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction”

Does this Court have jurisdiction to entertain the petition before it? It is the Court's mandate under Article 23 (1) of the Constitution to “...to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”. In the case of **GITHUNGURI** (supra) Court of Appeal drove the point home when it stated that where abuse of court process is alleged the court ought to address the point. Hence the Court is wearing its proper hat to address the petition. The question that now lies is whether or not the alleged breaches can be categorized as infringement of the Constitution so as to warrant the reliefs sought.

The Petitioner's main point is that he received communication from the police that the matter was civil in nature and that he would not be pursued under the criminal justice system. This communication led him to hold the belief that he was let go scott-free only for him to receive police summons seeking to present him before court. This to him amounted to the abuse of process and a likelihood of infringement and an infringement of his fundamental rights and freedoms as alleged.

The correspondences relied upon by the Petitioner as proof of the alleged promise do not state that investigation was to be stopped indefinitely and most importantly that the petitioner would not be caused to face criminal charges before court. The letter dated 19th January, 2012, marked as the Petitioner's annexure 7, is addressed to the 1st Respondent from the Divisional CID Officer, Hussein K Bakari indicating that verbal directives from their headquarters indicated that the complaint filed is civil in nature and is best pursued in a civil court. Another letter is annexure 8 dated 29th April, 2015 from the Director of Internal Affairs to the County Criminal Investigations Officer indicating that the matter is civil “...unless there are other new matters to the contrary”. The new matter in my view was the DPP directions to investigate the matter.

There is absolutely no implied or express promise given in the letters that a criminal matter would not be pursued. At most there was a directive in the latter letter that there be a stop to the “alleged *ongoing harassment*.” The term alleged implies that it had not been established. There was no directive at all as alleged that the 2nd & 3rd Respondents ought to stop investigations or issuing summonses.

In the case of **GITHUNGURI** (supra) the Appellant had received public reassurance that all was well and that the AG would not pursue the matter further. The new AG had a change of heart and preferred criminal charges against Githunguri. The Court of Appeal deemed that as an abuse of court process, vexatious and oppressive. In the instant case the police did not promise that they would stop investigations or not prosecute they simply held the opinion that the matter was civil in nature.

The prosecutorial powers during the period of time in the **GITHUNGURI CASE** (supra) lay with the AG. In the instant case the office of the DPP had been established and the power to prosecute lay with that office as per Article 157 (6) of the Constitution. Hence when the police formed the opinion that the matter was civil in nature their opinion would not override the directive by the DPP to investigate and prosecute as per Article 157 (4) of the Constitution. In fact, they communicated the DPP's directive to the Petitioner through his learned counsel. He was given an opportunity to lay down his side of the story for purposes of completing the investigations but he opted out of it. The DPP in light of the complaint had every right to order that it be investigated.

Neither the DPP nor the IG offered an olive branch to the Petitioner in the name of not commencing criminal proceedings, they did not go back on their word as none had been given. Any promise by the IG in light of Article 157(4) would not have held water unless it can be demonstrated that the subsequent process was vexatious or oppressive. The Petitioner has alleged that the DPP and the IG are in breach of Article 157 (4) & (11) of the Constitution and that the 1st Respondent seeks to settle personal scores via the criminal case. The established law is that the powers of the DPP Under Article 157 of the Constitution shall be limited in the event that the criminal proceedings are vexatious or abuse of court process. Any court of law must jealously guard against any form of abuse of its process. See

GITHUNGURI CASE (supra) and KURIA & 3 ORS V ATTORNEY-GENERAL [2002] 2 KLR 69.

The Petitioner also points to the fact that a civil suit is in place and that the police have all along been urging the 1st Respondent to pursue her claim in a commercial court which fell on deaf ears. Section 193 A of the Criminal Procedure Code provides that a civil suit can run concurrently with a criminal suit based on the same set of facts and evidence. It 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.

The core issue being brought out by the petition is that the dispute herein is civil in nature but has been turned into a criminal case. The 1st respondent filed a civil suit but is now pushing for the prosecution of the petitioner.

I have read the charge sheet for the criminal case. The petitioner is being charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence are: -

On diverse dates between 2nd February, 2011 and 16th August, 2011 at Amu Island of Lamu West District within Lamu County, with intent to defraud, obtained from Catherine Wembridge Baumgartner Kshs.5,260,962/= by falsely pretending that he was a licensed contractor trading in the name of Andrew Mcghie the contractor and was in a position to offer the construction services in Plot No. 7545 Block 1 Lamu.

The dispute can be traced to the agreement between the petitioner and the 1st respondent that was revised on 2nd February, 2011. The parties were close friends. In her plaint (paragraph 4), the 1st respondent avers that she has been a close friend of petitioner for approximately five years and they were close confidants. The terms of the agreement provided for payment of Kshs.2.5 million in five equal instalments to the petitioner. The total building costs of the project (materials and labor) was estimated to be Kshs.10 million.

The 1st respondent in her civil suit is demanding part of the money paid to the petitioner as part of fulfilling the project. I have seen the termination letter dated 15th September, 2011. Three grounds are given in the notice as follows: -

(a) Poor and substandard workmanship,

(b) Failure and/or refusal to comply with structural and other specifications,

(c) Failure and/or refusal to adhere to specific terms of the contract inter alia clauses 1, 3 and 7.

The petitioner in his defence maintains that he did his part as required under the terms of the agreement. He is equally blaming the 1st respondent as the one who breached the agreement.

The law as provided under section 193A of Cap 75 is that the existence of a civil suit cannot be the reason to stay or stop criminal proceedings. Further, the sufficiency or not of the evidence to be adduced before the trial court cannot be the reason for the court to stop criminal prosecution. That is understandable as the High Court's duty is to leave the trial court to determine the criminal case and evaluate the evidence. Should there be an appeal filed by either the prosecution or the accused as a result of an acquittal or conviction, the High Court will evaluate the evidence and make its own decision.

However, wherever an application of this nature is filed, the High Court has the power to terminate the criminal proceedings if it is convinced among other things that there is an abuse of the legal process as provided under Article 157 (11) of the Constitution.

The charge sheet provides that the petitioner presented himself as a licenced contractor trading in the name of Andrew McGhie, the contractor. The 1st respondent has known the petitioner for over five years. She knew that the petitioner was dealing in construction. It is evident that part of the work was done. That is why the 1st respondent in her termination notice states that the workmanship was poor and substandard and that the petitioner did not follow the specific terms of the contract.

It is my view that where the dispute is purely civil in nature, creating an offence out of a civil arrangement is tantamount to an abuse of the legal process. The 1st respondent's first action was to file a civil suit. The suit was to be fast tracked. By the end of the day the court will be called upon to quantify what was done under the terms of the contract against what was paid. That connotes a civil dispute. It cannot be an intention to obtain money by false pretence. If that were to be the case, then all contractors who fail to complete the work on time or do shoddy work would be charged with obtaining money by false pretences. There is the element of the petitioner carrying himself as a registered and licenced contractor. There is nowhere in the agreement indicating that the petitioner presented himself as a licenced contractor. These are obvious facts and by pointing out such plain issues does not mean I am assessing the sufficiency of the evidence. Evaluation of whether the prosecution is an abuse of the court process calls for analyzing the dispute and making a decision as to whether the petition is merited or should be dismissed. There are many plumbers, electricians and masons who carry out construction works. It is not possible to have all such people registered as licenced contractors. The petitioner is such a person who supervises construction work for his clients. That is why the agreement with the 1st respondent indicate that the petitioner was to liase with the Architect, structural engineers and other consultants or specialists.

It can be concluded that by being prosecuted, no rights or freedoms of the petitioner have been violated. However, one should not be prosecuted for prosecution sake. There must be a proper legal basis for the prosecution. I do agree with the Court of Appeal in **COMMISSIONER OF APOLICE & DPP V KCB & OTHERS** (supra) that *"It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes."*

My conclusion herein is that this is purely a civil dispute. The 1st respondent correctly filed Malindi HCCC No. 94 of 2012. She should pursue that case to its logical conclusion. The prosecution of the petitioner is simply intended to settle personal scores. It is an abuse of the legal process which should not be allowed to continue. I further do find that no damages are payable to the petitioner. The issue of damages will be determined in the civil case.

In the end, I do find that the petition is merited and is granted in terms of prayer 7:01, 7:04 and 7:05. The prosecution of the petitioner is unconstitutional and is an abuse of the legal process. Each party shall meet their own costs.

Dated and delivered in Malindi this 1st day of November, 2016.

S.J. CHITEMBWE

JUDGE