



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 407 OF 2014

EVANS TUNGU NYABWENGI.....1ST PETITIONER
MARTIN GITAU NYOIKE.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
INSPECTOR GENERAL, NATIONAL
POLICE SERVICE.....2ND RESPONDENT
THE DIRECTOR, CRIMINAL
INVESTIGATION DEPARTMENT.....3RD RESPONDENT
CFC STANBIC BANK.....INTERESTED PARTY

JUDGMENT

Introduction

1. This petition concerns the alleged violation of the petitioners' constitutional rights following their arrest and prosecution in Nairobi Chief Magistrate's Court Criminal Case No. 418 of 2014. They allege that the institution of the proceedings is an abuse of the court process.
2. The petitioners also filed an application for conservatory orders brought by way of notice of motion dated 20th June 2014 which were both supported by an affidavit sworn by the 1st petitioner, Evans Tungu Nyambega on the same date. They also filed submissions dated 1st December 2014. The application for conservatory was dispensed with and this judgment therefore deals with the substantive petition.

The Petitioners' Case

3. In his affidavit in support of the petition sworn on 20th June 2014, the 1st petitioner states that he

and the 2nd petitioner entered into a business in early 2013 known as Trubizna Twenty Four Seven which was involved in offering car hire and taxi services. They opened a bank account No. 0100002837484 with the interested party, CFC Stanbic Bank, which they operated without any problems.

4. On or about 28th October 2013, they entered into a car hire agreement with a company known as Acer International Limited (Acer) under which they were to lease two vehicles to Acer for a period of four months from 28th October 2013 to 28th February 2014 at a sum of Kshs. 640,000/-. The 1st petitioner avers further that upon expiry of the contract period, Acer requested for an extension of the contract. The 1st petitioner deposes that they then asked Acer to pay the lease fees for the period of 28th October 2013 to 28th February 2014 being Kshs. 640,000/- and Kshs. 230,000/- being a deposit for extension and/or renewal of the lease.

5. According to the 1st petitioner, on or about 20th of March 2014, Acer made a transfer of Kshs. 870,000/- to their business account in the name of Trubizna Twenty Four Seven. He avers that on the same date, 20th March 2014, he went to CFC Stanbic Bank to withdraw the sum of Kshs. 850,000/- in order to pay for other services and to enable them run their business, and it was while at the Bank that the police were called and he was arrested and detained at K.I.C.C. Police Station. The 2nd petitioner was also arrested on the same day, and they were both charged on 21st March 2014 before the Chief Magistrate's Court in Milimani with the offence of conspiracy to commit a felony and attempted stealing.

6. According to the petitioners, the institution of the criminal case is an abuse of the court process as no investigations were done prior to the institution of the criminal case, in violation of Article 27 on equal protection of the law; that the 1st respondent mistreated the petitioners in instituting the proceedings without regard to the law; and that the violation of Article 27 arose in that the 1st respondent did not prosecute the principle party, Acer.

7. The petitioners, according to their Counsel, Mr Wesonga, operate a car hire and taxi business. They entered into an agreement with a 3rd party, Acer International, and the said Acer deposited into their account Kshs.870,000/-. They allege that they were arrested by the 1st respondent when they went to withdrew the money. It is their contention that it would be a violation of Article 27 if the respondent would fail to prosecute the person who forwarded the money or to look at the evidence that they have produced.

8. The petitioners further submit that there was a violation of Articles 29, 50 and 157(11) with respect to them. Mr. Wesonga submitted that there is an intention to abuse the legal process by instituting those charges, and he places reliance on the decision of the court in **HCC 406 of 2001 Republic v Kipngeno Arap Ngeny**. Mr. Wesonga submitted that the strength of the evidence produced by the respondents does not have probative values to maintain the charge, and that the process used by the investigating offices was not proper and did not give regard to the rights of the petitioners.

9. They therefore asked the court to grant the orders sought in their petition, noting that they were unable to access the funds held in their account, which had been frozen, and they are therefore unable to operate their business. The petitioners therefore ask the Court to allow their petition and grant the following prayers:

(a) A declaration that the institution, maintenance and prosecution of Milimani Magistrate's Court Criminal Case No. 418 of 2014 against the Petitioners herein is an abuse of the Criminal justice process and contravention of the Petitioners' Constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law.

(b) A declaration that the institution, maintenance and prosecution of the Milimani Magistrate's Court Criminal Case No. 418 of 2014 herein is oppressive, malicious and an abuse of the Court process.

(c) Judicial Review orders prohibiting the Respondent by themselves, their agents, surbodinates or otherwise from harassing, arresting, bringing criminal charges and/or prosecuting the Petitioners herein.

(d) An order of prohibiting continuance of Criminal Case No. 418 of 2014 at Milimani Magistrate's Court against the Petitioners herein.

(e) An order of certiorari or other appropriate order to quash the charges and proceedings against the Petitioner herein in Milimani Magistrate's Court Case No. 418 of 2014.

(f) A declaration that the Petitioners are entitled to damages as redress in respect of each of the above rights that were and continue to be breached by the Respondents.

(g) An order consequential to the above declarations quantifying the amount of damages in respect of each and every declarations and order granted.

(h) That the costs of this suit Petition be borne by the Respondent.

(i) Any other /further relief that this Honourable Court may deem fit to grant.

The Respondents' Case

10. The respondents oppose the petition and rely on the affidavit of Corporal Gerald Kanyithia dated 30th September 2014 and written submissions. Their case is that they are discharging their constitutional mandate in accordance with the provisions of Articles 157, 243 and 245.

11. In his affidavit in opposition sworn on 30th September 2014, No. 65854 Cpl. Gerald Kanyithia, a police officer attached to Banking Fraud Investigation Unit of Criminal Investigation Department, states that the Banking Fraud Investigation Unit deals with investigations of fraud cases within all the banks, companies, government ministries and parastatals in the Republic of Kenya. He further states that he is the investigating officer in Milimani Chief Magistrate's Court Criminal Case No. 418 of 2014 in which the petitioners, together with one Edward Nyaga, are charged with the offences of conspiracy to commit a felony, stealing by servant and attempted stealing.

12. He deposes that his office received a report of fraud from one Joel Kiarie, a security officer with CFC Stanbic Bank. The report was to the effect that a staff member, one Edward Nyaga, conspired with fraudsters and fraudulently transferred an amount of Kshs.26,095,650 to different accounts within the bank, including account No.010000283784 in the names of Trubizna Twenty Four Seven held by the petitioners. This account had been credited with Ksh 870,000 which, according to Cpl. Kanyithia's deposition, routes its source from the account of Sinohydro Corporation, a genuine customer, to Acer international Ltd, and finally to the petitioners' account.

13. He depones further that it was when the petitioners went to the bank to withdraw the amount that they were arrested together with the said Edward Nyaga, a member of staff at CFC Stanbic Bank who was suspected to have perpetrated the fraud. Cpl. Kanyithia further avers that investigations revealed a trail of the transfers, and that witness statements clearly show that the account of Acer International Ltd was fraudulently credited with Ksh.3, 510,120 from the account of Sinohydro Corporation.

14. Cpl. Kanyithia makes further detailed averments with respect to their investigations and what the investigations established which I need not go into here as they are not relevant for present purposes save to confirm that the respondents did carry out investigations into the matters leading to the arrest of the petitioners.

15. Through their Learned Counsel, Ms. Ngalyuka, the respondents submit that the petitioners have

not stated with precision nor demonstrated the violation or what they have suffered as a result of the violation, and have thus not met the test set in **Anarita Karimi v Republic [1979] KLR 154**

16. The respondents argue, further, that the allegation that the petitioners have been mistreated as the principal offender has not been charged is baseless. They assert that as averred in the affidavit of Cpl Kanyithia and also evident in the charge sheet, the 1st accused person is one Edward Nyaga.

17. To the petitioners' demand that this Court should consider the evidence and see its insufficiency, the respondents submit that this is not the right forum. It is their case that the right forum is the trial court which can hear and consider the merits and demerits of the evidence. The respondents rely for this proposition on the decisions in **Petition No 79 of 2012 Francis Mbugua vs Commissioner of Police and 2 Others** and **Judicial Review Misc. Appl. No 68 of 2011- Michael Monari vs Commissioner of Police**.

18. Finally, the respondents contend that being constitutional bodies, the Court can only interrogate their acts if it is demonstrated that they have acted in contravention of the Constitution. It is their submission that the petitioners have not demonstrated how the respondents have acted in violation of the Constitution; that the respondents have acted strictly in accordance and within their legal mandate; and there is nothing to show that the respondents have acted against the public interest or abused the court process.

The Case for the Interested Party

19. The interested party also opposed the petition. It relied on the affidavit sworn by Joel Kiarie on 27th October 2014 and submissions dated 15th January 2015. In his affidavit in opposition to the petition sworn on 27th October 2014, Mr. Joel Kiarie, an employee of the interested party working as a forensic investigator, confirms that the petitioners were account holders with the Bank under the name Trubizna Twenty Four Seven. Mr. Kiarie further deposes that on 20th March 2014, the Nyali Branch of the Bank received instructions from David Onyango Moyi, holder of account number 0100002886523 to transfer Kshs.8,100,000, to an account number 01050015010182701 held by Ayden Group Ltd at Ecobank, and the bank requested the customer to submit documentation in support of the transaction before it could be processed.

20. Upon checking the source of the funds in the account to be transferred, a bank official noted that the funds in the account originated from a transfer of Kshs. 8.5 Million from Standard Media Group's account. Mr. Kiarie makes further depositions with regard to the investigations that the interested party undertook which revealed further suspicious transactions, among them from Standard Media Group account and Sinohydro Corporation, conducted between 8.56 a.m and 9.03 a.m on 20th March 2014, resulting in fraudulent transfers of Kshs 26,095,650.

21. Further investigations by the interested party, according to Mr. Kiarie, led to the conclusion that the suspicious transactions had been undertaken by Mr. Edward Nyaga, a teller at the interested party's Kenyatta Avenue Branch Nairobi, who had also been in mobile telephone communication with the petitioners. The interested party then reported the matter to the police, leading to the arrest of the petitioners.

22. In his submissions on behalf of the interested party, Learned Counsel Mr. Wetangula confirmed that the petitioners were account holders with the interested parties. The bank, in exercise of its mandate, noted that there were suspicious transaction involving various accounts, among which was the petitioners' account. An evaluation of the system established that there was an employee by the name Edward Nyaga, the 1st accused in the criminal case, who was suspected of playing a role in the suspicious transactions. According to the interested party, in order to protect its customers who were ensnared in the transactions by the petitioners and the said Nyaga, it reported the suspicious accounts to the police for their action.

23. The interested party submits that its actions in reporting suspicious criminal activities can not

amount to violation of constitutional rights. While conceding that this Court has jurisdiction to protect the rights and freedoms of individuals and to supervise the conduct of inferior courts and tribunals, it submitted that the Court can only interfere in the clearest of cases. Mr. Wetangula submitted that cogent evidence has to be placed before the Court demonstrating violation of fundamental rights or abuse of the criminal justice system, but no such evidence had been placed before the Court. It prayed that the petition be dismissed.

The Petitioners' Rejoinder

24. In his response to the submissions by the respondents and the interested party, Mr. Wesonga contended that the affidavit filed by the interested party did not include the petitioners' account and that their account was not suspicious and did not have suspicious activities. He contended, further that the funds in dispute had been transferred by a third party, Acer International Ltd, but nobody from the said company had been charged alongside the petitioners. He argued on behalf of the petitioners that the failure by the respondents to charge anyone from Acer was capricious, arbitrary and in violation of their rights. He urged the Court to allow the petition with costs.

Determination

25. The crux of the petitioners' case, as I understand it from their pleadings and submissions, is that there has been a violation of their constitutional rights in their being charged with criminal offences in Criminal Case No. 418 of 2014. Their contention is that there were no investigations carried out, and that there was discrimination against them as no-one from a company known as Acer International Limited was charged with them.

26. Let me begin by reiterating what this Court has been saying over and over again: the institution of criminal charges is not in itself a violation of constitutional rights. As I stated in **High Court Petition No 482 of 2013 (Consolidated with Petition No 483 of 2013) Weldon Kechie Langat & Another -vs- The Director General of Police & Another:**

“...the fact that criminal charges are preferred against a person is not a violation of constitutional rights. The criminal justice system is underpinned by the Constitution, with safeguards placed in the Constitution and statute to ensure protection of the rights of accused persons. Further, the discretion on when and whether to bring criminal proceedings against a party is vested in the Director of Public Prosecutions, who under Article 157(10), must be independent and not subject to the direction or control of any party.”

27. In the present case, as is apparent from the summary of the averments by the parties in this matter, investigations were carried out by the police, and internally by the interested party, which led to the office of the Director of Public Prosecutions (DPP) being satisfied that there was sufficient evidence to charge the petitioners with criminal offences. It is not for this Court to determine when, and against whom, the office of the DPP should prefer charges. Further, it cannot be validly argued that there is discrimination against one party on the sole reason that the accused person, such as the petitioners, are of the view that others should have been charged with them.

28. Again, as has been emphasized in a number of cases by the High Court, the office of the DPP is constitutionally mandated to institute and undertake all prosecutions in Kenya. As is clearly stipulated under Articles 157(10) and (11), the constitutional power of prosecution is vested in the DPP, and cannot be interfered with as long as it is carried out in accordance with the Constitution. The Constitution provides as follows with regard to the exercise of power by the DPP:

(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.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

29. As the Court (Majanja J) held in **Thuita Mwangi & 2 Others -vs- The Ethics & Anti-Corruption Commission & 3 Others Consolidated Petitions No. 153 & 369 of 2013**, the Court can only intervene in the exercise of the DPP's power of prosecution in very limited circumstances:

"[43] The Court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of court process..."

30. This petition also contains an implicit invitation to the Court to do the work of the trial court by assessing the evidence against the petitioners to weigh its sufficiency. I need do no more than cite the words of Warsame J (as he then was) in **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011**:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

31. In the circumstances, I find no merit in the petition, and it is hereby dismissed with costs to the respondents and interested party.

Dated, Delivered and Signed at Nairobi this 6th day of May 2015

MUMBI NGUGI

JUDGE

Mr Wesonga instructed by the firm of Wesonga & Co. Advocates for the petitioner

Ms Ngalyuka instructed by the Director of Public Prosecution

Mr Wetangula instructed by the firm of Mohammed Muigai & Co. Advocates for the interested party