



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
WINDING UP CAUSE NO 22 OF 2011

In the Matter Of The Companies Act, Cap 486 Of The Laws Of Kenya

AND

In the Matter Of Winding Up of Pepachris Investments Limited

THERESA NYAMBURA THARA.....APPLICANT

VERSUS

MOSES NJOROGE THARA.....1ST RESPONDENT

SUSAN NJERI MIMI THARA.....2ND RESPONDENT

GEORGE THARA.....3RD RESPONDENT

NAPIER HOLDINGS LTD.....4TH RESPONDENT

RULING

Perjury, forgery and uttering false documents

[1] A request has been made to this court to:-

- a. Strike out and or expunge from the record the affidavit sworn on 5th October 2011 by the 1st Respondent herein together with the annexures attached thereto;*
- b. Recommend that the 1st Respondent to be prosecuted for perjury, uttering false documents and forgery; and*
- c. Condemn the 1st Respondent to pay costs of this application.*

[2] The above orders are sought in a Chamber Summons application dated 30th May 2014 and filed on 3rd June 2014. The application is expressed to be brought under the provisions of Article 159 of the Constitution, Order 19 Rule 6 and Order 51 Rule 10(1) and (2) of the Civil Procedure Rules, Sections 1A,

1B, 3 and 3A of the Civil Procedure Act, Section 11 of the Oaths and Statutory Declarations Act, Sections 347(a), (d)(i), 348 and 351 of the Penal Code and Section 222 of the Companies Act.

[3] The application is premised on the following grounds:-

a) **That the 1st Respondent willingly and knowingly swore an affidavit on 5th October 2011 and filed it before this Court and annexed documents that he had falsified and claimed to have been signed by the Petitioner. These documents are forgeries and are the subject of a criminal complaint by the Petitioner and under investigation by the Director of Public Prosecution. The signature on those documents is a forgery too. Therefore the Petition cannot proceed on the forged documents on record, for that will greatly prejudice the Petitioner. These allegations are affirmed in the averments in the affidavit of Theresa NyamburaThara sworn on 30th May 2014.**

b) **But, despite reporting the alleged crimes to the police and the Director of Public Prosecutions, there has been failure and or negligence in conducting investigations and prosecuting the 1st Respondent. Further, as Petitioner intends to prosecute the Winding Up Petition pending the outcome of the Director of Public Prosecution and the police investigations, it is only fair that that the impugned documents are expunged from the record and a recommendation is made for prosecution of the 1st Respondent and for perjury, fraud and uttering false documents.**

Respondents: Give us a hearing

[4] The 1st and 4th Respondents filed submissions dated 26th February 2015 in which they argued that the Petitioner is seeking summary determination of the Petition before the documents and evidence in issues have been subjected to scrutiny of cross examination in order to determine the veracity of their contents. The 1st Respondent relied on the case of **D T Dobie & Co. (K) Limited v Joseph Mbaria Muchina & Another (1980) eKLR** and **Mombasa Civil Suit No 187 of 2012 Fredrick Saisi Ishaga v Zenith Media Services & Another**. According to the 1st Respondent, this application is an attempt to them the right to a fair trial. They argued that the allegations of forgery herein are also the subject of a criminal complaint which is still pending. Therefore, granting the request in the application will be a violation of the provisions of Articles 48 and 50(1) of the Constitution.

DETERMINATION

[5] I have considered all the arguments presented before me and the applicable law on the matter. The major ground of the application is that the documents and evidence placed before court by the 1st Respondent are forgeries and should be expunged from the record. Apart from expunging the impugned documents, the Petitioner has made another request; that, the court recommend the prosecution of the 1st Respondent for forgery, uttering false documents and perjury. The Petitioner claims that the 1st Respondent forged her signature. In the circumstances, the Petitioner is convinced that these documents should not be produced as evidence against her in the Petition.

[6] From the record, it is evident that the Petitioner had filed a complaint with the DCI on the subject of this application. The course taken to report the matter to the police is most appropriate and I do not think the court should interfere with the said investigation by issuing orders sought herein. The allegations of forgery will need intense and professional forensic examination of the documents, which, the National Police as the organ mandated to carry out such criminal investigations should undertake. I should also state that, there is absolutely no need of a recommendation from the court for investigation or prosecution of the 1st Respondent for alleged forgery, perjury and fraud because; first, there are already criminal investigations going on; and second, the court has no power to order a prosecution. The Director of Public Prosecution under article 157 of the Constitution has prosecution powers on criminal offences. I note, however, that the Applicant claims that the investigations have taken a snail-speed or have almost halted;

that is regrettable, but this is not an application for orders of mandamus and I hope the criminal investigations will be carried out expeditiously to their logical conclusion by the DCI. And, should the investigations reveal an offence; the Office of the Director of Public Prosecutions will deal with the matter within its constitutional stature of an independent office free from the control or direction of any person. Needless to say; the result of the said investigations will also be useful material in this case if the Applicant intends to rely on it.

[7] I will now turn my attention to the request of expunging the affidavit in question. As I have stated and the Applicant has confirmed this fact, the allegations of forgery of the documents annexed to the affidavit in issue are yet to be fully investigated. The court does not have any forensic report on the documents or advantage of evidence to show the documents are forgeries. My discretion to strike out the affidavit herein should, therefore, be exercised with extreme caution. In the absence of sufficient evidence of forgery, the only means within the court system to prove and determine these claims of forgery is through a full-scale hearing of the petition. In the circumstances, to strike out the affidavit evidence will not only be usurping the power of the trial court in a summary procedure without cogent evidence, but also drawing the sword of the Damocles upon the Respondents' case without any or legal basis. Accordingly, I decline the application. I will not make any order as to costs given the nature of the claims involved and the circumstances of the case. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 2nd day of June 2015.

F. GIKONYO

JUDGE