



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO.17 OF 2012

ASHOK AGGARWAL

ATTIN AGGARWAL.....PETITIONERS

SUNNY AGGARWAL

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE COMMISSIONER OF POLICE

THE DIRECTOR CRIMINAL INVESTIGATIONS.....RESPONDENTS

THE ATTORNEY-GENERAL

THE CHIEF MAGISTRATE NAIROBI LAW COURTS

AND

BOSTONE INVESTMENT LIMITED INTERESTED PARTY

J U D G M E N T

1. The applicants petition dated 19/12 prays for the following orders:
 1. This court be pleased to quash the warrants of arrest issued on 17/2/12 by the Chief Magistrate's Court in Nairobi at Kibera vide Criminal Case No.6424/202 and at the institution of criminal charges, prosecution and committing the applicants to trial on the basis of the cheques issued by the petitioners and later stopped before their due dates but banked by the interested party herein.
 2. A declaration do issue that the decision by the Respondents to arrest the petitioners on the basis of the cheques issued and stopped before their due dates and issuing warrant of arrest against the petitioners without informing them of the existence of the criminal charges against them pending in court amounts to a contravention of the petitioners fundamental rights as guaranteed under Articles 26(3), 22(1), 23(1) and (3), 24, 25, 27(1) and (2), 28, 29, 35(1)(2) of the Constitution of Kenya 2010 and a nullity in law.
 3. Costs of this petition.

PETITIONERS CASE

2. The supporting affidavits of the petitioners sworn on 19/12/12 shows that they did enter into an

agency agreement with the interested party on 21/12/11 in which they were to sell on its behalf goods namely tyres. The said truck tyres were to be supplied on credit and later paid. During such transaction the applicant issued post dated cheques numbers 29.11.2011, 12.12.2011, 22.12.2011, 23.12.2011 and 5.1.2012. Cheque No.000113 dated 29.12.11 and 000114 dated 12.12.11 were replaced by cash payments.

3. The applicants avers that the tyres which were supplied to them were later discovered to be of low quality and some of them were returned by the customers. They did inform the interested party and they proceeded to stop the payments of the post dated cheques. Nonetheless the interested party banked the cheques on the due dates despite the applicants advice.

4. As a consequence of the above action the cheques were dishonoured. The interested party then took a criminal angle by reporting to the police who proceeded to seek warrants of arrest against the applicants. The warrants were issued by the 5th respondent, which prompted the applicants to file this suit. Further the interested party proceeded to file a civil suit at the High Court Nairobi against the applicants demanding the payment of Kshs.17,593,602 together with costs and interest.

RESPONDENTS CASE

5. The interested party did not file any response to the petition. The only party that responded was the 1st respondent through replying affidavit of one Chief inspector Samuel Bett who deponed that he was carrying out the investigation after receiving complaints from the interested party's Directors. Apart from narrating the business relationship between the applicants and the interested parties the respondents stated that they sought warrant of arrest from the court as they believed that the petitioners intended to flee out of Kenya and that they had refused to travel to Nairobi to have their specimen signatures taken. In short all that they were doing was within the mandate of the law and clearly in compliance with Section 193(A) of the Criminal Procedure Code.

ANALYSIS AND DETERMINATION

6. Having perused the petition herein as well as the rival affidavits and the written submissions by the learned state counsel, the principal issue to determine is whether there is any element of criminality in the understanding between the petitioners and the interested party which warrants an intervention of the respondents. Its worthy to note that the interested party did not oppose the application and therefore its the 1st respondent who took up that task.

7. First of all there is no dispute that the entire transaction is based on an agency agreement signed by the parties dated 21.12.2011. Under paragraph 5 thereof the petitioners were to enjoy a credit facility of upto 60 days and paragraph (iii) thereof stated as follows:

“(iii). In case of bouncing cheques the Dealer shall pay the principal all related bank charges together with 5% interest rates accumulated monthly.”

8. In essence therefore, the wholesome reading of the Dealership agreement captured all that the parties intended. The cheques according to the annexures were stopped and not dishonoured. The reason for that was because the tyres were substandard and therefore did not meet the expectations of the petitioners who alleged further that the same were returned by some customers. This assertion was not controverted by the interested party.

9. Does this therefore constitute a criminal act? Infact the interested party has gone ahead to file a civil suit claiming the value of the goods on the strength of the cheques which were dishonoured.

10. Is there any criminal offence by stopping the cheques? To my understanding the cheques were not dishonoured but were stopped and even the two cheques that bounced were replaced, a fact not disputed by the interested party. Further in acknowledging that this was a civil and commercial transaction, the interested party has gone a head to file a civil claim demanding the value of the delivered tyres.

11. Without going into the other merits of the petition I find that this is clearly a case where the police are being used to abuse its prosecutory powers. I find this conclusion sound for a single fact that the interested party choose not to oppose this petition yet it is the supposed aggrieved party.

The provisions of Articles 21 and 22 of the Constitution on the Bill of Rights are clear. I find the action of the respondents clearly in breach of the same.

12. In conclusion I shall allow the petition as prayed with cost to the petitioners.

Dated and delivered this 6th day of July, 2015.

H. K. CHEMITEI

J U D G E