



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS APPLICATION NO.19 OF 2007
IN THE MATTER OF MACHAKOS MAGISTRATES CRIMINAL CASE NO 1449 OF 2013

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SENIOR PRINCIPAL MAGISTRATES

COURT, MACHAKOS.....1ST RESPONDENT

THE INSPECTOR-GENERAL OF POLICE2ND RESPONDENT

AND

GEORGE LEMEIN OLE MUSEI1ST INTERESTED PARTY

THOMAS KILONZO MATHEKA2ND INTERESTED PARTY

ALLY NASSOR.....3RD INTERESTED PARTY

EX-PARTE RUPA COTTON MILLS (EPZ)

LIMITED.....EX-PARTE APPLICANT

JUDGMENT

Introduction

The *ex parte* Applicant (hereinafter referred to as “the Applicant” is Rupa Cotton Mills (EPZ) Ltd, a limited liability company that is operating a cotton mill. On 28th November 2013, the Applicant purchased 260 bales of cotton from George Lemein Ole Musei t/a Tokiam General Stores at a total price of Kshs. 8,478,400/=, and paid Kshs. 1,000,000/= as deposit. A few days later, the Applicant was contacted by the Kenya Police and informed that the cotton had been stolen by the aforesaid George Lemein Ole Musei and one Thomas Kilonzo Matheka, who are the 1st and 2nd Interested Parties herein. The said cotton was alleged to have been stolen from Ally Nassor, the 3rd Interested Party, and who is a director of Bibiti Ginneries Ltd that operates a cotton ginning facility in Mwanza, Tanzania and which is the company claiming the said cotton.

The police investigations culminated in the prosecution of the 1st and 2nd Interested Parties for the offence of stealing in Machakos Criminal Case number 1449 of 2013. On 6th February, 2014 when the matter was due for hearing the court withdrew the charges and ordered the cotton bales be released to one the 3rd Interested Party. The Applicant thereupon commenced these judicial review proceedings after leave was granted to do so by this Court on 11th February 2014.

The Applicant in its substantive application by way of Notice of Motion dated 28th February 2014, is seeking the following orders of judicial review:

- a) An order of certiorari to quash the orders of the Senior Principal Magistrate of 6th February, 2014 in Machakos C.M. Cr.C.No. 1449/2013.
- b) An order of prohibition restraining the Inspector – General of Police and all officers under him from enforcing the orders of the Senior Principal Magistrate of 6th February, 2014 in Machakos or in any way ordering the Applicant Company to release the subject cotton.

The Applicant in addition prayed that the costs of this suit be borne by the Respondents and interested parties. The said Notice of Motion was supported by an affidavit sworn on 28th February 2014 by Prabodh K. Shah, the Managing Director of the Applicant, and filed in court together with the application on 3rd March 2014.

The Respondents and 1st and 2nd Interested Parties did not participate in these proceedings despite of service of the court process on them. The 3rd Interested Party filed a Replying Affidavit he swore on 29th April 2014 and filed in Court on 5th May 2014. The following are the respective cases of the Applicant and 3rd Interested Party.

The Applicant's Case

The Applicant's case is as set out in its aforesaid Notice of Motion and supporting affidavit, and in written submissions filed in Court on 21st January 2015 . The Applicant avers that the Honourable Magistrate court acted in excess of jurisdiction and /or without jurisdiction in that:-

- a) No reasons were given to justify the withdrawal of charges and/or release of the cotton bales to one Ally Nasoor.
- b) No justification or application was made either by the prosecution or the accused to justify the orders made.
- c) The cotton bales had not as yet been produced as exhibits before the court as no prosecution witness had adduced any evidence and consequently the court lacked jurisdiction to deal with the cotton bales that it wrongly referred to as exhibits.

It was contended by the Applicant that the order of release has far-reaching effect as it fails to take into account the applicant company's interest in the cotton bales, and that it has legitimate claim and lien to the cotton whose proprietorship can only be adequately determined in the civil court.

The Applicant further stated that the cotton was held at the Applicant's company's go downs for a month during which no operation took place as efforts were made to source cotton from other alternatives, yet employees had to be paid in excess of Kshs. 2,928,287/= as salaries. Lastly, the Applicant claimed that it is entitled to storage charges for three months amounting to U.S 15,000 dollars.

According to the Applicant, the criminal proceedings before the magistrate's court was an attempt to avoid the determination of proprietorship and of which party should bear the losses incurred by it. Further, that since the court's determination, police officers have been trying to force the company to

release the cotton to the 3rd Interested Party hence the need for court protection.

The Applicant submitted that that the Senior Principal Magistrate acted substantively and procedurally in excess of his jurisdiction in the determination of the criminal case before him. He relied on the decisions in **Republic v Kenya Revenue Authority & Another ex-parte Peter Wainaina Githu T/A Quickserve Cargo Logistics [2004] eKLR** and **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001**, on the salient principles governing the judicial review process, and submitted that the criminal court overstepped its mandate in determining the case before it in various ways.

Firstly, that contrary to established practice, no reasons were given to justify the withdrawal of the charges against the 1st and 2nd Interested Parties and the release of the cotton to the 3rd interested Party. Secondly, that the criminal court proceeded to determine the issue of ownership of the cotton despite the fact that the issue before it was whether the cotton had indeed been stolen, and without the canvassing the criminal element. Thirdly, that the bales of cotton were not produced in court and there was no proper identification of the goods in question and at no point were they tendered into evidence.

However, that the criminal court wrongly referred to the court as “exhibits” despite the fact that no evidence had been adduced to prove that the goods were indeed the subject of the criminal investigation. Fourthly, that the criminal court made a determination on facts that enjoined the Applicant who was not a party to the suit. Further, that in determining the issue of the ownership of the cotton, the court ought to have given the Applicant an opportunity to be heard and in failing to do so, the trial court acted in excess of jurisdiction and in breach of the rules of natural justice. Reliance was placed on the decision in **Msagha v Chief Justice & 7 Others, (2006) 2 KLR 553** in this regard.

Lastly, it was argued by the Applicant that the true proprietorship of the cotton can only be determined through civil proceedings, and that the prayers sought ought to be granted to enable the parties pursue the claim in the proper forum, which is the civil courts.

The 3rd Interested Party’s Case

The 3rd Interested Party filed written submissions on 4th May 2015 in addition to his replying affidavit. He deponed that Prabodh K. Shah aka Prabodh Veshaulal Zaverchan Shah who claims to be a director of the Applicant is evasive about his real name and identity; and that said director never bothered to verify the true ownership of the cotton in dispute or to demand documentary evidence of the origin and ownership of the cotton. Further, that the said director never produced any credible documentary evidence of any payment made for the said cotton.

The 3rd Interested Party stated that the Applicant was attempting to address a business transaction gone wrong through the application of a public law remedy, which is an inappropriate and unavailable course of action. Further, that contractual disputes between the Applicant and third parties cannot form the basis of a judicial review suit, which is a public law remedy available only for the resolution of matters under the purview of public law.

The 3rd Interested Party gave a lengthy account of the circumstances in which the bales of stolen cotton that are the subject matter of this suit were stolen. In summary he stated that his company loaded 2 truck loads of cotton bales from Meatu–Simiyu which were destined for Arusha at the Sunflag company premises, and were expected to be delivered after 2 days. However, that the said cargo had not been delivered after 7 days, nor could the trucks or their cargo be traced.

The 3rd Interested Party also gave a detailed account of the investigations he made thereafter, through one Ismail Abdi who works at Namanga and who informed him that the cotton was seen being driven from Tanzania to Kenya on 20th November, 2014 in two trucks. However, that it was not until the 27th November, 2013 when he got information that bales of cotton suspected to have been stolen had been traced to Athi River in Kenya. The said investigations culminated in a report to the police at Namanga

and Athi River in Kenya. The 3rd Interested Party stated that upon interrogation he informed the police that he could positively identify the cotton which he had reported as stolen, and which he suspected was being stored at the Athi River EPZ compound.

According to the 3rd Interested Party, the EPZ officials confirmed that 260 bales of cotton had arrived by way of 4 trucks on the 25th November, 2013, and was delivered to the premises of the Applicant herein, Rupa Cotton Mills (EPZ) Limited. Further, that the registered owners of the above vehicles according to the police were Joseph Ndolo Mutua & Joseph Ngele David, the 1st and 2nd Interested Parties.

The 3rd Interested Party accompanied by the police then went to the premises of Applicant, and were eventually shown the bales of cotton, a KRA Entry, the LPO and Invoice which were submitted to the police by one Tinu Shah at the Applicant's premises. The 3rd Interested party also stated that after examination of the said documents, and others produced by the 2nd Interested Party as alleged proof of ownership and importation of the cotton from Tanzania through Taveta border station, he was of the view that the documents were not genuine and were not the regular importation documents, but were forged to provide cover for the movement of their stolen 260 bales of cotton to the Applicant's warehouse at the EPZ compound at Athi River. The 3rd Interested Party stated that he thereupon recorded his statement with the police.

Lastly, the 3rd Interested Party contended that the value of their stolen 260 bales of cotton goods is US\$ 106,000.00 but their claim is for US\$ 136,760,00 including the cost of transportation to Sunflag and Arusha and the costs expended in investigation and recovery. He was of the opinion that the Applicant's reasons for seeking the prerogative orders of Judicial review are not valid and/or true.

The 3rd Interested Party in his written submissions contended that having satisfied the police by producing evidence to show that the 260 bales of cotton was stolen by the 1st and 2nd Interested Party and handled by the Applicant, and further knowing the perishability of the cotton and the urgent need to have the same processed before it perished, he was amenable to the 1st and 2nd Interested Parties' proposals to have the criminal case dropped and the cotton bales returned to Tanzania to the custody of the owner, Bibiti Ginneries Limited.

Further, that it is also clear from the facts and from the face of the record that even if one was to be magnanimous and attempt to overlook the criminal behavior and acts of the Applicant in its purchase and handling of stolen goods, then at the very least, this matter is at its core a purely commercial dispute between the Applicant and the 1st and 2nd Interested Parties. That this being the case, it is a well-established principle of law that contractual disputes between the Applicant and third parties or any other parties cannot form the basis of a judicial review suit, which is a public law remedy.

Reliance was placed on the decisions in **Republic v Registrar-Administration, Maseno University & another ex-parte Dorothy Olum, (2014) eKLR** and **Republic v Attorney General & 2 others ex-parte Tawai Limited, [2011] eKLR** in this regard. It was contended that even if the orders are granted in the present case, there will be need to institute civil proceedings to determine if the Applicant is entitled to proprietorship of the 260 cotton bales.

It was also submitted that the Applicant who was never a complainant, and never participated in the hearing in the Machakos Magistrates Criminal Case No. 1449 of 2013, had failed to establish that the trial magistrate upon request by the prosecution lacks jurisdiction to allow the withdrawal of a claim and order a return of the 260 cotton bales to the complainant in the Criminal proceedings.

Further, that the magistrate in so acting followed the correct procedure as provided by the law, and there was thus no procedural impropriety, wrong consideration or breach of natural justice to warrant the judicial review orders sought, as the 3rd Interested Party sought to terminate the criminal proceedings

against the 1st and 2nd Interested party in order to save his perishable cotton wool. The 3rd Interested Party relied on the decision in **George Taitumu v Chief Magistrates Court, Kibera & 2 others [2014]eKLR.**

According to the 3rd Interested Party, it is trite law that he who comes to equity must come with clean hands. The orders of certiorari and prohibition sought are equitable remedies and therefore cannot be granted to persons with tainted hands. It was alleged in this regard that the Applicant had knowingly purchased goods which were stolen from Bibiti Ginneries Limited and in respect of which tax has been evaded when imported from Tanzania, as is evidenced by the great lengths it has gone to falsify documentations. Reliance was placed on the decision of the Court of Appeal in **Kenya Pipeline Company Limited V Glencore Energy (U.K) Limited, [2005] eKLR.**

The Issues and Determination

I have considered the pleadings and submissions made by the Applicant and 3rd Interested Party. The first and foremost issue that must be determined arising from the arguments made therein is whether the judicial review remedies sought are available to the Applicant. The nature and scope of judicial review was addressed in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** as follows:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

Likewise, in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The purpose of the remedy of judicial review is therefore to ensure that the individual is given fair treatment by the authority to which he has been subjected, but not to substitute the opinion of a Court that is seized with judicial review proceedings for that of the authority constituted by law to decide the matter in question. The proper avenue for such a result is the appellate process and not judicial review proceedings.

In the present application, the decision sought to be quashed was an order by the P.N. Gesora SPM in The Chief Magistrate's Court at Machakos , Criminal No. 1449 of 2013 given on 6/2/2014 that "the matter is hereby withdrawn under section 204 of the Criminal Procedure Code and that the exhibits (cotton bales) be released to the complainant (All Nasoor Ally). Both accused are acquitted unless otherwise lawfully held."

The Applicant alleges that the criminal court overstepped its mandate by not giving reasons for withdrawal of the charges, by proceeding on the issue of ownership of the cotton bales without the production of the said cotton in court, and by enjoining the Applicant who was not a party in the suit. I must respectively point out that all these aspects go into the merit of the decision by the learned magistrate, and particularly as to whether it was a right or wrong decision. This is a question that can only be determined on appeal.

In addition the Applicant did not provide any evidence of the processes or proceedings undertaken prior to this decision to support the allegations he made. Therefore, there is no basis for this court to determine if in reaching this decision the learned magistrate acted outside and/or in abuse of power; was unreasonable; acted in bad faith or in breach of the rules of natural justice; took into account irrelevant consideration; and/ or made an error on the face of the record, which is the proper province for judicial

review proceedings.

It is noteworthy in this regard that the law empowers the learned magistrate to make the decision that is sought to be quashed. Section 204 of the Criminal Procedure Code provides that “if a complainant, at any time before the final order is passed in a case under this part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused”.

I also agree with the 3rd Interested Party that the Applicant, not being a complainant or accused person in the criminal suit, and not having brought any evidence of its participation in the said criminal suit cannot claim to be affected by the decision made in the criminal suit. It is also noteworthy that a complainant according to Section 59 of the Criminal Law (Amendment) Act No. 5 of 2003 is a person who lodges a complaint with the police or any other lawful authority.

I do recognize in this regard that there is wide latitude given to aggrieved persons who have a personal or proprietary interest in the decision of an administrative authority to bring judicial review proceedings arising from that decision. However, it is my opinion that in the enforcement of criminal law, the only aggrieved parties are the complainant, public prosecutor and the accused, for reasons that firstly, they are the only ones whose interests are directly affected by the criminal proceedings. Secondly, any other indirect interests in criminal proceedings are in my view adequately taken care of, and represented by the public prosecutor who is the state's and public's representatives in criminal proceedings.

Finally, both the Applicant and 3rd Interested Party are in agreement that it is only civil proceedings that can address the issue of ownership of the disputed cotton bales with finality. The Applicant also clearly stated that he bought the disputed cotton from the 1st and 2nd Interested Parties. His remedy therefore can only be a contractual one as against the 1st and 2nd Interested Parties, in the event that the goods are found to have been stolen, and/or that the 1st and 2nd Interested parties have no good title to the same.

In the premises, I find that the remedies of certiorari and prohibition sought are not merited for the foregoing reasons, and the Applicant's Notice of Motion dated 28th February 2014 is accordingly dismissed with costs to the 3rd Interested Party.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF OCTOBER 2015

P. NYAMWEYA

JUDGE