



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 45 OF 2015

REPUBLIC.....APPLICANT

VERSUS

O.C.P.D. NAIROBI COUNTY POLICE HEADQUARTERS.....1ST RESPONDENT

O.C.P.D. KILIMANI POLICE STATION.....2ND RESPONDENT

O.C.P.D, CENTRAL POLICE STATION.....3RD RESPONDENT

IN-CHARGE C.I.D. NAIROBI COUNTY

POLICE HEADQUARTERS.....4TH RESPONDENT

IN-CHARGE C.I.D. KILIMANI POLICE STATION.....5TH RESPONDENT

IN-CHARGE C.I.D. CENTRAL POLICE STATION.....6TH RESPONDENT

IN-CHARGE FLYING SQUAD

PANGANI POLICE STATION.....7TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....8TH RESPONDENT

ATTORNEY GENERAL.....9TH RESPONDENT

EX-PARTE

MARY GATHONI NDUNGU

JUDGMENT

1. Through the notice of motion application dated 19th February, 2015, the ex parte Applicant, Mary Gathoni Ndungu prays for orders as follows:

“1. That the application herein be certified urgent and be heard ex parte without serving any notice to the respondents herein in the 1st instance.

2. That the court do declare that the Respondents' action of summoning, seeking to arrest and prefer criminal charges against the Applicant on a purely Civil matter is illegal and should henceforth be stayed and reversed pending the hearing and determination of this application and suit.
3. That an order of mandamus does issue compelling the 7th Respondent to refund the police cash bail deposited with them by the applicant pending the hearing and determination of this application.
4. That an order of mandamus does issue compelling the 7th Respondent to refund the police cash bail deposited with them by the applicant pending the hearing and determination of this suit.
5. That the court do declare that the action by the 7th Respondent to continue retaining the Applicant's money in form of cash bail as illegal and henceforth should be reversed pending the hearing and determination of this application and suit.
6. That an order of judicial review do issue against the Respondents from preferring criminal charges on a matter that is purely civil pending the hearing and determination of this application and thereafter the suit.
7. That the court do declare that the action and/or decision of the respondents to investigate the complaint against the applicant and their subsequent findings and recommendations if any to charge the applicant with the disclosed charge of obtaining money by false pretence is unlawful and the same should be quashed pending the hearing and determination of this application and suit.
8. That this Honourable Court be pleased to grant Anticipatory free Bond or Bail before arrest and charge, if any, to the Applicant for any Bailable offence that may be preferred against her by the respondents."

2. The 1st to 7th respondents are officers in charge of the named police stations within Nairobi County. The 8th Respondent is the Director of Public Prosecutions and the Attorney General is the 9th Respondent.

3. The Applicant's case is that she is the proprietor of Subuiga General Merchants Co. Ltd. and on various dates between 24th February, 2014 and 1st August, 2014 she entered into investment agreements with three people namely Lilian Sheunda Wakhule, Eunice Wandia Mailu and Isaac Ochieng' Mboya. She averred that she later paid back the various amounts invested in her company by the named investors.

4. However, on 29th January, 2015 she was arrested by C.I.D. officers from Kilimani Police Station and compelled to issue cheques to the said investors. Further, that on 31st January, 2015 she was arrested by officers of the Flying Squad from Pangani Police Station and Nairobi Area Police Station who locked her in the boot of the car and drove around Nairobi City before ordering her to produce her original title deed, executed blank transfer forms, and copies of her national identity card & PIN certificate and passport size photographs. She was required to produce the documents on 10th February, 2015. She was released on cash bail of Kshs.20,000/=.

5. According to the Applicant, although the dispute between her and the investors is civil in nature, she has continually been harassed, threatened and intimidated by the respondents. Further, that one Flying Squad officer from Pangani Police Station, whose name she has provided, has continually threatened her through telephone calls.

6. In the statutory statement dated 10th February, 2014, the Applicant asserted that she stands to suffer irreparable damage if the decision of the respondents is not reversed by the Court. Further, that the actions of the respondents were unlawful and malicious. In addition, it was her contention that the dispute between her and the investors is civil in nature, capable of being pursued through a civil claim.
7. The respondents opposed the application through a replying affidavit sworn on 6th March, 2015 by Police Constable Billy Kenei of the Flying Squad Unit of the Directorate of Criminal Investigations. In summary, he averred that he is the investigating officer in **Nairobi Milimani Chief Magistrate's Court Criminal Case No. 242 of 2015** in which the Applicant is charged with obtaining money by false pretence.
8. The respondents' case is that the complainant one Isaac Ochieng' Mboya reported on 29th January, 2015 that the Applicant had obtained from him Kshs.6.6 million on the pretence that she had a Local Purchase Order (LPO) from a company called CATIC International Construction Company Limited. The Applicant asked the complainant to finance the projects of her company, Subuiga General Merchants so that he could be made a director of the company.
9. The complainant did indeed finance the Applicant's company by supplying building materials to various sites within Nairobi. After sometimes, the complainant realised that he had not been made a director of the Applicant's company. Upon further enquiries, the complainant also learned that a company by the name Catic International Construction Company Ltd did not have offices at Jomo Kenyatta International Airport as had been alleged by the Applicant. When he demanded his money, the Applicant threatened him. The complainant thereafter reported the matter to the police.
10. Constable Kenei deposed that on 31st January, 2015 they managed to arrest the Applicant and escorted her to their offices at Pangani Police Station where she was later released on cash bail of Kshs 20,000/= and asked to report for plea at Milimani Law Courts on 10th February, 2015. She was informed that she was going to be charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code.
11. According to Constable Kenei their investigations revealed that the Applicant had not been issued with any LPO from CATIC International Construction Company Ltd and there was no such company based at Jomo Kenyatta International Airport as had been claimed by the Applicant. The police came across a company called China National Aero-Technology International Engineering Corporation (CATIC) which denied any connection with the Applicant.
12. Investigations also revealed that the postal address that had been indicated in the LPO as belonging to CATIC International Construction Company Limited belonged to somebody else. It was also discovered that the company did not exist in the database of the Registrar of Companies.
13. A search with the Registrar of Companies for Subuiga General Merchants Company Limited showed that the directors/shareholders of the company were Mary Gathoni Ndungu and Jane Muriuh Ndungu. The name of the complainant did not appear in the list of directors of the company.
14. Further investigations revealed that the Applicant had indeed received a total of Kshs.14.3 million from the complainant. The investigating officer concluded that the money given to the Applicant by the complainant Isaac Ochieng Mboya was obtained unlawfully, fraudulently, irregularly and illegally and the issuance of the LPO to him was through misrepresentation of facts and fraud.
15. It was the respondents' case that when the Applicant failed to turn up in court for plea on 10th February, 2015, her cash bail was forfeited to the state and a receipt issued accordingly.

16. Constable Kenei averred that the Applicant had not been harassed by any police officer or threatened or compelled to surrender any documents. He specifically denied that one P.C. Chemilil had threatened the Applicant and averred that the recording of the said officer's mobile number on the cash bail receipt was routine and the Applicant was using this fact to malign the name of the said officer.

17. This matter raises the question as to whether the respondents' decision to prosecute the Applicant is unlawful. Submissions have been advanced by the protagonists in support of their positions.

18. The Applicant's case is that her prosecution is unlawful and malicious. It is her case that the respondents are aiding a party in what is purely a civil process.

19. The starting point will be to state that the police and the Director of Public Prosecutions (DPP) are empowered by the law to investigate and prosecute criminal offences-see Section 24 of the National Police Service Act and Articles 243, 245 and 157 of the Constitution.

20. The powers of the respondents must, however, be exercised within the laws of this country. Where investigations are conducted outside the parameters of the law, and where the DPP continues with prosecution in abuse of power, the courts will not hesitate to quash such prosecution – see **Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR; Kuria & 3 Others v Attorney General [2002] 2 KLR 69; and George Joshua Okungu & Another v The Chief Magistrate's Anti-Corruption Court at Nairobi & Another [2014] eKLR**

21. It is incumbent upon an applicant to demonstrate that the prosecution is hinged on illegality or bad faith. In the case before me, the Applicant claims that the dispute between her is one that can be resolved through the civil courts. That is most likely true. The respondents have, however, demonstrated that there is an element of criminality in the Applicant's conduct. It is alleged that she enticed the complainant with a Local Purchase Order of a non-existent company. If the allegation is correct, then there is some aspect of false pretence in her conduct and the only way to establish whether or not the Applicant committed an offence is through a criminal trial.

22. It is not for this Court to hear the witnesses to be called at the trial and return a verdict of not guilty for the Applicant. That onus has been given to the trial court where Article 50 of the Constitution and the Evidence Act, Cap 80 and other laws will protect the Applicant. That is where she will get a fair trial and evidence will be adduced in accordance with the law.

23. The fact that the Applicant's conduct may also give rise to civil action is no bar to a criminal trial. This is the edict of Section 193A of the Civil Procedure Code, Cap 75 which gives room for concurrent criminal and civil proceedings.

24. The Applicant also claimed malice on the part of the respondents. She has, however, not placed any evidence before the Court to show that the officers who arrested her went beyond the call of duty. As demonstrated through the respondents' replying affidavit all the police officers did was to investigate an alleged crime and ask the Applicant to go to court to take plea. The officers cannot be accused of malice for executing their statutory duties.

25. From the material placed before the court, it is clear that the Applicant's case has no merit. The same is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 5th of Nov., 2015.

W. KORIR,

JUDGE OF THE HIGH COURT