



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISCELLANEOUS CONSTITUTIONAL APPLICATION NO. 4 OF 2013**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(6) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF EXERCISING SUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS IN THE RESIDENT MAGISTRATES COURT AT KANDARA**

**(CRIMINAL CASE NO. 682 OF 2012**

**REPUBLIC VERSUS PETER RUCHACHU MACHARIA)**

**BETWEEN**

**PETER MACHARIA RUCHACHU.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The applicant filed an originating notice of motion under article 165(6) and (7) of the **Constitution** and **rules 24 to 30** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** seeking several orders against the respondents jointly or severally.

The prayers sought in the motion are based on what the applicant alleges to be a violation of his constitutional rights by the 1<sup>st</sup> Respondent; amongst the prayers which the applicant seeks is an order by this honourable court to call for the record of the proceedings in the Principal Magistrates Court at Kandara Criminal Case No. 682 of 2013 in which the appellant was charged by the 1<sup>st</sup> Respondent and to determine the legality of the said criminal proceedings and to make such orders or directions as it deems fit to ensure fair administration of justice.

The applicant also sought for a declaration that under **article 157(6)** of the Constitution the 1<sup>st</sup> Respondent exercises a quasi-judicial function in determining whether or not a person such as the applicant should be charged for purposes of a criminal prosecution and that in breach of that function the 1<sup>st</sup> respondent charged the applicant in the **Kandara Principal Magistrates Court Criminal Case No. 682 of 2012**. As the criminal trial of the applicant in **Kandara Principal Magistrates Court Criminal**

**Case No. 682 of 2012** is tainted with the breach of the constitution, so the applicant argues, this court ought to stay permanently the criminal proceedings against him. The applicant therefore wants a declaration that his rights under **sections 28 and 29** of the Constitution have been contravened by the respondents and wants the second respondent be ordered to pay him both general and exemplary damages.

The motion was supported by the applicant's own affidavit sworn on 21<sup>st</sup> January, 2013. Alongside the notice of motion, the applicant also filed the chamber summons in which it sought conservatory orders to stay the criminal proceedings in the magistrate's court pending the hearing and determination of the substantive notice of motion.

The first respondent neither filed a replying affidavit nor grounds of objection to the applicant's summons or motion. Mr Njeru for the first respondent informed the court that the first respondent would rely and adopt the position taken by the second respondent in response to the substantive motion. That position assumed grounds of opposition dated 31<sup>st</sup> January, 2013 filed in court by the second respondent on 6<sup>th</sup> February, 2013.

On 8<sup>th</sup> February, 2013, the court directed that rather than hear the chambers summons for conservatory orders, it would be appropriate to have the substantive motion heard and in the meanwhile the criminal proceedings against the applicant in the magistrate's court be stayed. This direction was informed by the need to save judicious time and deal with finality the issues raised by the applicant in the substantive motion. The application for conservatory orders was effectively compromised to that extent.

As a way of disposing of the substantive motion, parties agreed to file and exchange written submissions and highlight them on the 13<sup>th</sup> March, 2013. On that date the first respondent was not ready and therefore the motion was adjourned to 24<sup>th</sup> April, 2013. Unfortunately, when this motion came for hearing on 24<sup>th</sup> April, 2013, as earlier scheduled, this court was sitting in Nyeri where it had been allocated two election petitions arising out of the March, 2013 general elections. It was not until the 7<sup>th</sup> October, 2013 that this matter came up for hearing again and even then the hearing could not take off because the first applicant applied for and was granted an adjournment to enable him file his replying affidavit and written submissions. On 20<sup>th</sup> November, 2013 parties agreed that the motion be determined based on their written submissions; the first respondent who had still not filed a replying affidavit or submissions opted to adopt the position taken by the second respondent in his pleadings.

I have gathered from the affidavits filed by the applicant that sometimes in the year 2012 he had an order to supply timber of particular specifications to one Andrew Maina Kariuki. Following this order, the applicant entered into a contract with one Moses Njuguna Macharia sometimes in September, 2012. According to this bilateral contract, Moses Njuguna Macharia who owned a power saw was to extract, at a fee, timber from two trees which the applicant had purchased. It was Macharia's obligation under the contract to extract timber of various specific measurements and sizes in accordance with the applicant's order. The consideration for Macharia's timber extraction services was agreed at Kshs. 11, 200/- out of which the applicant was to make a down payment of Kshs. 4,000/- upon commencement of the work and the balance of Kshs. 7,700/- was to be settled upon completion. It was also agreed that the applicant would pay labour charges of Kshs. 4000/-.

In breach of the covenant between him and the applicant, Macharia is said to have extracted timber whose measurements and sizes did not match the specifications provided by the applicant. As a result of this breach the applicant could not supply the timber that had been ordered for and therefore suffered a loss. The applicant took the position that since the Macharia did not perform that contract between them in accordance with the agreed terms he could only be paid the balance less the loss that the applicant had incurred as a result of the breach of the contract.

Macharia could not accept anything less than what had been agreed as his due balance. He therefore reported the matter to the area chief and then to the police at Kandara police station. Acting on the Macharia's report, the police arrested the applicant on 27<sup>th</sup> October, 2012, handcuffed him and took him

to Kandara police station where he spent the night until the following day when he was released on a bond of Kshs. 10,000/-. He was subsequently charged in **Kangema Principal Magistrates Court Criminal Case No. 682 of 2012** with the offence of obtaining credit of Kshs. 7,700/- from Macharia pretending that he would pay him. This offence was based on **section 316(A)** of the **Penal Code**

The facts as laid out by the applicant were not controverted by the respondents since none of them filed any affidavit in response to the applicant's depositions. In the determination of this petition, therefore, it would be lawful and logical to proceed on the basis that the criminal case against the applicant stemmed from a dispute between him and Moses Njuguna Macharia over performance of a contract. As noted hereinbefore, the dispute simply was whether Macharia was entitled to payment of full contract price even when he extracted timber whose specifications were not in accordance with the order placed by the applicant.

More relevant to the determination of the motion herein would be whether the dispute between the applicant and the complainant in the criminal case could legally and properly be resolved in a criminal trial and in particular, assuming that the balance of the contract price was due and owing, whether the contract could be enforced through prosecution of the applicant. In other words would a dispute over performance of a contract form a basis to prosecute one of the parties to the dispute? Would such a prosecution be consistent with the tenets of the constitution? In my very humble view, this is the simple question that has been brought to the fore in this motion and whose determination will certainly resolve the motion or petition herein one way or the other.

In answer to this question counsel for the applicant made lengthy submissions and provided the court with numerous court decisions from diverse jurisdictions the crux of which is to urge this honourable to find that the **Kangema Principal Magistrates Court Criminal Case No. 682 of 2012** was instituted against the applicant to exert pressure on him to settle the balance of the disputed contract price due to the complainant. The applicant wants the court to find that, based on the evidence which has been proffered, the entire process that led to his prosecution which commenced with his arrest and culminated in his arraignment in court was not only unlawful but contravened his constitutional rights.

The respondents are of a contrary view. In the grounds of opposition and the submissions filed by the second respondent, the respondents have invoked **section 21** of the **Criminal Procedure Code, Chapter 75** Laws of Kenya, to counter the allegation that by arresting and putting the appellant in handcuffs, the appellant's right to dignity under **article 28** of the **Constitution** was thereby violated. In order to understand the respondents' submission on this issue it is necessary to quote **section 21 of the Criminal Procedure Code** verbatim. That section provides:

*21.(1) In making an arrest the police officer or other person making it shall touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.*

*(2) If a person forcibly resists the endeavour to arrest him, or attempts to evade arrest, the police officer or other person may use all means necessary to effect the arrest.*

*(3) Nothing in this section shall justify the use of greater force than was reasonable in particular circumstances in which it was employed or was necessary for the apprehension of the offender.*

In the respondents' view, there was nothing unconstitutional in putting the applicant in handcuffs and in any event the police were executing their duty after the applicant had committed a cognizable offence as defined under **section 316 (A)** of the **Penal Code**. According to the respondents, the arrest of the applicant, the manner of his arrest and his subsequent indictment in court was justified. The respondents relied on the Court of Appeal decision in **Civil Appeal No. 171 of 2000, James Karuga Kiiru versus Joseph Mwamburi & 2 Others** where it was held that the police need not be held liable when carrying out their duty of investigating an offence and that where there is an arrest subsequent to a genuine complaint such an arrest is lawful. The police, so argued the respondents, instituted a criminal case

against the applicant pursuant to **section 14 of the Police Act, Chapter 84 of the Laws of Kenya** which enjoins them to maintain law and order, preserve peace, protect life and property, prevent and detect crime, apprehend offenders and enforce all laws and regulations with which they are charged. According to the respondents, the police should not be faulted for undertaking their statutory tasks.

Upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute is a question that has engaged the minds of learned judges in our courts on numerous occasions. Apparently, whenever such a question has arisen in cases before them, the learned judges have been consistent and are in agreement in their decisions that the institution of a criminal case for a purpose other than upholding the criminal justice is an abuse of the criminal process and it is upon the courts, whenever such scenario emerges, to rise to the occasion and halt such criminal proceedings.

In the case of **Stanley Munga Githunguri versus Republic (1985) KLR 91** it was held that if the prosecution of a person is oppressive and malicious, it would amount to an abuse of the criminal process and therefore it would not be in the public interest to continue with that kind of prosecution. The court was emphatic that whenever such a situation arises, the high Court has inherent power and duty to intervene and prevent the abuse of the due process of the court and to secure fair treatment for all persons who are brought before it or before a subordinate court.

There is no doubt, as counsel for the state argued, that the police have a statutory mandate to arrest any person whenever they are bound to do so; however, such an arrest must be in conformity with the provisions of **section 21 of the Criminal Procedure Code** and more importantly, the Constitution.

On his part the Director of Public Prosecutions exercises a quasi-judicial function whenever he decides to charge any person or, as in the instant case, the arrested person. This function presupposes that some investigation, however basic or preliminary has been carried out in which, under the circumstances of this case, the applicant was accorded a reasonable opportunity to present his side of the case. It would have been appropriate to hear the applicant before making a deliberation to prosecute him.

The charge against the appellant demonstrates that an elementary investigation by the Director of Public Prosecutions would have even been more useful to the Director than the applicant because **section 316(A) of the Penal Code** under which the applicant was charged presupposes a situation where the accused has issued or drawn a cheque when he knows that either the account does not have sufficient funds, or that an account has been closed or he has instructed the bank not to honour the cheque. The factual background against which the appellant was charged had nothing to do with the drawing or issuing of a cheque and the Director of Public Prosecution would have established this fact had he carried out the basic investigations before charging the applicant.

In the Court of Appeal decision in **James Karuga Kiiru versus Joseph Mwamburi & 2 Others (supra)** which was cited by the second respondent, the court emphasised the importance of an investigation even when making an arrest. The court held that *“...it may well be that the appellant was innocent all the time, but there is no reason in the absence necessary evidence for making a police officer liable when he had only done his duty in investigating an offence.” (Underlining mine)*. According to the applicant he was arrested, handcuffed, detained and finally charged; there is no evidence that he was arrested for purposes of or in the course of conducting investigations into the complainant’s complaint.

In the case of **Samuel Kamau Macharia & Another versus Attorney General & Another, Nairobi High Court Miscellaneous App. No. 356 of 2000** the court was emphatic that the Director of Public Prosecution’s discretion to arraign a person in court should be exercised in a quasi-judicial way. In this case the court halted the applicant’s trial because in its view, the Director of Public Prosecutions was prodded to act and did not act independently and more so, the intention of the complainant was driven more by his quest for payment than a genuine intention to have the applicant face a criminal trial.

The manner in which the applicant was arrested also appear to have contravened the very **section 21 of the Criminal Procedure Code** which the second respondent heavily relied upon to justify the applicant’s

arrest. The applicant deposed that though he submitted to the custody of the police officers who arrested him he was nevertheless handcuffed. My understanding of **section 21** of the **Criminal Procedure Code** is that use of such instruments as handcuffs is unnecessary where a person submits to the arrest or the custody of the arresting officer or officers. The Code proscribes use of greater or excessive force than necessary particularly where there is no threat of escape or resistance to an arrest.

When I consider totality of the circumstances comprising the background of the dispute between the complainant and the applicant, the manner of the applicant's arrest and finally the charge which was preferred against him, I am persuaded that the prosecution of the applicant was influenced by ulterior motives; in other words, the criminal case against him was for a purpose other than upholding the criminal law. It is meant to bring pressure to bear upon the applicant to settle a civil dispute. Such a trial cannot be allowed to proceed. In the case of **Cruisair Ltd versus CMC Aviation Ltd (Ltd), (1978)KLR 131** which was quoted in **Nairobi High Court Miscellaneous application No. 839 and 1088 of 1999 Vincent Kibiego Saina versus the Attorney General** the Court of Appeal emphatically stated with regard to winding up proceedings, that;

“...a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides...”

From the material presented before me, it can safely be concluded that the predominant purpose in the institution and prosecution of the criminal proceedings against the applicant was besides the purpose for which these proceedings were designed. This court is obliged to intervene and stop these proceedings. Accordingly, the applicant's originating notice of motion dated 21<sup>st</sup> January, 2013 is allowed to the following extent:

1. It is hereby declared that under **section 157(6) of the Constitution** the 1<sup>st</sup> Respondent exercises a quasi-judicial function in determining whether or not criminal proceedings shall be instituted against a person such as the applicant herein.
2. The 1<sup>st</sup> Respondent breached the quasi-judicial function aforesaid in paragraph (1) above by instituting criminal proceedings against the appellant the **Kandara Principal Magistrates Court Criminal Case No. 682 of 2012**.
3. Accordingly the criminal proceedings against the appellant in the **Kandara Principal Magistrates Court Criminal Case No. 682 of 2012** are hereby stayed permanently.
4. The 1<sup>st</sup> Respondent will bear the costs of the Originating Notice of Motion herein.

**It is so decreed.**

**Signed, dated and delivered in open court this 3<sup>rd</sup> day of March, 2014**

**Ngaah Jairus**

**JUDGE**