



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 528 of 2012

DOUGLAS MAINA MWANGI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECTIONS1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner in this matter presented the petition dated 26th October 2012 in person. His grievances stem from a previous relationship with Cooperative Bank Limited (“the bank”). The petitioner took a loan from the bank to finance working capital of a milling business. The loan was secured by a machinery and equipment. In addition the petitioner was requested to provide a guarantor with security.
2. The petitioner’s case is that the guarantor supplied a logbook for a motor vehicle but never executed the chattel mortgage to perfect the security. Sometimes in the year 2003, as a consequence of default, the bank repossessed the vehicle and sold it. The petitioner complains that the bank forged the chattels mortgage and documents to enable it sell the vehicle. As he was aggrieved, he made a complaint to the Criminal Investigations Department.
3. It is the petitioner’s case that upon realising that it was under investigations, the bank approached the office of the 1st respondent. The Director of Public Prosecutions (“DPP”) ordered the closure of the file and directed that neither the bank nor its officers should be charged with any criminal offence. The petitioner avers that despite the following up the matter either personally and through correspondence, with the office of the DPP and that of the Attorney General his efforts have reached a dead end.
4. The petitioner points to an alleged collusion between the Attorney General’s offices, the CID headquarters and the bank to shield the bank from criminal investigations and prosecution. The petitioner also states that he approached the Bank Fraud Unit (“BFU”) to unravel the status of his case. The BFU confirmed to him that it was unable to attend to the matter as the 1st respondent had closed the inquiry.
5. The petitioner complains that despite evidence of criminal conduct on the part of the bank, the respondents have failed in their constitutional duties to investigate and prosecute the malefactors who have caused him loss and damage

6. The petitioner further alleges that the respondents' actions infringed on several of his constitutional rights including the right to a fair hearing contrary to **Article 50**. He avers that he was denied the right to access justice contrary to **Article 48** by the respondents' failure to institute criminal proceedings against the bank and failure to ensure that he gets his motor vehicle back and by denying him access to the investigatory report.

7. The petitioner also accuses the respondents of breach of the code of conduct as required of state officers under **Article 75** by compromising public interest in favour of personal interests and by allowing conflict between personal interests and official duties. The petitioner further points a finger at the office of the Attorney General for failing to observe **Article 156(6)** requiring the office to promote, protect and uphold the rules of law by failing to ensure that the alleged criminal offences were investigated and prosecuted in accordance with the law.

8. The petitioner seeks the following reliefs in the petition dated 26th October 2012.

(1) *This Honourable court be pleased to issue a declaration that the respondents contravened Articles 27, 31, 47, 48, 50, 75 and 157 of the Constitution of the Republic of Kenya by denying the petitioner the right to justice and ordering the closure of the investigatory file No. 90/09 and thus the decision should be declared null and void.*

(2) *This Honourable Court be pleased to issue a declaration that it is unconstitutional for any state officer to frustrate the efforts by any individual or authority to access justice and thus the 1st respondent contravened Article 157 of the Constitution of the Republic of Kenya.*

(3) *This honourable court be pleased to order the Co-operative Bank to pay me damages for loss of use of my motor vehicles unlawful seizure and disposal as the Josy Auctioneers has noted, the motor vehicle was actively involved in fuel transportation work, transporting petroleum products for customers of (3) three major oil companies, TOTAL, KOBIL and CALTEX, payments rates were 70 cents per litre of oil product transported, within Nairobi area and 1 shilling and 40 cents for deliveries outside area. The motor vehicle had a carrying capacity of 10,000 litres, for deliveries within Nairobi the truck could make 2 trips every day from Monday to Friday while for work outside Nairobi area, the truck could only make one trip in a day – annexed hereto and marked as exhibit Dmm 001, Dmm 002, Dmm 003, Dmm 004, Dmm 005 and Dmm 006 on pages A1, A2, A3, A4, A5 and A6 is true Photostat copies of fee demand note drawn by Josy Auctioneers, road tanker certificate or calibration from the Ministry of Commerce, transporters copies from CALTEX, TOTAL & KOBIL oil companies and transport rates advise from oil transporters carriage rates regulatory committee.*

(4) *This honourable court be pleased to order the Co-operative Bank to compensate me for loss of my motor vehicle at present value of Ksh.6,000,000 the motor vehicle was acquired in 1995 and was insured for 1,000,000 the motor vehicle did sub-contract work for NEMCO's of Mombasa transporting cargo from port city of Mombasa to upcountry destinations. Return cargo used to be NCPB's maize mostly from Eldoret's silo's to Chagamwe depot in Mombasa. In 2003, a petroleum tanker was fitted in the truck and it was actively involved in petroleum products transportation work. Today to acquire a used truck that can comfortably hand Mombasa-Nairobi-Eldoret-Mombasa work, one has to invest not less than 6,000,000 annexed hereto and marked Dmm007, Dmm008, Dmm 009, Dmm 010, Dmm 011, Dmm 012, Dmm 013, Dmm 01, Dmm 015, Dmm 016 on pages A7, A8, A9, A10A11, A12, A13, A14, A15 and A16 is true Photostat copies of the motor vehicles logbook, insurance brokers advice note, statement from NEMCO transporters, NEMCO's Company cheque payment, NCPB's registration advice note, NCPB's receiving advice note, payment vouchers and payment cheques and the motor vehicles image respectively.*

(5) *The Honourable Court be pleased to impose exemplary damages to reform and teach the Co-operative Bank a lesson and deter other banks from engaging in the same kind of conduct which formed the basis of the petition as well as the subsequent oppressive, arbitrary and un-constitutional actions by the servants of government where the Co-operative Bank had a hand in.*

- (6) *This Honourable Court be pleased to order the Co-operative Bank to pay me damages for mental anguish and financial distress bereavement following deprivation of only source of livelihood.*
- (7) *This honourable court be pleased to order the Commercial and Economic Crimes Unit at the CID headquarters to re-open the enquiry file 90/09 so that investigation are completed and justice done. It is important this time I am invited in the exercise.*
- (8) *This Honourable Court be pleased to requires the Director of CID to avail the enquiry file 90/09 to the judge attending to this petition.*
- (9) *Costs.*
- (10) *Any other order this honourable court deems fit.*

Respondents' Case

9. The 1st respondent has filed a replying affidavit sworn on 16th January 2013 by James Njogu, a prosecution counsel. He depones to the fact that by the letter dated 6th December 2011, the petitioner was duly informed of the position of the matter and in particular informing him that investigations were carried out and there was no evidence to sustain any prosecution. The 2nd respondent relied on grounds of opposition dated 20th November 2012.

10. The respondents oppose the petition on the ground that they carried out their statutory and constitutional responsibilities by investigating the complaint and making findings that the matter was not a proper one for prosecution. It is their position that the subject of the petitioner's grievance is a contractual relationship between the petitioner and the bank. In the circumstances, there is nothing to implicate the respondents in any abuse of process, bad faith or breach of the petitioner's right.

Determination

11. I have considered the material on record, I note that the matters raised by the petitioner were investigated and in the letter dated 18th December 2009 from the Attorney General Chamber's the petitioner was informed that, "*After due investigation and after due consideration of the police report the Hon Attorney General is persuaded that no criminal offence is disclosed and consequently you are advised to pursue a civil cause of action if any against the bank.*"

12. After this communication, the petitioner raised the issue with the Minister of State for Internal Security and Provincial Administration and by a letter dated 28th July 2010, the petitioner was informed that the matter was being referred to the Kenya Anti-Corruption Commission (KACC). The letter from the Minister of State was acknowledged by the Director of KACC in a letter dated 4th September 2010. A similar complaint was also lodged with the Central Bank of Kenya. Further correspondence on the subject was once again forwarded to the Attorney General, who in a letter dated 19th September 2011, referred the matter back to the DPP for consideration.

13. The matter did not rest there and the petitioner continued to seek assistance of the office of the Attorney General and the Director of the Public Prosecutions. By a letter dated 6th December 2011, the Director of Public Prosecutions informed the petitioner as follows;

Mr Douglas Maina Mwangi

P. O Box 55433-00200,

NAIROBI

RE: COMPLAINT BY DOUGLAS MWANGI AGAINST CO-OPERATIVE BANK OF KENYA

Reference is made to the above quoted matter and your correspondence to this office dated 21st November 2011.

This is to inform you that following the Hon Attorney General's directives the CID forwarded their investigations report. Upon perusal and consideration of all facts relevant, the Hon. Attorney General found that there was no evidence at all upon which to charge the Cooperative Bank or any of its officers with any criminal offence for the sale of your motor vehicle.

Accordingly the Attorney General directed the CID to close the file with no further police action. This position was duly communicated to you vide our letter dated 18th December 2009.

Further, following directives from the Office of the President as per letter ref No. OP/PA1/10 dated 28th July 2010, the CID file was submitted to KACC for investigations. KACC has written to this office confirming that upon interviewing you and considering the CID's report they concurred with the Attorney General directives of closure of file.

Accordingly, we reiterate the AG's directives that there is no evidence upon which a criminal prosecution can be mounted.

Be so advised.

(Signed)
KERIAKO TOBIKO

DIRECTOR OF PUBLIC PROSECUTIONS

14. The volume of correspondence between the petitioner and government officers testifies to the petitioner's grievance but what this court is required to interrogate is whether the respondents acted in accordance with Constitution and the law.

15. The office of the Director of Public Prosecution under **Article 157** of the Constitution is an independent office under the Constitution like its predecessor office, the office of the Attorney General under **section 26** of the former Constitution. When dealing with the decision as to whether or not to prosecute, the office exercises independent judgment and this court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of process. This has been the holding of this court in several decided cases including *Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)*, *Peter Maina Gacheru v The Director of Public Prosecutions, Nairobi Petition No 161 of 2012*, *Hon. Chirau Ali Mwakwere v Robert Mabera and Others, Nairobi, Nairobi Petition No. 6 of 2012 (Unreported)*, *William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported) [2010] eKLR*, *Jacob Juma v The Director of Public Prosecutions and Other Nairobi HC JR Petition No. 652 of 2009 (Unreported)*, *Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)* and *John Swaka v Director of Public Prosecutions and 2 others, Nairobi Petition No 318 of 2011 (Unreported)*.

16. I have perused the voluminous correspondence and I find that the petitioner's complaint was considered and the DPP came to the conclusion that there was no basis for prosecution. I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution.

17. I now turn to the reliefs sought in the petition. Prayers 3, 4, 5 and 6 of the petition seek relief against the Cooperative Bank of Kenya Limited. It is not a party to these proceedings and as such I cannot grant relief in respect of any allegations made against it.

18. The fact that I have held that there is no case against the respondent does not in any way prejudice the petitioner's right to take out civil proceedings against the bank. This is what the Kenya Anti-Corruption Commission advised in the letters dated 5th March 2007 and 19th March 2007. The office of the Attorney General also advised as much in the letters dated 21st May 2009 and 18th December 2009. This course is still open to the petitioner.

19. In view of my findings, I do not consider it necessary to deal with the Chamber Summons dated 11th March 2011 wherein the petitioner seeks certain documents from the respondents and the bank.

20. The petitioner's case is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 5th day of April 2013

D.S. MAJANJAJUDGE

Douglas Maina Mwangi , the petitioner in person.

Ms Kahoro, Prosecution Counsel, instructed by the Directorate of Public Prosecutions.

Ms Kung'u, Litigation Counsel, instructed by the State Law Office for the 2nd respondent.