



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 218 OF 2011

BETWEEN

KENYA COMMERCIAL BANK LTD 1ST PETITIONER
DAVID KIPROP MALAKWEN 2ND PETITIONER
WILFRED KIPKORIR SANG 3RD PETITIONER

AND

THE COMMISSIONER OF POLICE AND THE DIRECTOR OF CRIMINAL
INVESTIGATIONS DEPARTMENT 1ST RESPONDENT
HON ATTORNEY GENERAL 2ND RESPONDENT

AND

MUIRU COFFEE ESTATE
LIMITED 1ST INTERESTED PARTY
BENJOH AMALGAMATED LTD 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. According to the material before the court, this petition is another proceeding in a long running saga that has occupied judicial space and time over the last 20 years. According to Justice Lenaola, ***“This suit is one of those that fall within the category of a relationship between banker and customer gone sour. Sour is even mild.....”*** (See *Benjoh Amalgamated Ltd & Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd, Nairobi HCCC No. 1576 of 1999 (Unreported)*).

2. This petition is not strictly a dispute between the bank and its customers but one between the bank and its the employees on one hand and the State on the other. The interested parties were the bank’s customers who have precipitated these proceedings. The petitioners accuse the State of infringing and or violating their constitutional right to a fair trial under **Article 50** of the Constitution.

3. The genesis of the relationship between the Kenya Commercial Bank Limited (“KCB”) and the interested parties is that sometime in 1988, USAID developed a programme whereby rural entrepreneurs would be granted loans through Kenya Commercial Bank (“KCB”) to undertake commercial projects. Benjoh Amalgamated Limited applied for funds through KCB. An overdraft facility of Kshs.1.8 million was approved in 1989 and further loan was also approved in the same year. In 1990 an additional overdraft facility was granted to Benjoh Amalgamated Limited.

4. These facilities were secured by three parcels of land owned by the 1st and 2nd interested parties that is, LR 10075 situated in Kiambu, LR 12411/1 and LR 12411/2 situated in Njabini, Nyandarua.

The cases between KCB, Benjoh Amalgamated Limited and Muiru Coffee Estates Limited

5. Due to default by the interested parties in servicing the banking facilities, KCB evinced its intention to realise its securities. This led to a series of disputes between the parties. The suits and decisions of the respective courts are matters of public record. These cases are as follows;

(1) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd Nairobi HCCC No. 1219 of 1992.* By a consent judgment and decree dated 4th May 1992, the plaintiffs agreed to pay outstanding sums by 31st July 1992 failing which the defendant was at liberty to realise the securities. The plaintiffs successfully applied to set aside the consent order causing KCB to appeal.

(2) *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Muiru Coffee Estate Limited Nairobi Civil Appeal No. 276 of 1997* The Court of Appeal set aside the order of High Court which set aside the consent judgment recorded in ***HCCC No. 1219 of 1992***. The consent so recorded was reinstated by the court in its judgment delivered on 10th March 1998.

(3) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd Nairobi HCCC No 285 of 1993.* After the default in complying with the consent recorded in ***HCCC No. 1219 of 1992***, KCB advertised the properties for sale; the plaintiffs filed this suit and applied for an injunction. On 8th February 1993, the Court dismissed the plaintiffs' application for an interim injunction to restrain the bank from selling the securities.

(4) *Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd & Benjoh Amalgamated Ltd Nairobi HCCC No. 1520 of 1996.* This suit was filed after a further attempt to realise the securities. On 26th June 1996, the court dismissed both the application for interlocutory injunction as well as the suit.

(5) *Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd, Watts Enterprises and Meghji Kanji & Company Limited Nairobi HCCC No. 1611 of 1996.* On 26th January 1998, the court struck out the suit on application by the 1st defendant.

(6) *Benjoh Amalgamated Ltd v Kenya Commercial Bank Ltd Nyeri HCCC 24 of 1997.* Once again the bank's efforts to realise the securities were thwarted by filing of this suit seeking to stop the sale. On 9th May 1997, the court struck out the suit on grounds that it was *res judicata*.

(7) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd Nairobi HCCC 1576 of 1996.* This case was a further attempt to salvage the properties. It is noteworthy that one of the prayers in the suit was that the plaintiff's sought an account of the amount owed. After hearing the suit, Justice Lenaola dismissed the suit on the ground that it was *res judicata* and an abuse of process. Key to the court's finding was that the matter in issue had been settled by the consent recorded in ***HCCC 1219 of 1992***.

(8) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd Nairobi Civil Appeal No. 239 of 2004.* This was an appeal from the judgment of Justice Lenaola in ***HCCC 1576 of 1999***. The Court of Appeal affirmed the decision of Justice Lenaola and held that the suit was *res judicata* and an abuse of the court process in view of the previously decided cases.

(9) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd HCCC 243 of 2006.* The suit was struck out on the grounds that it was *res judicata* and an abuse of the court process.

(10) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd Nairobi Petition No. 352 of 2007.* The petitioner sought to have the securities held by the bank declared unconstitutional and a breach of their fundamental rights and freedoms. On 30th May 2007, Justice

Emukule struck out the petition on the ground that it raised no constitutional issue and the matters raised were *res judicata*.

(11) *Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd v Kenya Commercial Bank Ltd Nairobi HCCC 122 of 2007*. This suit was struck out by Justice Warsame on 17th June 2008 on the ground that it was frivolous, vexatious and an abuse of the court process in view of the previously decided suit.

Petitioner's Case

3. What triggered those proceedings were requisitions to compel attendance issued under **section 22** of the ***Police Act (Cap 84 of the Laws of Kenya)*** to the 2nd and 3rd petitioners. These requisitions required them to report at the CID Headquarters along Kiambu road on 28th October 2011 in relation to an investigation concerning the making of a document without authority and conspiring to defraud in respect of the interested parties account with KCB.

4. It is common ground that these requisitions were issued based on a complaint lodged by Benjoh Amalgamated Limited alleging fraud in relation to **A/C No. 31504365107**. This matter was the subject of correspondence between KCB and the 1st respondent. In a letter dated 12th November 2010, the Chief Executive Officer of KCB wrote to the Director of the CID, in part, as follows, ***“We refer to your letter dated 13.9.2010 on the above subject and write to confirm that the Bank will endeavour to respond to the issues raised to the best of our ability taking into consideration that this has been a long drawn matter running into several years. We however wish to put to your attention that all the issues you have raised in your letter have been determined before by the various courts through civil litigation filed by the customer and by the bank and all information provided hereunder is on an entirely without prejudice basis more so bearing in mind the many rulings and judgments of both the High Court and the Court of Appeal on the same issues. As such we believe that the said proceedings, rulings and judgments made by the courts can be relied upon since such are admissible in evidence. We enclose herein some of the rulings and judgments for your ease of reference. Consequently our response and the customer’s complaints should be read together with the findings of the courts. Having registered our intention to cooperate fully in your investigations, it is our considered view without prejudice, that the customer having lost through the various civil cases in court over the years has now opted in bad faith to turn the whole matter into a criminal complaint for a purpose other than that of upholding the criminal law but to bring pressure to bear upon the bank to settle the civil dispute.....”***

5. The letter set out the background of the relationship between the 1st petitioner and the interested parties. That letter was duly received and in response, a letter dated 7th July 2010 was sent from the CID to the Chief Executive Officer of KCB.

6. The letter from the CID raised several queries which the Attorney General had asked for certain clarifications. The query that led to the investigation and issuance of the requisitions was the ruling of Hon. Lady Justice Khaminwa in ***HCCC No. 494 of 2008*** which I shall advert to later in the judgment.

7. In response to the letter dated, 7th July 2011, the Chief Executive Officer, KCB once again wrote to the 1st respondent setting out in detail all the cases that had been determined by the High Court and Court of Appeal including those pending in respect of the inquiry at hand. In the letter he stated that in his view it, ***“was grossly illegal, mischievous, unfair, unprocedural and totally untenable for the [the interested party] to try and use your good offices so as to illegally obtain information and for evidence on matters pending for trial in the High Court and the Court of Appeal”***

8. According Mr Nyachoti, counsel for the petitioners, the steps taken by the 1st respondent in relation to the complaints lodged by the interested parties while the various suits are still pending is an attempt to deprive them the right to a fair trial enshrined in **Article 50(1)** of the Constitution particularly in view of the fact that the matters subject of the complaint have been determined by the courts.

Respondents' Case

9. The respondents have opposed this petition through the replying affidavit of Chief Inspector James

Chemitei sworn on 8th December 2011. Inspector Chemitei deposes that the 1st petitioner answers to the allegations were unsatisfactory and unclear and the 1st respondent wrote to the KCB on 7th July 2011 requesting certain clarifications on matters contained in the letter dated 12th November 2010 but it did not give a comprehensive response. It was necessary to issue a requisition to compel attendance under **section 22** of the **Police Act** to the 2nd and 3rd respondents as investigations of allegations of making a document without authority in KCB's dealing with the complainant's loan account had been made.

10. The respondents argue that although the substantially touches on the disputes that have been and are before court, the 1st respondent has a constitutional duty to investigate any criminal aspect of the dealing with the loan account by the KCB and its employees. It was further contended that the requisition is not an act of coercion or undue influence but part of investigations of allegation of making a false document against KCB and only its officials can answer such a requisition which is not conclusive but part of the process of investigations.

11. The respondents also filed grounds of opposition dated 21st November 2011 where the petition was opposed on the following grounds:-

- 1) *That the orders sought cannot be granted as they are in contravention of **Article 245(2)(a)** and **245(4)(b)** of the Constitution of Kenya.*
- 2) *That prayers sought cannot be granted as they are in contravention of **Article 157(4)** and **157(10)** of the Constitution.*
- 3) *That the rules of sub judice and res judicata cannot be invoked to bar concurrent and parallel criminal investigations to the civil suit.*
- 4) *That the entire petition ought to be dismissed with costs as the police are legally mandated to issue a requisition under **section 22** of the **Police Act** but the petitioner have not demonstrated how the respondents have violated or usurped the powers conferred under **section 22** of the Act.*
- 5) *That the prayers sought cannot be granted because the doctrine of self-incrimination does not extend to corporate criminal liability.*

12. Mr Kuria, counsel for the respondent, argued the case involves investigations by the police and the fact that a civil case is pending does not in itself mean that the criminal process must be stopped. Both processes can proceed contemporaneously. He contended that the petitioners had not demonstrated that the requisition under **section 22** of the **Police Act** was unconstitutional in any manner and that no one would be compelled to give incriminating evidence.

13. Counsel further maintained that if KCB was aggrieved by the criminal process, then its remedy was to move the court in the civil matters to stop the police investigations.

14. As regards the 2nd and 3rd petitioners, Mr Kuria, submitted that it cannot be argued by the petitioners that since they were not employed by the bank at the material time the offences are alleged to have been committed, they cannot be investigated. In his view, the doctrine of perpetuity of a company entitles the state to investigate the employees of a company at a particular time as a company acts through people and it is the employees of the company who must be investigated. Counsel further submitted that the 2nd and 3rd respondents cannot resist investigations in respect of matters concerning the company.

15. Finally, Mr Kuria, asserted that this matter was *res judicata* in so far as the court dealt previously with similar matters. These matters are apparent from the affidavit of Samuel Kungu Muigai sworn on 3rd November 2011. They are as follows;

(1) **Republic v Commissioner of Police & 2 others exparte Kenya Commercial Bank Limited Nairobi HC Misc. 784 of 2007**. This was a judicial review application seeking to stop investigations of account No. 315043615017 at KCB and to stop an order issued by the Chief Magistrate's Court Kibera on 13th June 2007. The matter was withdrawn on 9th October 2008.

(2) **Republic v The Commissioner of Police and others ex parte Kenya Commercial Bank Limited Nairobi HC Misc 275 of 2009.** This was an application for orders of judicial review seeking to stop the Commissioner of Police from investigating Account No. 315043651017 in the name of the Benjoh Amalgamated Limited. The application was dismissed by Justice Gacheche on 24th June 2010.

Interested Parties Case

16. The 1st interested party, Muiru Coffee Estate Limited, represented by Mr Wambugu, relied on the affidavit of Samuel Kung'u Muigai sworn on 3rd November 2011. Mr. Muigai confirms that two suits led to the filing of the complaint against the 1st petitioner.

(i) **Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited and Bidii Kenya Limited Milimani HCCC No. 494 of 2008.** The case concerned the sale of the property LR No. 10075, Kiambu to the 2nd defendant. Though the court did not grant an injunction. Justice Khaminwa ordered that the proper accounts be furnished. The Court of Appeal stayed the order of Justice Khaminwa.

(ii) **Muiru Coffee Estate Limited v Kenya Commercial Bank Ltd, Benjoh Amalgamated Limited, Watts Enterprises and Bidii Kenya Limited. Milimani HCCC No. 505 of 2008.** The court granted interim orders in accordance with **section 52** of the **Indian Transfer of Property** by restraining any further dealings with the suit properties. The orders issued by Justice Khaminwa have now been stayed by the Court of Appeal.

17. Mr Muigai confirms that KCB provided accounts in **HCCC No. 494 of 2008** but when the 2nd interested party applied to cross examine the KCB, Chief Executive Officer on the accounts produced, KCB appealed to the Court of Appeal and that court ordered a stay of further proceedings.

18. It is instructive to note that Mr Muigai deposes at paragraph 5 and 6 of the affidavit that, **“.....the interested parties strongly believe that the High Court cases and Appeals thereto can only be resolved by a conclusive and independent investigation into the management and maintenance of records concerning Loan Account No. 315043651017 in the 1st Petitioners’ Bank”** and **“... it is with this in mind that the 2nd interested party lodged its complaint with the Criminal Investigations Department.”**

19. Counsel, for the 1st interested party noted that each of the civil cases is different, the parties are different and it is only proper that the investigations commenced do proceed to their logical conclusion.

20. Mr Wachakana for the 2nd interested party adopted the respondent’s position and the contents of the affidavit sworn by Ngengi Muigai. He urged the court to dismiss these proceedings.

Criminal and civil proceedings

21. This petition concerns the enforcement of fundamental rights and freedoms. The petitioners are entitled, under **Article 22** of the Constitution to move this court of relief where the facts disclose an actual or threatened violation. The court is entitled to act *quia timet* where the circumstances call for it to act and as such it cannot be said that the mere issuing of a requisition by the police under **section 22** of the **Police Act** does not entitle the Court to act. The court can and will act when it is satisfied that fundamental rights and freedoms are threatened.

22. **Section 193A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides that, **“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”**

23. Although this matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the heads of the petitioners. It is recognised even in light of **section 193A** of the **Criminal Procedure Code**, the High Court may stop proceedings where such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of fundamental rights and freedoms. This power though must be exercised sparingly as it is in

public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.

Independence of Office of the Director of Public Prosecutions and Inspector General of the Police

24. The respondents have referred to the provisions of **Articles 157 and 245** which deal with the powers of the Director of Public Prosecutions and the Inspector General of the National Police Service to prosecute and investigate criminal offences independently and without interference. Counsel argues that this court should respect that independence and avoid interfering with the criminal process in a manner that diminishes the independence of those offices as provided in the Constitution.

25. The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

26. In this case, the issue for consideration is whether the petitioners' rights to a fair hearing guaranteed under **Article 50** of the Constitution are infringed by the continued investigations, commenced by the issue of requisitions, under **section 22** of the *Police Act* to investigate making of documents without authority and conspiring to defraud.

Abuse of the court process

27. It is the petitioners' case that in light of the suits already instituted and the findings in each case that the matters concerning the relationship between the petitioners and the interested parties have been determined. It is their argument that subjecting them to parallel investigation on account of fraud in the same matters is unlawful, illegal and an abuse of the criminal process and an infringement of the right to a fair trial.

28. It is clear from the history of the relationship between the parties and the various decided cases I have cited in paragraph 5 above, that the interested parties are keen to keep matters alive in any forum that will lend them an ear. It is in this light that the complaint in respect of the account at KCB must be seen. I hold that the complaints in respect of the account are really a collateral attack on the decisions of the High Court and Court of Appeal on matters which those courts have held are settled. This is evident from the deposition of Ngengi Muigai which I have cited at paragraph 17 and 18 above.

29. It is true that the complaint was lodged based on decision by Justice Khaminwa as set out in paragraph 16 above. It is not disputed that those decisions have now been stayed by the Court of Appeal. As a court of law, I cannot shut my eyes to what is an obvious abuse of the legal process. This abuse must be stopped in its tracks and I am satisfied that I have jurisdiction to do so.

Breach of the petitioners fundamental rights and freedoms

30. As regards the rights of the petitioners, I hold that the continued invocation of the criminal process in light of the peculiar facts of this case would impair the ability of the petitioners to have a fair trial. The intentions of the interested parties in lodging the criminal complaint is borne out by paragraphs 5 and 6 of the affidavit of Ngengi Muigai which I have set out at paragraphs 17 and 18 above.

31. The right protected under **Article 50** is not only in respect of the court or tribunal itself but also in respect of the acts third parties affecting a fair process. After all the Constitution is binding on all persons by virtue of **Article 20(1)** and it is the obligation of the interested parties not to do anything that would impair the 1st petitioner's rights.

32. I hold that, in effect, if the criminal process proceeds the petitioners will be called to answer for matters which have been settled by courts of law in disputes between the petitioners and complainants. I need not wait for that date and time to come, I need only be satisfied that such a threat is real. The intention of the interested parties is clear that they intend to use the criminal process to pry open the

decisions that have dealt with matters in dispute. Subjecting the 1st petitioner's officers to an inquiry by the police outside the confines of the case where an application for cross examination of the Chief Executive Officer of KCB has been made and whose cross examination may be expected is, in my view, an interference with the fair determination of the pending claims in court.

33. I have looked at the orders issued in the judicial review matters and I am satisfied that the doctrine of *res-judicata* does not apply to these proceedings for several reasons. First, these proceedings are commenced under **Article 22** of the Constitution intended to enforce fundamental rights and freedoms. Second, this case has been triggered by the issuance of the requisition notices by the 1st respondent's officer under the **Police Act**. It is a fresh cause of action which is different.

34. While exercising jurisdiction to interfere with criminal investigations and the criminal trial process, the court must balance the public interest and private interest. In this case, what is evident is that the parties have been at loggerheads since the first suit was filed in 1992. It is really a matter between two parties and it is in public interest that the integrity of the judicial process is preserved. The opening of a criminal inquiry which would result in impugning lawful court decisions no doubt diminishes the standing of the court.

Disposition

35. Apart from what I consider to be *an infringement of the petitioners' right to a fair trial guaranteed under **Article 50** of the Constitution, I must also exercise the courts inherent jurisdiction to prevent an abuse of the court process in the peculiar circumstances of this case as outlined in this judgment.

36. Under **Article 23** of the Constitution I am entitled to frame an appropriate remedy that will give effect to the rights protected. I therefore grant the following orders;

(i) A declaration that the continued investigation of the petitioners by the respondents in relation to matters concerning disputes between Kenya Commercial Bank Limited, Benjoh Amalgamation Limited and Muiru Coffee Estates Limited is a threat to the 1st petitioner's right to a fair trial guaranteed under Article 50 of the Constitution.

(ii) The respondents, either by themselves, their servants and agents, are restrained from investigating, summoning or arresting the 1st petitioner's officers and or employees or in any way howsoever from investigating any matter in respect of the dispute between Kenya Commercial Bank, Benjoh Amalgamated Limited and Muiru Coffee Estate Limited.

37. Like all the judges who have dealt with these matters, I entertain the faint hope that one day we shall all wake up and find the matters settled with no order as to costs. In the circumstances, I make no order as to costs.

DATED and DELIVERED at NAIROBI this 2nd day of March 2012.

D.S. MAJANJA
JUDGE

Mr Nyachoti instructed by Nyachoti & Company Advocates for the Petitioner.

Mr Kuria, Litigation Counsel, instructed by the State Law Office for the Respondents.

Mr Wachakana instructed by Wachakana & Company Advocates for the 1st Interested Party.

Mr Wambugu instructed by Gichuki King'ara & Company Advocates for the 2nd Interested Party.