



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

MISCELLANEOUS APPLICATION 52 OF 2011

**IN THE MATTER OF AN APPLICATION BY AFRICAN SAFARI CLUB, FRANK HELGE
NEUGEBAUER, HASMUK NANDHA**

**THE JOINT APPLICANT'S FOR LEAVE TO APPLY FOR ORDERS AND PROHIBITION AND
CERTIORARI**

AND

IN THE MATTER OF THE SENIOR PRINCIPAL MAGISTRATE'S COURT, NAROK

IN THE MATTER OF NAROK/CIS-MARA/LEMEK/172 NAROK/CIS-MARA/LEMEK/173

AND

IN THE MATTER OF SAMSON SAPEI OLE MAITAI

RULING

The notice of motion dated 24/05/2011, is made pursuant to **Order 53 rule (1)** of the **Civil Procedure Rules** and **section 8 and 9** of the **Law Reform Act**; seeking orders of:

- (a) Certiorari to quash the decision of the Hon. Attorney General to criminally prosecute FRANK HELGE NEUGEBAUER and HASMUKH HARILAL NADHA (2nd and 3rd exparte applicants) in Case No.339 of 2011.
- (b) Prohibition to stop further proceedings in the Senior Principal Magistrate's Court at Narok relating to **Criminal Case No.339 of 2011** involving the two mentioned individuals.

The application is premised on grounds that the applicants are charged in the aforementioned criminal case, on a charge of issuing a bad cheque contrary to **section 319 Penal Code**. The 2nd and 3rd exparte applicants are co-signatories of the cheques issued by the African Safari Club Limited dated **18th March 2009**, for Kshs.350,000/=. They contend that although the cheque was issued, they stopped payment on **17th March 2009** but the recipient presented it for payment on 18th March 2009, despite knowledge that the same had been stopped. It is further contended that the cheque which is the subject matter of the criminal case has been settled in Civil **Suit No.279 of 2009** instituted by the complainant against African Safari Club and Mara Buffalo Camp – Judgment was entered in favour of the complainant in November 2009.

The exparte applicants accused the complainant of deliberately misleading the CID so as to ensure that

they were arraigned in court. This is alleged to have been made deliberately so as to put pressure on the ex parte applicants to pay additional sums being demanded, but which were not in the pleadings before the High Court. The applicants state that prior to the cheque being issued complainant had intimated to them that the amount was too little and he would file proceedings for the entire rent arrears, hence the reason for stopping the cheque dated 18th March 2009. The complainant is alleged to be demanding Kshs.11,000,000/= (eleven million), instead of the amount pleaded in suit No.279 of 2009. The institution of the criminal case in Narok is termed as being gross abuse of the court process, as it comes two years after the cheque had been stopped. The criminal case is described as a vendetta by the complainant to subdue the applicants into admitting the demands for further payments and refusal to account for the proceeds of the sale by public auction.

Applicants contend that the whole purpose for instituting the criminal case is to prevent the applicants from demanding a full and comprehensive account of the proceeds of the auction which was conducted in the Mara Buffalo Camp where the African Safari Club was running a hotel and leased out property **No.Narok/Cis-Mara/Lemek/173 and 172** from the complainant. In any event, the cheque for Kshs.550,000/= was issued to settle rent arrears, which rent the complainant enjoys a judgment from **Civil Suit No.278 of 2009**. The applicants rely on the statutory statement and affidavit herein.

The background to this matter is that the ex parte applicants are the Managing Director and Chief Accountant respectively of African Safari Club Limited. As Principal Officers they are mandated to execute cheques on behalf of the club. The club runs hotels and lodges having leased the same from the registered proprietors **Samuel Ole Koriata** and **Samson Sapei Ole Maitai** (referred to as Lessors). The club fell into rent arrears and after some negotiations cheques were issued but the lessors rejected them saying the sum was too little – and they would file suit. Indeed they filed Suit **No.278 of 2009** for the entire rent due and because of this move, the cheque which the club had issued was stopped, as applicants interpreted this to mean that the lessors did not wish to receive rent arrears any more.

As a result of the judgment entered in that matter, Kshs.5,000,000/= has already been paid to the lessors lawyers where 3,000,000/= was paid to the auctioneers prior to taking of the club's goods. When the club demanded a full account of the proceeds from the auction, the last two ex parte applicants were arrested and charged in the criminal case. This is why the applicants seek the orders herein saying the courts should not be used to settle personal issues or for a collateral purpose other than legitimate concerns.

There has been no response filed by the Respondent or the interested party, and the matter proceeded ex parte. From the material presented to this court, it is apparent that the Club fell into rent arrears and a cheque No.5202511 for Kshs.550,000/= signed by the two named individuals was issued. From the annexures, that is the same cheque dated 18th March 2009 and which also bears the number 114899 – it was a post-dated cheque. Incidentally, there had been cheques issued earlier, but which were returned with remarks on the face that the amounts were too small and the lessors would be instituting court proceedings. It is also clear that the 2 individuals wrote a letter dated 17th March 2009, to the Manager of Barclays Bank of Kenya Limited, requesting for an immediate stoppage of the cheque.

This is the very cheque which two years down the line has seen the applicants arrested and arraignment in court charged with issuing a bad cheque contrary to **section 316A (1)(a)** of the **Penal Code** as amended by the **Finance Act No.4 of 2004**.

The particulars of the charge states that on 18th day of March 2009 at Narok Township, jointly issued a cheque **No.5202511** for **Kshs.550,000/=** to **Samson S. Ole Maitai** drawn on account of African Safari Club **Account No.5202511** of Barclays Bank of Kenya Limited, Nkurumah Road Branch and knowingly stopped payment of the cheques. The main issue of concern is whether the criminal proceedings should go on, in the light of the subsequent events i.e. a judgment entered in favour of the complainant for the rent arrears (including the sum claimed in the cheque) and the subsequent auction of the Club's property, there being no account for the proceeds thereof.

Mr. Kabiru submits on behalf of the exparte applicants that when the complainant became unreasonable in his demands for payment, the exparte applicants advised the bank to stop the payment and the complainant (who is the interested party) was advised not to bank the cheque – but he did – eventually the cheque was dishonoured.

When the interested party filed suit, the issue of dishonour of the cheque was raised and the debt that the cheque was to meet was covered in the proceedings – the debt was paid in full.

Mr. Kabiru has cited several decided cases and urged this court to be guided by these saying the interested party gave different version of dates to police and court, which was an express act of malice, intended to create the impression that the cheque was stopped before the date of issue – which he submits is incorrect. What I understand from the material placed before me, is that there seems to be a duality of civil and criminal process over the same subject matter – in fact that the criminal process is being abused by the interested party to arm twist the to exparte applicants.

In the matter of Criminal **Case No.2804 of 2004, Mohammed Gulam Hussein Karmali and Hyundai Motors V The Chief Magistrate's Court Nrb and the Attorney General**, Justice Nyamu examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to take into account, which were enunciated in the case of **M. DEVAO V DEPARTMENT OF LABOUR** (190) INZUR 464 at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court process may lend themselves to oppression and injustice the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in his way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

I have not found any correspondence from the applicants outrightly advising the interested party not to bank the cheque but from the interested party's own conduct of rejecting the cheque because the amount was small, and indicating he would institute proceedings to recover the debt, then it is reasonable to infer that the applicants upon seeing the futility of trying to settle the matter by way of periodic payments, decided to stop the cheque. And even if this should have been constituted a criminal offence really, the events that followed thereafter, all orchestrated by the interested party were such that the stoppage no longer presented any real vice, having adequately found remedies in the civil process at this point only subjects Applicants to underserved trauma and harassment. I don't think this criminal process has been fairly invoked and it is pretty clear that it is simply intended to cause vexation and oppression to the two individuals.

I can do no better than borrow from the words of Kuloba J. in **Saina Vincent Kibiego V The Attorney General** Misc. Application No.8 of 1997 at Mombasa when he held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases. That is an abuse of the court process. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some ulterior purpose.”

From the conduct of the interested party, I find that having exhausted the civil process up to execution, he now irked by the thought that there is a demand to account for proceeds of the sale, and he is actuated by the desire to punish the applicants to silence that demand by brandishing the sword of punishment under the criminal law, than any genuine desire to punish for a crime. Indeed if this was a bonafide concern, then the interested party would have lodged his complaint with the police immediately the cheque was stopped and not wait two years later.

I find that a remedy existed and has been exploited by the interested party in the civil court, and there is really no valid reason to permit use of the criminal process to further his desire to over-abuse the applicants and jeopardise their personal liberty. Under the circumstances I find it appropriate to quash what has so far been done in the SPM's court in Narok in **Criminal Case No.399 of 2011** by way of certiorari. It is also important to stop any further use of the criminal process against the two applicants in relation to the Kshs.550,000/= claim by issuing orders of prohibition.

Costs of this application all awarded to the applicants.

Delivered and dated this 11th day of September, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**