



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Miscellaneous Civil Application 154 of 2008

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE COURT AT KIBERA.....1ST
RESPONDENT

THE ATTORNEY GENERAL.....2ND
RESPONDENT

AND

KURBAN BHALOO.....1ST INTERESTED
PARTY

MALEK KURBAN BHALOO.....2ND INTRESTED
PARTY

EXPARTE

DR. SHASHIKANT VITHALDAS BADIANI AND
MRS JYOTSANA SHASHIKANT BADIANI

JUDGEMENT

What is before this court is the notice of motion dated 16th April 2008 filed pursuant to leave granted on 2nd April, 2008. The applicants seek the following orders:

1. **THAT an Order of Certiorari do issue directed at the Kibera Chief Magistrate’s Court, the 1st Respondent herein, to bring to the High Court for purposes of being quashed the entire proceedings, rulings and/or orders made by the Trial Court in Kibera Chief Magistrate’s Criminal Case No.6983 of 2007(Republic Versus Shashikant Vithaldas Badiani and Jyotsana Shashikant Badiani).**

2. **THAT an Order of Certiorari do issue directed at the Kibera Chief Magistrates Court, the 1st Respondent herein , to bring to the High Court for purposes of being quashed the Order of the Trial Court in Kibera Chief Magistrate’s Criminal Case No.6983 of 2007 dated 18th September**

2007 in which the presiding Magistrate Ordered that the money in the Bank Accounts of the Ex-parte Applicants held at the Bank of Baroda (K)Limited ,Westlands Branch, be deposited before the Trial Court for safe keeping and be brought in form of a banker's cheque in the name of the Registrar of the High Court.

3. THAT an Order of Certiorari do issue directed at the Kibera Chief Magistrate's Court, the 1st Respondent herein, to bring to the High Court for purposes of being quashed the Ruling of the presiding Magistrate in Kibera Chief Magistrate's Criminal Case No.6983 of 2007 delivered on 31st January 2008, in which the said Magistrate admitted into the Court record a Notice of Motion Application dated 14th November 2007 and the affidavit in support thereof, drawn and filed in the said Kibera Chief Magistrate's Criminal Case No.6983 of 2007 by the Complainants therein through their Advocates M/s. Mohamed Madhani and Company Advocates, a firm that had no locus standi in the case.

3. THAT an Order of Prohibition do issue directed at the Kibera Chief Magistrate's Court, the 1st Respondent herein, to prohibit the presiding Trial Magistrate in Kibera Chief Magistrate's Criminal Case No.6983 of 2007 from further hearing the said case either by receiving evidence from the prosecution witnesses, admitting to hearing any application filed by the prosecution or the complainants, granting any orders and or /delivering any ruling or judgement in the said Kibera Chief Magistrate's Criminal Case No.6983 of 2007.

5. THAT an Order of Prohibition do issue directed at the Kibera Chief Magistrate's Court, the 1st Respondent herein, to prohibit the presiding Trial Magistrate in Kibera Chief Magistrate's Criminal Case No.6983 of 2007 from hearing and/or determining the Notice of Motion dated 14th November 2007, drawn and filed in the said Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 by the Complainants therein through their Advocates M/s. Mohamed Madhani & Company Advocates.

6. THAT an Order of Prohibition do issue directed at the Honourable Attorney General, the 2nd Respondent herein, restraining the said Respondent from prosecuting the Notice of Motion dated 14th November 2007, drawn and filed in the said Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 by the Complainants therein through their Advocates M/s. Mohamed Madhani and Company Advocates and from further prosecuting the accused persons in Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 and/or instituting any fresh charges against the Ex-parte Applicants based on the same set of facts relied on in instituting Kibera Chief Magistrate's Criminal Case No. 6983 of 2007.

7. THAT this Honourable Court be pleased to permanently stay the proceedings in the said Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 and to grant all necessary and consequential orders as it and may deem fit and just to grant.

8. Costs of and incidental to this application.

The application is premised on the grounds on its face as follows:-

1. The conduct of the proceedings in Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 and the Ruling of the Trial Magistrate in the said case outweighs the greater public good in that the Ex-parte Applicants have been condemned unheard and are unlikely to ever get a fair hearing.

2. The prosecution of the Applicants in Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 is tainted with ulterior motives and has been selectively instigated on extraneous matters divorced from the goals of justice and is oppressive and vexatious and amounts to an abuse of the process of the court.

3. The rights of the Applicants are under serious threat of being undermined and compelling the

Applicants to stand trial in Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 would violate fundamental principles of justice.

4. Public interest would best be served by permanently staying the Prosecution of the Applicants in Kibera Chief Magistrate's Criminal Case No. 6983 of 2007.

When the matter came up for hearing Mr Naeku, counsel for the ex-parte applicants, sought to rely on the affidavit in support of the notice of motion, the supplementary affidavit thereto, the main submissions and supplementary submissions. He has also brought to the attention of the court the fact that the 1st interested party is deceased and that this position has not been regularized as required by the law. In Kibera Chief Magistrate's Criminal Case No. 6983 of 2007 the applicants herein are the accused persons having been arrested and jointly charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code. The charge was later substituted with two counts namely making a document without authority contrary to Section 357 and uttering a false document contrary to Section 353 of the Penal Code. Prior to the arrest of the applicants the prosecution had moved the court and obtained ex-parte orders freezing the applicants' bank account and ordering the deposit of Kshs.38,000,000/= which was the suspected proceeds of a criminal transaction in court. The applicants being the directors of Ashworth Investments the registered proprietor of L.R. No.214/135 situate in Muthaiga had sold the said parcel of land to the interested parties. The applicants are also the directors of Alpha Medical Manufacturers Ltd whose bank accounts were seized by the court. The applicants contend that no reason has been given as to why the accounts for the company have been frozen yet the company was not a party to the transaction forming the case against them. The applicants submit that Ashworth Investments sold the property on willing-buyer willing-seller basis to the interested parties which sale was consummated via a share purchase agreement, payments being done in three installments. The applicants further argue that Ashworth Investments purchased the property from one Mr. Nayan Vithalbai Patel for kshs. 10 million through a clean transaction the same having been conducted by advocates.

The applicants' main contention is that adverse orders were obtained in their absence without being given an opportunity to state their side of the story or even being served with summons. They had not even been charged in court at that time. The applicants further contend that the magistrate erred by allowing into the court record a notice of motion dated 14th November, 2007 which application was drawn and filed by the interested parties' advocates and this amounted to the interested parties usurping the powers of the prosecution. It is the applicants' contention that they have been subjected to two parallel processes i.e. the criminal case at Kibera Magistrate's Court and Civil Case No. 322 of 2008 at Nairobi High Court (Milimani). In their view this amounts to violation of the rules of natural justice and due process. The applicants further submitted that there was a conflict of interest as the trial magistrate had witnessed the affidavit of the investigating officer and proceeded to grant the orders prayed for in the said affidavit ex-parte. The applicants urged the court to exercise its powers under Section 165(7) of the Criminal Procedure Code and examine the record of the lower court in Kibera CM miscellaneous applications numbers 216/2007, 217/2007 and 218/2007 filed on 11th September, 2007. Finally, the applicants submitted that the criminal case will not serve any public interest as the same arose out of a commercial dispute.

Mr. Mule, state counsel, appearing for the respondents opposed the application through the replying affidavit of Boaz Obetto sworn on 27th January, 2012 together with the annexures thereto and the submissions filed on 28/2/2012. In the said affidavit Boaz Obetto avers that the interested parties made a report that the applicants had sold to them the L.R. No.214/135 Muthaiga in the City of Nairobi at a purchase price of Kshs. 38,000,000/= but the parcel of land was later claimed by one Vithalbhai Patel hence the sale was fraudulent. That upon being instructed by the Provincial Criminal Investigation Officer he proceeded to investigate the allegation of fraud. He carried out a search at Ardhi House and the search results showed that the last conveyance was on 30th August, 1990 between Murushai Noghan Mudhwadia and his wife Jasiben Murubhai as vendors and Nayan Vithalbhai Patel as the purchaser.

Further that the purported transaction between the applicants and the registered owner Nayan Vithalbhai Patel was never registered or recorded and according to him the same was therefore a forgery. He

thereafter proceeded to obtain a court order on 11th September, 2007 to investigate and freeze the applicants' bank account numbers 0063500031 and 0061100808 all domiciled at the Bank of Baroda Westlands Branch, the latter belonging to Alpha Medical Manufacturers Limited. The investigating officer further deponed that the amount was deposited in court to safeguard the same as exhibit. The said investigating officer swore that he then proceeded to request the Registrar of Persons to confirm the holder of national ID No. 0541304 S/No.20254986 and ID No. 8954524 whereupon the Director of Registration of Persons reported that ID No. 0541304 was issued to Halima Ahmed Abdi born in 1908 and that Serial No. 202549856 was used to process ID No. 1781196 for one Thomas Susus Mutia from Vihiga, Shamakhokho hence the identity cards the applicants held were forgeries. He deponed that one Vithalbhai Patel whom the applicants purport to have bought the land from has a different national identity card from the one the applicants used in the transaction with the interested parties. He swore that upon investigations he discovered that the sale proceeds had been deposited in the applicants' account No. 0063500031 and Alpha Medical Manufacturer Limited's account number 0061100808 all in the Bank of Baroda's Westlands Branch. It is the respondent's case that the orders were obtained at the investigation stage hence the presence of the applicants was not necessary as the same would defeat the purpose of investigation, and that the applicants would be afforded an opportunity during trial to question the witnesses and access evidence against them. The respondents also submitted that the applicants had failed to demonstrate that the respondents acted without or beyond their powers.

Mr. Rimui for the interested parties opposed the application through a replying affidavit filed on 19th August, 2008 wherein the interested parties state that they were aware that the applicants were charged for allegedly trying to sell them a parcel of land they did not own. They also stated that they were aware that the proceeds of the sale had been deposited in court pursuant to an order issued by the court at the request of the police. It is the interested parties' case that upon realizing that it would take considerable time for the trial to conclude they instructed their advocate to apply for the amount to be released to them as they were paying interest on the same. It is pursuant to these instructions that their advocate prepared the notice of motion dated 14th November 2007 which was taken over by the Attorney General after the preliminary objection by the applicants was overruled. It was further contended that in order to scuttle the hearing of the said application the applicants instituted these judicial review proceedings which stayed the criminal trial. They further stated that the applicants have misrepresented material facts as in their verifying affidavit they are claiming to have paid ten million shillings as purchase price whereas particulars of cheques and payments annexed thereto only add up to eight million shillings. It was further contended that the applicants are undeserving of the orders sought as they have failed to disclose correspondences with regard to the to the alleged purchase of the property which show that the actual purchase price was fourteen million shillings thereby revealing that the contents of the application are false.

From the pleadings before this court I conclude that the issues for determination are:-

1. Whether the learned magistrate acted in excess of her jurisdiction;
2. Whether there was a violation of the rules of natural justice;
3. Whether the proceedings are properly before the court;
4. Whether the respondents usurped the powers of the Attorney General
5. Whether the applicants are deserving of the orders sought; and
6. Who should pay the costs of the application?

Let me start by thanking the advocates for their input in this matter. Though I may not cite the authorities presented to court by the advocates, I must state that the said authorities will have a bearing on the outcome of this matter.

The starting point is of course the alleged defectiveness of the application. The respondents and the

interested parties argue that the application is defective and incompetent on three grounds namely

(a) the law under which the application is brought is not stated in the title, (b) leave to commence the proceedings was granted seven months after the issuance of the order complained of thereby breaching the six months rules for applying for an order of certiorari and (c) the application for leave was not accompanied by a statutory statement as required by the rules.

I hope I am not mistaken on the first ground because the notice of motion dated 16th April, 2008 and filed in court on 17th April, 2008 clearly shows that the application is brought under Order LIII Rule 3(1) of the Civil Procedure Rules. The objection to the application on this ground therefore lacks merit and the same fails.

The second ground of objection is that leave was granted on 3rd April, 2008 to quash a decision made on 18th September, 2007 which means the application was brought outside the six months for bringing an application for an order of certiorari. The said prayer is one among other many prayers so that even if this particular prayer is struck out the applicants will still remain with other important prayers which if granted will result in the demise of the order issued on 18th September, 2007. It is therefore not necessary to dismiss the prayer to quash the order of 18th September, 2007.

The final objection is that there was no statement accompanying the application for leave. Once again, I hope I am not mistaken. I have perused the court file and find a statutory statement dated 2nd April, 2008 and filed on the same date. The claim that the application for leave was not accompanied by a statutory statement is therefore unfounded.

In short, the applicants' application is properly before this court. Before proceeding to address the crux of the matter, I want to address the claim by the respondents and the interested parties that the applicants ought to have resorted to the other remedies available to them. It is their considered view that the applicants ought to have appealed against the decisions of the magistrate instead of coming to this court for judicial review. I have already reproduced the grounds in support of the application. It is clear that the application is premised on the allegation that the rules of natural justice have been breached by the trial court and the applicants' right to a fair hearing cannot be guaranteed.

The grounds raised by the applicants appeal to this court both in its judicial review jurisdiction and in its appellate jurisdiction. The applicants should not be condemned for opting for judicial review if in their view the same would provide the most efficacious remedy.

It is now time to address the substantive issues in this case. The applicants have asked the court to address its mind to four considerations namely:-

- (a) Requirements of fairness to the applicants in the criminal trial forming the subject matter of these proceedings;
- (b) The legitimate public interest in the criminal justice system;
- (c) The need to maintain public confidence in the administration of justice; and
- (d) The need to prevent abuse of the court process.

The applicants submit that the action by the police of obtaining orders to freeze their accounts and that of a third party (Alpha Medical Manufacturers Limited) without informing them was an act of bad faith. The applicants claim that the issuance of the freezing orders by the 1st respondent without informing them points to unfairness on the part of the 1st respondent.

On this issue the respondents and the interested parties responded that the action by the police and the 1st

respondent was well within the law and in particular sections 118 of the Criminal Procedure Code and Section 180 of the Evidence Act. I do not find it necessary to reproduce the said sections. It is important to note that the move by the investigating officer to obtain orders freezing the accounts was done in a bid to preserve evidence. The 1st respondent after considering the application found it merited and issued the necessary orders. Evidence had been placed before the magistrate that the proceeds of what appeared to be a fraudulent transaction had been deposited in the accounts of the applicants and that of Alpha Medical Manufacturers Limited. The actions of the investigating officer and the 1st respondent were within the law. There is no conflict in the action of the magistrate signing an affidavit and later issuing orders on the contents of the said affidavit. The magistrate was not the author of the affidavit and only swore the deponent in the course of judicial duties. The applicants cannot fault the proceedings in the criminal trial on this score.

Another issue which is said to point to illegality in the criminal trial is an application filed on 14th November, 2007 by the interested parties in which they sought orders that the sum of kshs.38,000,000/= which had been deposited in court be released to them. The applicants argued that by filing the said application the interested parties had usurped the prosecutorial powers of the Attorney General. For purposes of record it is noted that prosecution of criminal cases has been shifted to the Director of Public Prosecutions by the 2010 Constitution. On the said issue the respondents and interested parties argued that the said application was taken over by the Attorney General. It should be noted that the said application is still pending before the magistrate's court. I do not wish to preempt the decision of the trial court in respect of that application. Judicial review should not be used to obfuscate the decisional powers of magistrates. A magistrate is a lawyer by training and is expected to consider arguments in any application and come up with a sound decision. On the face of it, there is nothing illegal about the application that has been placed before the court. I would only caution that the application is a landmine of sorts and the trial magistrate must carefully weigh the arguments before making any decision.

Finally, the applicants argued that the interested parties are guilty of abusing the court process. In support of this argument they point to the fact that the interested parties on 16th July, 2008 filed Nairobi HCCC No. 322/2008 and claimed kshs. 38 million and yet the criminal trial was ongoing. The reply to this by the respondents is that there is nothing wrong with the interested parties' actions since Section 193A of the Criminal Procedure Code recognizes that there can be concurrent criminal and civil proceedings dealing with the same issue. I agree with the respondents and the interested parties that the concurrency of the criminal and civil proceedings cannot be cited as evidence of abuse of the court process. May be if the civil case had been filed before the application of 14th November, 2007 could one have said that there was an abuse of the court process.

The applicants have pointed out that the matter that has taken them to the criminal court is purely a commercial matter. It is difficult to comment on this issue without prejudicing the criminal case in the lower court. I will only state that the prosecution is of the view that a crime may have been committed in the course of the said commercial transaction. It is upon the trial magistrate to weigh the evidence presented to the court and come up with an appropriate decision.

It was also pointed out that the 1st interested party is deceased. This being a judicial review application, the same does not in any way stall the applicants' application. It is unfortunate that the 1st interested party died without knowing the outcome of this application.

In conclusion, I find that the application has no merit. The same is dismissed with costs to the respondents and interested parties. The magistrate-in-charge, Kibera Law Courts is directed to arrange for the hearing of the criminal case on priority basis.

Dated and signed at Nairobi this 4th day of **October**, 2012

W. K. KORIR, J