



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 118 OF 2015

BETWEEN

MUCHIRI KIUMA MAINA..... APPELLANT

AND

ATTORNEY GENERAL..... RESPONDENT

(Being an Appeal from the Ruling of the High Court at Nakuru

(Emukule, J.) dated 14th November, 2016

in

H. C. Petition No. 34 of 2011)

JUDGMENT OF THE COURT

The facts of the case that was filed at the High Court of Kenya at Nakuru in Petition No. 34 of 2011 were largely undisputed. The appellant, Muchiri Kiuma Maina, sued the respondent, the Attorney General, on what he believed was contravention of his fundamental rights and freedoms under various articles of the Constitution of Kenya, 2010 including **Articles 22, 23, 36 (1), 40(1) 50 (1 &2)**. It was alleged in the petition that at the material time the appellant was a director of the then dissolved Kieni East Farmers Company Limited (the company). The appellant alleged that on the 19th July, 2011, he received telephone calls from a person who identified himself as Mr. Kimathi of Kinamba Police Station in Ng'arua, Laikipia West, requiring him to report to that station; that the appellant to confirm legitimacy of the summons told the caller to serve him with official written summons; that on the 12th August, 2011 the appellant received another telephone call from the Land Registrar in Laikipia who made inquiries over an unstated issue; that in answer to this the appellant proceeded to Nyeri and was promptly arrested, forced into a motor vehicle where the Land Registrar was with two other occupants and he was taken to Kinamba Police Station where he was confined. He further alleged that he was denied release on bail, was asked for a bribe which he refused to give; that he was shown some documents and that the next day, which was a Saturday, he was taken to his home by the police who were armed with AK47 rifles which they used to threaten him and because of this he surrendered to them the Members' Register, 3 files, the Memorandum and Articles of Association and the Company Seal of the company. Further, that he was taken back to the said police station where he was held in further confinement. The next day, Sunday, the police officers forced him to record a statement whereafter he was released. He was not charged with any offence. The appellant alleged further in the petition that he was a retired teacher and had served the said company as a director and had been involved in settling crisis occasioned in the company by actions of former directors who wanted to defraud members of the company. According to the appellant, some of those former directors were using the police to obtain the said documents including the company seal to enable them to defraud the company. Further, that it was the wish of the members of the said company that the company be dissolved and in that regard, the appellant had forwarded a dissolution request to an unnamed office on 5th September, 2009.

We hope we have made a fair summary of the petition, which is not elegantly drawn.

For all those reasons the appellant prayed that it be declared and ordered that his fundamental rights and freedoms had been violated; that it be declared that, he, the appellant, was the accredited secretary/director of the dissolved company; that the Company Seal, Members Register, Memorandum and Articles of Association and 3 files taken from him by the District Criminal Investigations Officer, Laikipia West and the Officer Commanding Station, Kinamba Police Station, be immediately surrendered back to the appellant; that he be granted general damages, costs of the petition and such other orders as the court deemed just.

The petition was supported by the appellant's affidavit which repeats the matters in the petition. There were several annexures to the petition.

The respondent filed a replying affidavit through Inspector Bernard Kwarat, the Deputy District Criminal Investigations Officer of the then Laikipia West District. The officer deponed in essence that his office had received communication from the Provincial Criminal Investigations Officer, Rift valley Province, directing that investigations be carried out on complaints received from the said company; that the complaint related to an allegation that some individuals including the appellant had been involved in irregular or illegal allocation of public plots within Kiriko/Morogo farms belonging to the said company; that the said individuals and the appellant had sold plots through forgery of documents; that investigations had revealed that the appellant had no authority to act on behalf of the said company as he was not a director of the same; that the appellant was summoned by the police but refused to obey summons; that the appellant had been arrested to assist in investigations; that materials belonging to the company had been recovered from the appellant's house; that the appellant had been detained for a reasonable period to assist in the said investigations and that the appellant had been released on free bond pending further investigations. The deponent denied that any bribe had been sought from the appellant and denied that the appellant's rights had been violated.

The petition was heard by **Anyara Emukule, J.** who in a judgment (*headed "Ruling"*) delivered on 14th November, 2014, found no merit in the same and dismissed it. Those findings provoked this appeal where the appellant has set out 5 grounds in the Memorandum of Appeal drawn by him dated 7th April, 2015. In the first ground, the appellant faults the learned Judge for holding that the appellant was not a director of the said company; that the learned Judge erred in dismissing the petition when there was sufficient evidence that the appellant's rights had been contravened; that the learned Judge erred and misdirected himself by not holding that the appellant had not been properly summoned to appear before the police. In the penultimate ground, the appellant faults the learned Judge for not holding that the police had no reasonable or probable cause to arrest him. In the last ground, it is said that the learned Judge erred in law and fact in holding that police investigations cannot be a basis for violation of rights and fundamental freedoms.

The appeal came up for hearing before us on 14th March, 2018 when the appellant appeared in person but the respondent was absent. We allowed hearing of the appeal to proceed after satisfying ourselves that the respondent had been served with a hearing notice on 15th February, 2018 for the said hearing.

The appellant had filed written submissions on 14th March, 2018 and relied entirely on the same without finding any need to highlight the same.

We have perused the Record of Appeal and the submissions filed by the appellant.

The learned Judge who heard the petition identified 3 issues for his determination. Firstly, whether the appellant's rights and freedoms were violated. Secondly, whether the arrest and confiscation of the company items in possession of the appellant was constitutional and therefore legal. And lastly, whether the appellant was entitled to the orders sought. On the first issue the learned Judge discussed various cases and considered various articles of the Constitution under which the petition had been presented. The learned Judge also considered the facts stated in the replying affidavit of the representative of the respondent which we have discussed. The learned Judge found that taking away of files and other documents relating to the company was lawful because the police had a right to take away the documents in furtherance of investigations. The learned Judge also found that taking away of company documents did not deprive the appellant of his right of association and that the taking away of the documents served a public duty of investigating possible fraud on land belonging to the company; that it was alleged that the appellant and others were selling the said illegally. On the second issue identified by the learned Judge, whether the arrest of the appellant was legal and within the constitution, the learned Judge found that the police had a mandate which included carrying out investigations. The learned Judge found that the arrest of the appellant by the police was lawful. The learned Judge finally found that the appellant was not entitled to the prayers sought in the petition and the Judge proceeded to dismiss the petition. The learned Judge did not assess damages as sought by the appellant which he would have awarded had the petition succeeded.

The appellant went to the High Court alleging that his constitutional rights had been violated. It was not denied that he was arrested and detained by the police for about 3 days and that documents belonging to the company had been taken away from his house. The appellant alleged that he was secretary and director of the company which was in the process of dissolution.

It would appear that a member or members of the company made a report to the police that the property of the company was being defrauded. In that event, it would appear to us that the matter complained of by an unnamed person was of a civil nature and if there were any irregularities in the manner in which the asset or assets of the company were being dealt with, the company or its members should have proceeded to a civil court where rights and remedies would have been determined.

In **Civil Application No. Nai. 186 of 1992 (NAI 77/92 UR) *Kamau Mucuha vs Ripples Limited***, Hancox, CJ sitting in this Court, while dealing with a leasehold matter where a tenant had sublet a shop and a dispute arose and where police assistance was sought to resolve the issue, had this to say of use of police in such a matter:

"The only valid criticism of the order of the Judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the applicants. The police should never be involved in such matters as there is specific provision for the enforcement of an injunction under Order 21 Rule 28 of the Civil Procedure Rules".

In the more recent case of ***The Commissioner of Police & Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited [2013] eKLR*** where the police were called in on a complaint from a company that the bank had uttered a false document in order to defraud the company, this Court stated:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings” It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control”.

The dispute between members of the company between themselves or between them and the company was purely of a civil nature and the civil courts are well equipped to handle such matters. In the case before the learned Judge the police officer who swore an affidavit in opposition to the petition merely stated that he had been instructed by the Provincial Criminal Investigations Officer, Rift Valley, to investigate possible fraud. It was not actually revealed who the actual complainant was. Even after obtaining the company seal and other company documents from the appellant’s house which the appellant claimed he had a right to keep because he was the company secretary, no action was taken against the appellant then or even thereafter.

The appellant was therefore well within his rights to complain that his fundamental rights had been violated because he was arrested for no good reason. He was arrested on an alleged complaint which should have been filed in a civil court which court is well equipped to handle and determine disputes between members of corporate bodies either between themselves or between them and the company. The learned Judge, with respect, did not address his mind properly on the issues placed before him. No good reason was presented that would have entitled the police to proceed in the manner that they did. The appellant’s constitutional rights were violated when he was arrested without warrant and detained for about 3 days at the police station and must have suffered humiliation and embarrassment when, firstly, he was bundled into the police motor vehicle without any or any valid reason being given to him. Secondly, he was detained at the police station for about 3 days, and thirdly, he was escorted to his home by heavily armed police officers where a search was conducted and company documents, which he was entitled to keep as the secretary and director of the company, were carted away. The police had no business doing all these and the learned Judge should have found in favour of the appellant. He was entitled to the prayers that he sought in the petition before the learned Judge.

The appeal has merit and we hereby allow it. We set aside the orders of the learned Judge and substitute therefor an order allowing the petition.

As we have noted earlier, the learned Judge did not assess damages that he would have awarded to the appellant had the petition succeeded. It was his duty to do that. In the absence of such assessment the proper order that we make is to remit the matter to the High Court for assessment of damages. The appellant is entitled to costs here and below which we hereby grant him.

Dated and delivered at Nyeri this 23rd day of May, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR