



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 478 of 2012

TOTAL KENYA LIMITED.....1ST PETITIONER
BONIFACE ABALA.....2ND PETITIONER
MARTIN MURIUKI.....3RD PETITIONER
FRANCIS KINUTHIA.....4TH PETITIONER
ANDREW OTIENDE.....5TH PETITIONER
MOSES KIARA.....6TH PETITIONER
THOMAS OKOTH.....7TH PETITIONER
MARGARET NDIRANGU.....8TH PETITIONER
CHRISTINE OLUGA.....9TH PETITIONER
DANIEL KINUTHIA.....10TH PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS

DEPARTMENT..... 1ST RESPONDENT
COMMISSIONER OF POLICE.....2ND RESPONDENT
DIRECTOR OF PUBLIC
PROSECUTIONS.....3RD RESPONDENT
HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

A O BASID LIMITED.....INTERESTED PARTY

JUDGMENT

Introduction and background

1. This case concerns the powers of the Director of Public Prosecutions (“DPP”) to prosecute suspected offenders on the one hand and the need to protect the fundamental rights and freedoms and prevent abuse of the court process on the other.
2. The 1st petitioner, Total Kenya Limited (“Total”), is a limited liability company carrying on the business of importing, distributing and marketing various petroleum products within and outside Kenya. The 2nd to 10th petitioners are employees of Total and are the Legal Manager, Senior Internal Auditor, Treasury Manager, Treasury Supervisor, Sales and Administration Manager, Credit Control Manager, Territory Managers and Depot Supervisor respectively.
3. At the heart of this case is a fraud reported to the Criminal Investigation Department (“CID”) in June 2010. Investigations were conducted with the assistance of the petitioners and led to the apprehension of Nelson Mburu Karanja *alias* Samuel Korosho who was charged with fraud in ***Kibera Chief Magistrates Court Case No. 2995 of 2010*** (“the Criminal Case”). The case is now being heard and the 2nd to 10th petitioners are scheduled to give evidence on behalf of the prosecution.
4. While the trial was going on, the petitioners were shocked when they were informed in October, 2012 that the DPP had advised the CID to arrest and charge the petitioners for their role in the fraud and that such arrest and charges would be effected forthwith. The petitioners now seek to restrain the respondents from commencing criminal proceedings against them over fraud.
5. The petitioners complain that they had now become the hunted yet they co-operated with the CID in unearthing the fraud which culminated in the apprehension of the suspects who are now facing trial.

The fraud

6. Central to this matter is a fraud perpetrated against Total. The fraud was executed by persons posing as agents of its customer Nakumatt Holdings Limited (“Nakumatt”) through the use of forged bank guarantees leading to the loss of about 670,000 litres of oil products valued at Kshs 45,161,800. The purpose of receiving the guarantees was to cushion the Total against any possible default by the customer.
7. According to police investigations two individuals, one of whom is the accused in the Criminal Case, masquerading as senior managers of Nakumatt, presented themselves to Total purporting to seek credit facilities to secure the supply of petroleum products. The malefactors were given account application forms and a list of accepted banks. They duly completed the forms which they submitted to Total’s head office accompanied by copies of account opening documents including a copy of a bank statement, PIN certificate, VAT Certificate, Certificate of Incorporation and the bank guarantee. The account opening documents were processed by Total internally and the Nakumatt account was opened. Barclays Bank of Kenya provided a Kshs. 30 million guarantee which was later increased to Kshs. 45 million.
8. The account opening documents and the bank guarantee however turned out to be false. Total formed the view that A.O Basid Limited, the interested party and a transporter it contracted, was a conduit of the fraud and as a result of negotiations the parties entered into a Memorandum of Understanding in which A. O. Basid undertook to pay Total the sum of Kshs. 45,161,800/00 being the value of the products lost through the fraud. The Memorandum of Understanding is now the subject of a civil suit, **Nairobi HCCC No. 723 of 2012** which is still pending hearing and determination.
9. The respondents, on their part, suspect collusion between the Total staff and the accused in the Criminal Case to perpetrate the fraud resulting in the loss of products.

Petitioners’ case

10. The petitioners' case is that their fundamental rights and freedoms will be violated if they are charged with fraud.

11. They contend that they are entitled to equal protection and benefit of the law enshrined in **Article 27(1)**. Their case is that they had a legitimate expectation that the investigation into the complaint by Total would be fairly investigated and that they would be informed of the outcome. By purporting to charge them on matters which they complained about, the petitioners aver that the respondents' conduct amounts to an abuse of criminal law and constitutes a violation of **Article 27(1)**.

12. The petitioners are apprehensive that their right to security of the person and freedom of movement guaranteed under Articles **29** and **39** respectively will be violated if they are arrested on the basis criminal charges instituted arbitrarily, without just cause for an ulterior and extraneous purpose.

13. The petitioners aver that **Article 35** enjoins the respondents to share information obtained in the investigation with them and not overtly use the same information against them. They also complain that the respondents breached **Article 35** by failing to share information in their possession thereby curtailing their rights. As regards the right to fair administrative action which is guaranteed under **Article 47(1)**, the petitioners complain that the investigation was carried out was in violation of their right.

14. In light of the various breaches of their rights outlined above, the petitioners complain that **Article 50** which guarantees the right to a fair trial will be violated unless the petition is allowed.

15. Mr Kemboya, learned counsel for the petitioner, submitted that the petitioners had a legitimate expectation that the investigations into the complaint lodged by Total would be fairly investigated and that they would be informed of the outcome of the same. Further that they are apprehensive that their 'innocent cooperation' with the authorities may have been covertly abused to their detriment without affording them their constitutional right to know of any suspicions against them or to protect themselves from any form of self-incrimination.

16. Counsel further submitted that the petitioners are concerned that they are being charged two years after the complaint was lodged. They aver that the respondents' conduct amounts to an abuse of their power as there is not fresh evidence to warrant a change in the decision to prosecute the petitioners.

17. Mr Kemboya argued the 1st respondent did not explain to the petitioners their culpability and that there has been failure to undertake a fair and impartial investigation. Counsel submitted that the criminal process is prejudicial as it affects the liberty of the individual and places him at the risk of conviction not to mention damage to one's reputation. Counsel argued that there may have been negligence on the part of the employees but this does not amount to a crime.

18. In the petition dated 18th October 2012, supported by the affidavit of Boniface Abala, Total's Legal Manager, the petitioners pray for various reliefs including the following:

a) A declaration be issued to declare that the 1st Respondent's conduct infringed the Petitioner's rights under Articles 27, 28 and 47 of the Constitution

b) A declaration be issued to declare that 1st Respondent's conduct threatens to infringe the Petitioners' rights under Articles 29, 39 and 50 of the Constitution.

c) The Honourable Court be pleased to uphold the Petitioner's right under Articles 27, 28, 29, 39, 47 and 50 of the Constitution by issuing an order of prohibition prohibiting the Respondents by themselves, their agents and or officers or other persons acting on the authority of the Respondents from arresting, detaining, preferring any charges or in way whatsoever interfering with the liberty and freedom of the 1st Petitioner's Directors and/or employees, and that of the 2nd to 10th Petitioners arising from the investigations into the fraud perpetrated against the 1st Petitioner amounting of Kshs. 45,161,800.

d) An injunction do issue restraining the Respondents by themselves, their agents and or officers or other persons acting on the authority of the Respondents from arresting, detaining, preferring any charges or in any way whatsoever interfering with the liberty and freedom of the 1st petitioner's Directors and employees and that of the 2nd to 10th petitioners arising from the investigations into the fraud perpetrated against the 1st petitioner amounting to Kshs. 45,161,800

e) An injunction do issue compelling the Respondents to avail to the 1st Petitioner all the information it has garnered in its investigations into the fraud perpetrated against the 1st Petitioner amounting to Kshs. 45,161,800

f) This Honourable Court do issue such Orders and give such Directions as it may deem mete, just and appropriate in the circumstances of this matter.

g) The Costs of the Petitioner be awarded to the Petitioners.

14. The petitioners have relied on various authorities to support its case including that of **DPP v Humphrys [1976] 2 All ER, Ndarua v Republic [2002] 1 EA 205, Githunguri v Republic, Nairobi Misc. Crim. Appl. No. 180 of 1985** and **Kenya Commercial Bank Ltd & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department and Another, Nairobi HC Petition 218 of 2011 [2012]eKLR**. These cases support its proposition that this court has inherent jurisdiction to issue prohibition orders where the conduct of the respondents is found to violate fundamental rights and freedoms, oppressive or an abuse of process.

Respondents' Case

15 .The respondents oppose the petition on the basis of a Replying Affidavit sworn on the 26th November 2012 by Chief Inspector Samwel Bett, a Police Officer serving in the Directorate of the CID and also the Investigating Officer in the on-going criminal case at Kibera Law Courts, being **Criminal Case No. 4716 of 2012** and also **Criminal Case No. 2995 of 2010**.

16. It is the respondents' case that preferring of charges against the petitioners was informed by their investigations which revealed that there was negligence or collusion on the part of Total staff in the commission of the fraud. Chief Inspector Bett depones that after investigation he forwarded the investigation file together with his recommendations to the DPP. After reviewing the matter, the DPP in the letter dated 2nd October 2012, stated, "*We have perused the Inquiry file and considered the evidence contained therein and your recommendation thereon. We concur with your analysis that there is credential evidence to prove that the named members of staff of Total (K) ltd colluded with the accused persons in the commission of the offences with which you have recommended them to be jointly charged Accordingly, the said person should be jointly charged with the accused persons as recommended ...*"

17. Mr Okello, learned counsel for the 1st and 2nd respondents, stated that it is the duty of the police to investigate complaints and that in this case, the investigations disclosed commission of offence and that there was found to be sufficient evidence to sustain a charge. Counsel submitted that there was no provision in law requiring the DPP to inform the petitioner of its intention to charge and showing them the information that necessarily led to the decision to charge them.

18. The respondents denied any violation of petitioners' constitutional rights and stated that the police and DPP acted in accordance with their respective constitutional and statutory mandates and there was no reason advanced for the court to intervene in the decision made to charge the Total's employees.

Determination

19.The investigation into the conduct of the petitioners is now complete and the DPP has evinced his intention to prosecute the petitioners and therefore the central issue for consideration is whether the

decision is within the law and whether the court should intervene to stop implementation of that decision. I agree with the respondents that it is within the mandate of the police to investigate crime and where there is reasonable evidence to prosecute the offender.

20. The office of the Director of Public Prosecutions established under **Article 157** is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with the constitutional dictates. As I stated in **Kenya Commercial Bank Ltd and 2 others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011**, “[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.*” [Emphasis added] (See also **Investments & Mortgages Bank Limited v Commissioner of Police and Director of Criminal Investigations & Others, Nairobi Petition No. 104 of 2012 [2013] eKLR**, **Hon. Chirau Ali Mwakwere v Robert Mabera & Others, Nairobi, Petition No. 6 of 2012**, , **Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)**, **Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)**).

21. Although this court has inherent jurisdiction to stop abuse of its process by prohibiting criminal proceedings where the same are found to be oppressive or otherwise an abuse of its process, such power must be exercised ever so cautiously so as not to stifle what is otherwise the lawful discharge of constitutional mandate by the police service and the DPP. That is why in **Kenya Commercial Bank Ltd case (supra)**, I stated that, “[23] ... *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.*”

22. I am afraid that the circumstances of this case do not justify intervention by the court as submitted by the petitioner. I have considered the facts and the material before the court and I find that the respondents directed themselves to the evidence and material before them. While examination of the facts may lead to a different view of the matter, that alone does not justify intervention by the court as the review required by the court is one of legality and process rather than the substance unless the evidence leads to an unreasonable and unsupportable conclusion.

23. The petitioners have raised an important question that they aided the investigations that culminated in the on-going criminal matter and that some are in fact potential witnesses in the said matter. In my view, this fact alone does not entitle the petitioners to immunity from prosecution. The duty of the CID and the DPP is to determine the facts and see whether there is evidence of criminal culpability as a basis for the decision to prosecute. The right against self-incrimination is one of the fundamental rights ingrained especially in our criminal justice system. Indeed, one of the elements of the right to fair trial under **Article 50(2)(1)** is the right ‘*to refuse to give self-incriminating evidence.*’ In this case though, the remedy to such a violation is not to stop the intended prosecution but rather to exclude evidence that is obtained in violation of the prohibition. I think the issue is one to be taken at the trial where the petitioners are entitled to object to specific evidence obtained in contravention of the Constitution.

16. I do not think there is any law that forbids criminal proceedings from being instituted two years after the event upon reasonable suspicion so long as this does not violate specific rights of the accused. In this case, the issue is one of fraud that had to be investigated in detail. I therefore would not term the time taken to investigate the petitioners as so inordinate as to amount to violation of their rights.

17. **Article 35(1)** entitles every citizen access to information held by the State. This provision is not self-executing. The petitioners must at least request for information before it is given to them. If the information is not sought, it cannot be argued that in fact, the provision has been violated (see **Kenya**

Society for the Mentally Handicapped v Attorney General and Others Nairobi Petition No. 155A of 2011[2011]eKLR at para 42 and 43). I have read the petition and deposition and there is no evidence that the petitioners requested for any information from the respondents and as such no breach has been established in this respect.

18. As a matter of fact, the petitioners may as well be innocent of the alleged charges, but it is not for this court to usurp the role of the trial court and evaluate the weight of the evidence levelled against the petitioners. The burden to prove the offences against the petitioners lies on the prosecution to prove commission of the offence 'beyond reasonable doubt.' In summary, the matters raised will be resolved at the trial (see ***William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 [2010] eKLR***). Finally, there is no evidence that the petitioners will not receive a fair trial consistent with the values and principles set out in the Constitution.

Disposition

19. In the circumstances, I find and hold that the petitioners' rights and fundamental freedoms have not been violated as alleged or at all. Consequently the petition be and is hereby dismissed.

20. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 17th day of May 2013.

D.S. MAJANJA
JUDGE

Mr Kemboy instructed by Kemboy & Ogola Advocates for the petitioners

Mr Okelo instructed by the Directorate of Public Prosecutions and the Commissioner of Police.

Mr Ojwang', Litigation Counsel, instructed by the State Law Office for the Attorney General

Ms Mutua instructed by Issa & Company Advocates for the interested party.