



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR APPLICATION NO. 9 OF 2013

**IN THE MATTER OF AN APPLICATION BY GIRO COMMERCIAL BANK LIMITED FOR
LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF MISC. CRIMINAL CASE NO. 2325 OF 2012 AND CASE NO. 2327 OF
2012**

AND

**IN THE MATTER OF EVIDENCE ACT CAP 80 OF THE LAWS OF KENYA AND THE
CRIMINAL PROCEDURE CODE**

BETWEEN

GIRO COMMERCIAL BANK.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

TRICON INTERNATIONAL LIMITED.....1ST INTERESTED PARTY

MAHENDRABHAI MITHABHAI PATEL.....2ND INTERESTED PARTY

EX PARTE

GIRO COMMERCIAL BANK

RULING

1. By a Chamber Summons dated 15th January 2013, **Giro Commercial Bank Limited**, the ex parte applicant herein sought the following orders:

1. **That this application be certified as urgent and the same be heard immediately in view of its urgent nature.**
2. **That the Applicant herein, Giro Commercial Bank Limited be granted leave to apply for an order of Certiorari to remove into this honourable court and to quash the warrant to investigate account issued on 23rd October 2012 in Misc. Criminal Case No. 2325 of 2012 and the warrant issued on 24th October 2012 in Misc. Criminal Case No. 2327 of 2012 respectively.**
3. **That the Applicant herein be granted leave to apply for an order of Prohibition directed to and prohibiting the respondents from executing and/or effecting the said warrant in the present from or in any intended variation thereof.**
4. **That the Applicant herein be granted leave to apply for an Order of prohibition directed to and prohibiting the respondents from further investigating the 1st interested Party's bank accounts number 4002127 and 3003759 at Giro Commercial Bank Limited or any other account of the 1st Interested Party.**
5. **That the grant of leave herein do operate as a stay of execution of the warrant issued on 23rd October 2012 and 24th October 2012 in Misc. Criminal case No. 2325 of 2012 and Misc. Criminal Case No. 2327 of 2012 at the Chief Magistrate's Court, Nairobi pending the hearing and determination of the application for Orders of Certiorari and Prohibition aforesaid and/or until further Orders of this honourable court.**
6. **That the costs of this application be in the cause.**

When the application came for hearing before me on 16th January 2013, I invoked the provisions of Order 53 rule 1(4) of the Civil Procedure Rules and while granting the leave sought directed that the application be served and be heard inter partes on 23rd January 2013. The said provision provides as follows:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

2. After hearing the counsel for the parties, I, in the exercise of the powers conferred upon the Court by the above provisions granted a stay of the impugned proceedings pending the delivery of this ruling.
3. The said application is, required under Rule 1(2) of the aforesaid Order 53 supported by statement and affidavits verifying the facts therein. According to the ex parte applicant, a Police Officer named **Mr Makau** attached to Economic Crimes Unit and Commercial Crimes Unit of the of the Criminal Investigations Department served the applicant with warrants authorising one **Cpl Tinga Mwango Charles** to investigate accounts held in the name of **Tricon International Limited** and to carry away statements, account opening forms and other documents specified in the warrant. According to the ex parte applicant the subject accounts as well as documents are the subject of HCCC No. 399 of 2012 filed by **Tricon International Limited**, the 1st interested party herein (hereinafter referred to as Tricon) and the ex parte applicant. In the said case, it is contended that Tricon obtained orders compelling the ex parte applicant to furnish the applicant with all statements and documents pertaining to **Tricon's** accounts but following the failure by **Tricon** to comply with the conditions of the said orders as well as its misconduct the said orders were vacated and the Court ordered the parties to fix their pending applications for hearing. However, instead of proceedings as directed **Tricon** secured the impugned warrants which in the applicant's opinion is a ploy meant to circumvent the due process of the law and assist **Tricon** to obtain the orders sought in the civil suit through the criminal process and hence harass and intimidate the applicant into conceding **Tricon's** claim in the pending civil since the documents constitute evidence

upon which the applicant intends to rely in the said civil suit.

4. In opposition to the application **Tricon**, through an affidavit sworn by its Managing Director contended that the Director of Public Prosecutions cannot be permanently stopped from executing his Constitutional and statutory mandate of investigating and prosecuting crime. According to the deponent, Tricon, as the proprietor of the subject accounts is the only one with the right to complain on the issues touching on the manner in which the accounts are being run. And call the police to investigate the same. In its attempt to stop the investigations in respect thereof, it is contended that the applicant is obstructing justice. Since the e said Civil Suit is not a criminal case, it is **Tricon's** position that the same cannot be the subject of investigations into commission of criminal offence hence cannot be the basis for obtaining the orders sought herein hence the orders sought are unmerited.

5. In his submissions, **Mr Kangethe**, learned counsel for the ex parte applicant, stated that since leave to commence these proceedings has been granted, it would make a lot of sense if the stay was also granted so that the ex parte applicant's victory is not rendered an academic exercise. If the documents sought are taken away, it is submitted, there is no way in which the applicant will be able to operate the said accounts yet there are pending suits in respect of the operation of the said accounts. Learned Counsel in support of his submissions cited the case of **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, in which it was held that the Court has the power and duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation; that it is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform; that an order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious; and that in cases where the prosecution is an abuse of the process of court, the duty of the court is to ensure that it maintains its integrity and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear on extraneous considerations.

6. On his part **Mr. Macharia**, learned counsel for **Tricon** submitted that Court ought not to set aside the impugned orders as **Tricon** is the owner of the subject accounts and that the grant of the stay sought would amount to interfering with the state's exercise of its Constitutional mandate hence the application ought to be dismissed. In his submissions he relied on Nairobi High Court Miscellaneous Civil Application No 240 of 2011 between **Cape Holdings Limited vs. Attorney General & Others** where it was held that it is outside the Court's jurisdiction to supervise how the police should conduct its investigations unless there is evidence to show that the investigation is being conducted in a manner to prejudice the rights and interests of the applicant. He also cited Nairobi High Court Constitutional Reference No. 165 of 2011 between **Rosemary Wanja Njau & Others vs. The Hon. Attorney General & Others** in which it was held that by dint of section 193A of the Criminal Procedure Code, the fact that there was an on going criminal case in which the matters in issue were also directly in issue in a pending civil case, is not a ground for any stay, prohibition or delay of the criminal proceedings.

7. It is worth noting that the 1st respondent, the Director of Public Prosecutions and the 2nd Interested Party did not oppose the orders sought.

8. I have considered the application. It is important to first deal with the circumstances under which the Court will grant stay of a criminal process in these kind of proceedings. In doing so the Court is alive to the fact that at this stage the Court is only concerned with the determination whether or not to stay the proceedings pending the determination of the Judicial Review application hence the merits or otherwise of the judicial review application ought not to be dealt with at this stage.

9. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to hold criminal

process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration. See **R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763** and **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.

10. In the present case it is alleged that there are pending civil proceedings between the parties herein. In one case **Tricon** sought and obtained conditional orders compelling the release of the documents the subject of the impugned warrants but failed to comply with the said conditions. Secondly **Tricon's** conduct led the Court into vacating the said orders and the Court directed the parties to fix the pending applications for hearing. Instead of complying with the Court's directions, **Tricon** resorted to criminal process in order to circumvent the directions of the Court. **Tricon** on the other hand contends that since it is the proprietor of the subject accounts and has complaints with respect to the manner in which the accounts are being operated is justified in lodging a complaint for the investigation thereof. In his ruling dated 1st August 2012, **Mr Justice Mabeya** found that:

“by their act of resulting (sic) to other extra judicial route to achieve what they have come to seek in court leaves a lot to be desired as to the bona fides of these proceedings. In my view, it would seem that the Plaintiffs [read Tricon] are undeserving of the orders so far that were made in their favour...In order to place the parties on equal footing, and since the plaintiff seems to prefer to the Central Bank of Kenya giving directions as to how the accounts the subject matter of this suit and motion dated 20/6/12 are to be operated, this court; (sic) view is that it will be prejudicial to the Defendant to have orders made against it to remain in force whilst the plaintiff who had obtained the said orders in its favour, is not ready to comply with the same and has instead preferred that the regulatory body deal with the issue...Accordingly to avoid the abuse of the court process by the plaintiff, and in the exercise of the inherent jurisdiction of this court, I hereby set aside the orders given herein on 25th June, 2012 in their totality. This will give the plaintiff and the defendant room to face the regulatory body in banking in sorting out the dispute...All pending applications may be fixed at the registry for hearing in the new term”.

11. It seems that this is the decision that triggered the commencement of the criminal proceedings. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of

these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

12. Whereas at this stage the Court cannot find with finality that **Tricon** is abusing the process of the Court, based on its past conduct of securing an order from this Court, failing to comply with the conditions attached thereto, seeking the interpretation of the said order from a body other than the Court and on being directed to fix its application for hearing resorting to the criminal process, the court finds that the applicant's contention that it is abusing the Court process may not be baseless. If the Court were to eventually find that **Tricon** is actually abusing its process, the Court would no doubt be entitled to bring the criminal process to a halt in order to maintain its dignity.

13. In the premises, it would not be prudent to allow the said criminal proceedings to continue. The Court ought in the circumstances of this case to investigate the bona fides of **Tricon** in commencing the said criminal proceedings in order to satisfy itself as to the *bona fides* thereof before permitting the same to continue.

14. I am therefore satisfied that this is a proper case in which a stay of the proceedings ought to be granted. Accordingly, the order that commends itself to me is that the execution of the warrant issued on 23rd October 2012 and 24th October 2012 in Miscellaneous Criminal Case No. 2325 of 2012 and Misc. Criminal Case No. 2327 of 2012 at the Chief Magistrate's Court, Nairobi is hereby stayed pending the hearing and determination of these Judicial Review proceedings and/or until further orders of this court. The costs of this application shall be in the cause.

Dated at Nairobi this day 28th of February 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kangethe for the Applicant