IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & MURGOR JJ.A)

CIVIL APPEAL NO. 56 OF 2012

BETWEEN

THE COMMISSIONER OF POLICE & THE DIRECTOR

OF CRIMINAL INVESTIGATION DEPARTMENT…… 1ST APPELLANT

THE HON. ATTORNEY GENERAL …… 2ND APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED …….. 1ST RESPONDENT

DAVID KIPROP MALAKWEN …….. 2ND RESPONDENT

WILFRED KIPKORIR SANG …….. 3RD RESPONDENT

MUIRI COFFEE ESTATE LIMITED …….. 4TH RESPONDENT

BENJOH AMALGAMATED LIMITED …….. 5TH RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT OF HON. DAVID MAJANJA J. DELIVERED ON 2ND MARCH, 2012

IN

H.C. PETITION NO. 218 OF 2011)

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JUDGMENT OF THE COURT

In the course of arguments in this appeal, we were informed that there have been over 18 suits between the 1st respondent (Kenya Commercial Bank Limited – the bank), on the one hand and the 4th respondent (Muiri Coffee Estate Limited – the guarantor) and the 5th respondent (Benjoh Amalgamated Limited – the Company) on the other hand. The first suit was instituted in 1992. We are ourselves aware of the number of Judges of this Court who have had to recuse themselves from hearing any

matter relating to this dispute on account of having dealt with one or more matters involving the three parties. Because of the well documented history of this dispute, we do not intend to rehash that history save to explain that the dispute relates to a loan facility extended by the bank to the company in 1989, secured by charges over two properties in Kiambu and Nyandarua guaranteed by the guarantor. There was default on the part of the company in the repayment of the facility. After issuing the requisite statutory notice, the bank scheduled an auction. The company and guarantor filed HCCC No. 1219 of 1992 against the bank. A consent was recorded in which the company and guarantor undertook to liquidate the liability, failing which the bank would proceed with the sale. There was, once more, default, marking the beginning of the legal battle that has engaged the courts since 1992.

This appeal therefore arises from one of the several suits brought by the main parties to the original suit but sucking in the appellants, the then Commissioner of Police, (before the appointment of the Inspector General), the Director of Criminal Investigations Department and the Attorney General (the A.G.).

The genesis of the instant appeal is a requisition purportedly issued under **Section 22** of the Police Act (Cap 84 of the Laws of Kenya) on 27th October, 2011 to compel the attendance at the Criminal Investigation Department (C.I.D.) Headquarters of two senior officials of the bank, David Kiprop Malakwen (the 2nd respondent), the company secretary of the bank and Wilfred Kipkorir Sang (the 3rd respondent). We have said the requisition was purportedly issued under **Section** 22 of the Police Act on 27th October 2011 because by that date the Police Act had been repealed by the National Police Service Act No. 11A of 2011 on 30th August 2011 and **Section 22** replaced by **Section 52** of the new Act. We say no more on this point. Perhaps the police were using old forms.

The bank and its two employees, the 2nd and 3rd respondents, upon being served with requisition petitioned the High Court in Nairobi in H.C. Petition No. 218 of 2011 for protection of their fundamental rights and freedoms arguing that the requisition requiring their attendance at the CID headquarters was not only prejudicial to them in view of several cases already determined in the bank's favour or pending determination before the courts but also amounted to a violation of their rights to a fair trial guaranteed by **Article 50 (1)** of the Constitution; that the investigations are in a matter that is *sub judice;* that the company is using the CID to illegally obtain information and evidence which they intend to use in the civil matters pending in the High Court; that there can be no basis for criminal investigation of the company's account in view of the fact that the company and guarantor have admitted liability, offered a scheme of payment and even recorded a consent; that the 2nd and 3rd respondents as employees of the bank have not been involved in the drawing of documents the subject of the investigations and that the requisition against them is only intended to frustrate, embarrass and intimidate them.

The 2nd appellant (the A.G.) filed grounds of opposition stating that the petition was itself a violation of **Articles 245 (2) (a) 245 (4), (b), 157 (4)** and **157 (10)** of the Constitution; that the rules of *sub-judice* and *res judicata* cannot be invoked to bar concurrent and parallel criminal investigations to the civil suit; and that in issuing the requisition the police were acting within the law.

On behalf of the 1st appellant, a replying affidavit sworn by Chief Inspector James Chemutai, is to the effect that the CID was moved by a complaint from the company that the bank had uttered a false document in order to defraud the company through its loan account as a result of which several letters have been exchanged between the CID and the bank. Because the CID did not get satisfactory answers to the complaint, it issued the requisition against the two employees of the bank on behalf of the bank.

The company through Samuel Kungu Muigai deposed that aggrieved by the state of its account with the bank, the company had instituted Nbi. HCCC No. 285 of 1993. The court in that case ordered that the

Provincial Criminal Investigation Officer, Nairobi to investigate the company's account with the bank. The investigations revealed that the record and statements of the account could not be traced leading the company to suspect that the loss or misplacement of these documents had everything to do with the state of its account, which, within seven months had shot from Kshs. 3,400,000/- to Kshs. 44,358,583/-; that the bank has previously brought similar applications rendering the petition *res judicata* and finally that the latest demand to the company to pay to the bank Kshs. 70,102,426/40 without any basis amounts to a fraud, hence the decision to report the matter to the police for investigations.

After listening to submissions by counsel and considering authorities cited in support of the submissions, the learned Judge (Majanja, J.) appreciated and held *inter alia* that:-

i. Under **Article 22** of the Constitution the bank and its two employees were entitled to seek court's protection and that the issuance of the requisition was sufficient basis for the three to move the High Court.

ii. In terms of **Section 193A** of the Criminal Procedure Code, the fact that any matter in issue in any criminal proceedings is also directly substantially in issue in any pending civil proceedings is not a ground for staying or prohibiting the criminal proceedings.

iii. Where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power is exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

iv. The offices of the Director of Public Prosecutions and the Inspector General of the National Police established under **Articles 157** and **245** of the Constitution are independent and the court would not ordinarily interfere in the running of those offices provided they operate within the constitutional and statutory limits.

The learned judge concluded thus:-

"28 ……I hold that the complaints in respect of the account are really a collateral attack on the decisions of the High Court and Court of Appeal on matters which those courts have held are settled. This is evident from the deposition of Ngengi Muigai which I have cited at paragraph 17 and 18 above.

29. It is true that the complaint was lodged based on decision by Justice Khaminwa as set out in paragraph 16 above. It is not disputed that those decisions have now been stayed by the Court of Appeal. As a court of law, I cannot shut my eyes to what is an obvious abuse of the legal process. This abuse must be stopped in its tracks and I am satisfied that I have jurisdiction to do so.

30. As regards the rights of the petitioners, I hold that the continued invocation of the criminal process in light of the peculiar facts of this case would impair the ability of the petitioners to have a fair trial. The intentions of the interested parties in lodging the criminal complaint is borne out by paragraphs 5 and 6 of the affidavit of Ngengi Muigai which I have set out at paragraphs 17 and 18 above…

……

33. I have looked at the orders issued in the judicial review matters and I am satisfied that the doctrine of *res judicata* does not apply to these proceedings for several reasons. First, these proceedings are commenced under Article 22 of the Constitution intended to enforce fundamental rights and freedoms. Second, this case has been triggered by the issuance of the requisition notices by the 1st respondent's officer under the Police Act. It is a fresh cause of action which is different."

With that, the court declared that the investigations were a threat to the bank's right to a fair trial under **Article 50** of the Constitution. The court also restrained the CID from investigating, summoning or arresting the bank's employees or investigating any matter in respect of the dispute between the company and the bank. The Commissioner of Police, the Director of Criminal Investigations and the Attorney General were aggrieved by the order and have brought the instant appeal citing 15 grounds which we have condensed as follows:-

i. That the learned judge failed to appreciate that the issues raised in the petition were substantially and materially in issue in similar applications JR Misc. Appl. No. 784 of 2007 and J.R. Misc. Appl. No. 275 of 2009.

ii. That the learned judge erred in failing to find that civil and criminal proceedings can proceed concurrently.

iii. That the judge erred in holding that the issuance of requisition under **Section 22** of the Police Act is unconstitutional.

iv. That the learned judge erred in failing to appreciate that the doctrine of self-incrimination does not apply to criminal responsibility by a corporate body.

v. That without evidence of violation of fundamental rights of the respondents the court erred in granting an order of injunction.

Mr. Kuria, learned counsel for the appellants argued these grounds on five heads, as follows:-

a. *Res judicata* – whether the issues in the petition were similar to those in the concluded JR. Nos. 7841 of 2007 and 275 of 2009. According to counsel, the petition was *res judicata.*

b. Duality – whether there can be concurrent criminal and civil proceedings of related issues. Counsel submitted that by dint of **Section 193A** of the Criminal Procedure Code the two proceedings can run concurrently.

c. Constitutionality and/or legality of **Section 22** of the Police Act – whether the Court can intervene merely upon the issuance of requisition even before a decision to prosecute has been made. It was the appellant's contention that the intervention by the High Court was premature.

d. The independence of the Inspector General of Police and the Director of Public Prosecutions – whether a court can direct the two offices in the manner they carry out their constitutional mandate. It was argued that in the discharge of their functions the two offices do not require consent from any person or authority and are not under anyone's direction or control.

e. Criminal responsibility of body corporate - whether the doctrine of self-incrimination applies to corporate criminal responsibility: that a body corporate cannot incriminate itself.

In a brief rejoinder Mr. Wachakana for the company submitted that the High Court cannot curtail the investigating mandate of the police.

For the bank and its two employees it was submitted by Mr. Nyachoti, learned counsel, that the petition was not *res judicata* JR. Misc. Application Nos. 784 of 2007 and 275 of 2009 as the former was withdrawn and not determined on merit, while the latter was dismissed; that the dispute being of a commercial nature, police investigation is misplaced; that both the High Court and this Court have found no evidence of fraud and the investigations sought are purely to serve collateral purpose.

Although the arguments in this appeal appear elaborate, in our own assessment, the sole broad issue is whether a court can interfere with the powers of the police to investigate an alleged crime by issuing a prohibitory order. The other aspect of this appeal is whether the petition was *res judicata.* Since we consider the latter issue easier to dispose of, we shall begin with it.

While Mr. Nyachoti was explicit that JR Misc. Appl. No. 784 of 2007 was withdrawn before being determined on merit, he was less explicit with regard to No. 275 of 2009. He merely said that it was dismissed. We cannot blame him for adopting that approach. After all it was the appellants who had raised the point and were bound to prove it. Mr. Kuria also simply referred us to two orders. The first order relates to JR Misc. Application No. 784 of 2007 and was, to the effect that the Notice of Motion dated 26th July 2007 was withdrawn with costs. The second order made in JR Misc. Civil Application No. 275 of 2009 was that the application was dismissed with costs. Can the foregoing be a basis for us declaring that the petition was *res judicata* the above two judicial review applications" The only common thing between the petition and the two applications are the parties. Yet, for a matter to be said to be *res judicata* it must also be demonstrated that the matter in issue has already been determined in a previous suit on merit by a court of competent jurisdiction. **Section 7** of the Civil Procedure Act, makes this quite clear.

It is difficult for an appellate court to ascertain these facts without the party asserting them providing the details. In short, we are unable, with the material contained in the record, to say one way or another that the petition was or was not *res judicata.*

We now turn to the crux of this appeal – whether or not the court can prohibit the police from conducting investigation into an alleged crime. From the provisions of the Constitution, and the National Police Service Act, as a key agency of the criminal justice administration, the police are responsible for performing multi-faceted functions such as the prevention of crime, maintenance of law and order, and conduct of investigation of crimes.

For the purpose of this appeal, we shall focus on the role of police in the investigation of crime and the extent, if at all, to which the court can interfere with this function bearing in mind that police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system. **Article 157 (4)** and **(11)** of the Constitution underscores this point. It provides that:-

"4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

……..

11. In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to

prevent and avoid abuse of the legal process." (our emphasis supplied).

Article 245 (4) (a) of the Constitution on the other hand provides that:-

"245(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-

a. The investigation of any particular offence or offences." (Emphasis).

Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

By the same token and in terms of **Article 157 (11)** of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See **Githunguri V. Republic [1985] LLR 3090.**

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See **Ndarua V. R.** [2002] 1EA 205. See also **Kuria & 3 Others V. Attorney General** [2002] 2KLR 69.

Turning to the matter before us, it is common ground that the dispute between the company and the bank has been on-going for many years and several suits have been instituted by the petitioner and they have lost in most of them. The dispute relates to advancement of certain financial facilities to the company by the bank on the security of two properties. In some of the suits brought by the company it has been alleged that the company's loan account has been operated fraudulently. See for example the plaint in Nbi. Milimani Commercial Court Civil Suit No. 122 of 2007, the plaint in Nbi. HCCC No. 494 of 2009, and the plaint in No. 90 of 2009. In Civil Appeal No. 100 of 2010 consolidated with No. 106 of 2010 arising from the decision of Khaminwa, J. in HCCC No. 505 of 2008, this Court found that:-

"……the 1st respondent has filed a number of cases that have been between the same parties, addressing the same issues, heard and finally decided by courts of competent jurisdiction that are directly and substantially in issue in HCCC No. 505 of 2008. In addition, a perusal of decisions in the record of appeal that were made by Lenaola, J., Warsame, J., Ochieng, J., and the Court of Appeal discloses that these previous decisions have addressed the issue of fraud……..

Having found that all the issues between the parties had already been determined, it is not clear to us how the learned judge made the finding in her ruling later on to the effect that the issue of fraud was not *res judicata*. It is our finding that the learned judge erred in that respect."

It is important however, to understand the background of the criminal investigations. Towards the end of 2010 up to late 2011, there was an exchange of correspondence between the bank and the CID on the operation of the company's bank account, following a complaint lodged by the company. Apparently, the company had complained that the account had been operated in a fraudulent manner. The picture of this concern is clearer from the averment in the affidavit of Ngengi Muigai, sworn on behalf of the company and guarantor in an application to join the two in the petition. He stated:-

"5. That the 1st and 2nd intended interested parties strongly believe that the High Court cases and appeals thereto can only be resolved by a conclusive and independent investigation into the management and maintenance of records concerning loan account No. 3150436 in the 1st petitioner bank.

6. That it is with this in mind that the 2nd interested party lodged its complaint with the Criminal Investigations Department." (Emphasis underlined).

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.

In the result, and for the reasons stated, we can see no reason to disagree with the reasoning and conclusions of the learned judge. Accordingly, this appeal is hereby dismissed with costs.

Dated and delivered at Nairobi this 18th day of October, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MUGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

/mgkm