



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION 18 OF 2015**

**IN THE MATTER OF AN APPLICATION BY JANE WANJIRU MWAURA FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF NYAHURURU CHIEF MAGISTRATE COURT INQUEST CASE NO. 6 OF 2008-ALEX MAOSA MURURI (DECEASED)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NYAHURURU CHIEF MAGISTRATE COURT.....RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED PARTY**

**AND**

**JANE WANJIRU MWAURA.....EXPARTE APPLICANT/SUBJECT**

**JUDGMENT**

1. Alex Maosa Mururi (the “Deceased”) was found dead in his home on 18/03/2008 at about 11:30 pm following a fire which razed his house in Nyakarianga village in Oljororok, Nyandarua. His remains were badly burnt.
2. It was not immediately clear what the source of the fire was. Since there were suspicions of foul play, the Police initially recommended that the Deceased’s wife, Jane Wanjiru Mwaura (the Applicant herein) be charged with the murder of the Deceased. However, upon perusal of the Police file, the State Counsel determined that there was no sufficient evidence to charge the Applicant. Instead, the State Counsel recommended that an Inquest before file be opened in the matter. An Inquest file was duly opened at Nyahururu Magistrates Court.
3. The Inquest proceeded before the Honourable D. Musyoka. The state called eight witnesses. It appears from the ruling given by the Learned Magistrate that by the time the State closed its case, there were two witnesses deemed “key” who had not been presented. The Learned Magistrate’s ruling and findings were therefore in the following terms:

*According to the evidence I have gathered from the witnesses, the Deceased was killed before the house was put on fire. Otherwise if the house caught fire when the Deceased was still alive he could have been saved by the villagers that ran to rescue his child as he could have screamed for help. Who is the woman that IW1 and IW2 and other witnesses heard yelling for help? Could the said woman be the mother to IW5? Why was the Deceased’s wife not called as a witness in this inquest to come and testify as to what she knows about the fire and the subsequent death of the husband?*

*At one point, the Prosecution asked the adjournment to call the two key witnesses, Benson Owino and Andrine Kerubo who were working with Suera Flowers but had relocated to Kisii. Then after warrant of arrest was issued against them, the Prosecution did not put any effort to trace the said witnesses. How key were these witnesses and what did they know about the death of the Deceased?*

*It seems the Police did not investigate this case well. It should have been handed over to the Criminal Investigations Department for investigation. It was the opinion of the investigating officer PC Ngati that the Deceased had been killed but he left his investigations at that without further asking himself who then killed the Deceased?*

*I am therefore not satisfied with the investigation conducted in his inquest and I do recommend that this matter be taken over by the DCIO Nyandarua and properly investigated and more so as to where the wife of the Deceased, just minutes before the fire broke out was and if she had a hand in the death of the Deceased.*

4. Following this Inquest ruling, it seems that DCIO proceeded to arrest Benson Oino and presented him to the Court for further proceedings. It would appear that on the strength of the ruling, the Applicant herein was named an "Accused Person" and was arrested and arraigned in Court. She was released on bond. The Court then issued orders that the Inquest be re-opened and for evidence to be taken anew.

5. The Applicant is aggrieved by this turn of events. Pursuant to leave granted by Court on 12<sup>th</sup> August 2015, the Applicant filed the instant Judicial Review Application *vide* a Notice of Motion dated 26<sup>th</sup> of August 2015 filed in court on 1<sup>st</sup> of September 2015 seeking the following orders:-

*a. An order of Prohibition be issued, prohibiting Nyahururu Principal Magistrate's Court from taking further proceedings and implementing any orders, directions, warrants or any kind of proceedings in Nyahururu PM Inquest No. 6 of 2008 Alex Maosa Mururi*

*b. An order of Certiorari to remove to this Court for purposes of quashing the proceedings, orders, directives, warrants or any other proceedings in Nyahururu CMC Inquest No. 6 of 2008 – Alex Maosa Mururi that were taken and/or were granted and issued after the 25<sup>th</sup> February 2011.*

*c. Any other consequential orders and directions that this Honourable Court may deem fit to grant*

*d. The Cost of the Application for leave and substantive motion be borne by the Interested Party.*

6. According to the Applicant, the Nyahururu CMC Inquest 6 of 2008- Alex Maosa Mururi was fully heard and a conclusive determination in form of a ruling was delivered on the 25<sup>th</sup> of February 2011. The Applicant says that the Principal Magistrate formed the opinion that the said Alex Maosa Mururi had died before the house was put on fire and ordered that the Nyandarua Criminal Investigation department conduct further investigations. The Principal Magistrate did not form an opinion as to the identity of the person who committed the murder.

7. The Applicant's case is that the the Nyahururu Chief Magistrate's Court lacks jurisdiction to reopen an already concluded inquest. She argues that upon delivering of the ruling on the 25<sup>th</sup> of February 2011, the Nyahururu Principal Magistrate's Court became *functus officio* and as such it could not reopen the matter for purposes of taking further direction

8. The applicant draws courts attention to the decision in ***Estate of Philip Otieno Odhiambo (deceased) [2015] eKLR***. She also noted that the Respondent has not opposed the current proceedings and urges the Court to allow the Notice of Motion dated 26<sup>th</sup> of August 2015.

9. The Respondent's in their submissions filed on the 1<sup>st</sup> of November 2016 also pointed out that the Magistrate's Court lacked jurisdiction to re-open the inquest. The Respondent pointed out that under Article 157 of the Constitution, only the Director of Public Prosecution can order an inquest. Once a magistrate's court has made a ruling on an inquest, the Court becomes *functus officio*.

10. Both parties are united in opposition to the re-opening of the proceedings in the Inquest. There is really nothing deserving of a surfeit of judicial ink to declare that the parties are correct in their unity. Under our constitutional scheme, there is categorical separation between the functions of the Court and those of the Director of Public Prosecutions. It is important that those functions are kept separate. The Prosecutorial function, including a decision to request for an inquest belongs to the DPP and not the Court. In the present case, the Court performed its function and delivered a ruling. It is now up to the DPP to determine how to proceed beyond there.

11. Consequently, the orders sought are merited. The Court makes the following orders:

**a) An order of Prohibition is hereby issued, prohibiting Nyahururu Principal Magistrate's Court from taking further proceedings and implementing any orders, directions, warrants or any kind of proceedings in Nyahururu PM Inquest No. 6 of 2008 - Alex Maosa Mururi.**

**b) An order of Certiorari is hereby issued removing to this Court for purposes of quashing the proceedings, orders, directives, warrants or any other proceedings in Nyahururu CMC Inquest No. 6 of 2008 – Alex Maosa Mururi that were taken and/or were granted and issued after the 25<sup>th</sup> February 2011.**

12. **There will be no order of costs.**

13. Orders accordingly.

**Dated and Delivered at Nakuru this 19<sup>th</sup> day of December, 2019**

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**JOEL NGUGI**

**JUDGE**