



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL CASE NO. 66 OF 2010**

**IN MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE CRIMINAL PROCEDURE CODES, CAP 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: MOMBASA CRIMINAL MISCELLANEOUS APPLICATION NO. 114 OF 2009**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR THE PREROGATIVE ORDERS OF CERTIORARI  
AND PROHIBITION**

**BETWEEN**

**KASSIM ALI SAWA .....EX PARTE**

**AND**

**CHIEF MAGISTRATE'S COURT, MOMBASA.....RESPONDENT**

**RIZIQ FUNDI BAKARY.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. As contended by the Interested Party, the *ex parte* applicant and the Interested Party entered a commercial relationship about 2006 by which the ex-parte applicant rented out a business premises on plot No. 8844 Mombasa North, on which the Interested Party operated a hotel. Subsequently, a third party claimed ownership of premises and in ensuing confrontation between the ex-party applicant and the Interested Party, as landlord and tenant, the ex-party applicant threatened to recover possession from the Interested Party.

2. Apparently, the ex parte applicant made good the threat to recover possession of the suit premises because it was alleged by the Interested Party that “on about the 17<sup>th</sup> of October 2009, the defendant (*ex-parte applicant herein*) descended on the plaintiff’s premises and illegally and forcefully took away the plaintiff’s tool of trade and destroyed the plaintiff’s premises with a view to illegally evict the plaintiff without justifiable cause.” The complaint was pleaded as the cause of action in a suit filed by the Interested Party as the plaintiff against the ex-parte applicant as defendant in Mombasa Chief Magistrate’s Court Civil Case No. 2991 of 2009, *Riziq Fundi Bakary v. Kassim Ali Sawa*, in which the Interested Party contended that the ex-parte applicant’s actions were illegal, null and void *ab initio* and amounting to a criminal and illegal attempt to evict the plaintiff from the rented premises, and sought to fully specific reliefs in the Plaintiff dated 22/10/2009, as follows:

**“(a) A declaration that the defendant’s actions and/or conduct are illegal and total *ab-initio*.**

**(b) A permanent order of injunction to restrain the Defendant whether by itself, his agents, servants and/or any other person from evicting, harassing, threatening, the plaintiff's or in any other way interfering with the plaintiff's occupation of suit premises.**

**(c) General damages for trespass and loss of business.**

**(d) Costs of and/or incidental to the this suit.**

3. On 23/10/2009, the Magistrate's Court granted an order of injunction in terms of prayer No. (b) for 14 days pending the hearing *inter-parties* of an interlocutory application therefor.

**Application for leave to private prosecution**

4. By a Notice of Motion dated 15/12/2009, Mombasa Chief Magistrate's Court Criminal Application No. 114 of 2009, *Riziq Fundi Bakary v. Ali Kassim Sawa*, the Interested Party further sought leave of Court to institute private prosecution against the ex-parte applicant herein, which application was heard *inter-parties* and the Chief Magistrate gave a considered ruling on the matter on 5/5/2010. The Court considered that the application for leave to privately prosecute the ex-parte applicant herein was competent and meritorious having regard to case law authority of *Kimani v. Kihara* [1985] KLR and held as follows:-

*"In the case of Kimani (ibid), the grounds of allowing the application under section 88 Criminal Procedure Codes are set out. **The applicant in my view, has complied with the same.** It is not controverted that despite several reports having been made to the police by applicants and further, the Attorney General being notified, no response has been forthcoming. There is no challenge that the applicant was a victim of eviction and was dissatisfied with the manner it was carried out hence his filing of this case due to intransigence on the part of the police and the Attorney General. There is no evidence that the applicant is actuated by malice.*

*Finally, I find that the application under section 88 of the Criminal Procedure Code by the applicant must succeed and grant the same."*

**Application for Judicial Review of the Magistrate's Court order granting leave to Private Prosecution.**

5. Being aggrieved by the grant of leave to the Interested Party to prosecute him privately, the ex-parte applicant herein obtained leave to file Judicial Review proceedings seeking by Notice of Motion dated 10<sup>th</sup> June, 2010 specific relief as follows:-

**i. THAT an order of CERTIORARI do issue to bring into this Honourable Court for the purpose of quashing the proceedings, ruling/order of the Chief Magistrate's Court, Mombasa dated 5<sup>th</sup> May, 2010 in Miscellaneous Criminal Application No. 114 of 2009.**

**ii. THAT an order of PROHIBITION do issue to prohibit the Chief Magistrate's Court, Mombasa or any other subordinate Court from further entertaining the intended private prosecution in Miscellaneous Criminal Application No. 114 of 2009, Mombasa aforesaid.**

**iii. THAT there be an order for costs.**

6. The Notice of Motion for Judicial Review Orders of Certiorari and Prohibition was founded on grounds set out in the Notice of Motion and the statutory Statement dated 20/5/2010 as follows:-

**i. THAT the respondent erred and/or acted contrary to law in allowing the application for leave prosecute privately when she was not "a magistrate trying a case" within the meaning of Section 88(1) of the Criminal Procedure Codes.**

**ii. THAT the respondent acted contrary to law and especially S. 88(1) aforesaid in entertaining an application for leave to prosecute privately whilst there was neither a "case" before her nor a valid charge.**

**iii. THAT the respondent acted without jurisdiction in entertaining the application of leave when the proceedings before her were legally insufficient to bestow upon her jurisdiction.**

**iv. THAT the respondent acted contrary to law in granting leave to prosecute privately prematurely.**

**v. THAT it is in the interest of Justice that the integrity of due process is upheld.**

7. Despite opportunity by two adjournments for that purpose, the respondent did not file any response to the Motion.

8. The Interested Party filed a response by way of a replying Affidavit sworn on 2<sup>nd</sup> September 2010, setting out his case as follows:

**"REPLYING AFFIDAVIT OF RIZIQ FUNDI DATED 2<sup>ND</sup> SEPT 2010**

**I, RIZIQ FUNDI BAKARY, a Resident of Bamburi of P.O. Box 2676 Mombasa within the Republic of Kenya hereby make Oath and**

solemnly state as follows;

1. THAT I am the Interested Party herein named therefore competent to swear this affidavit.
2. THAT I have been shown a copy of the Applicant's Notice of Motion Application dated 1<sup>st</sup> June 2010 contents of which have where necessary been explained to me by my Advocates on record and wish to respond as follows.
3. THAT prior to the institution of the Proceeding in Chief Magistrates Miscellaneous Criminal Application No.114 of 2009, I had made frantic efforts to have the Police take action on my Complaint against the Applicant including meeting Mr. Leo Wanjala the Provincial Police Officer Coast Province but all in vain.
4. THAT I am advised by my Advocate on record which I verily believe to be true that my Application before the Chief Magistrate was based on strong Legal grounds and was presented within the required provisions of the Law.
5. THAT I am further advised by my Advocates on record which I verily believe to be true that the Applicant's Application is misconceived, unmerited and an abuse of the Court Process due to the following grounds:
  - a) The Application was fully heard before the Chief Magistrate and the Decision sought to be quashed was arrived at by the Court after considering the merits and arguments by both sides.
  - b) That in view of (a) above, there was no breach of statutory Provisions neither was there any failure to observe the Rules of Natural Justice by the Court to warrant any intervention by the High Court through Judicial Review as sought.
  - c) That it is not within the ambit of this Honourable Court's mandate to scrutinize the merits of decisions such as the one sought to be quashed.
  - d) That the Applicant has failed to point out any specific prejudice or breach of any statutory provision by the Chief Magistrate's Court.
  - e) That the Applicant's right if any lies on Appeal and not through Judicial Review Proceedings as sought.
  - f) That the Applicant should face the Criminal Court and defend himself against the specific complaint lodged by myself rather than seeking to block the course of Justice in the manner sought herein.
  - g) That the Applicant's Application is therefore an attempt to delay the course of Justice and should thus be dismissed with costs."

9. Counsel for the Parties, M/S Moses Mwakisha & Co. Advocates for the ex-parte applicant and M/S Godfrey Mutubia & Co. Advocates for the Interested Party filed written submissions, and ruling was reserved.

#### **Issues for Determination**

10. Upon considering the pleadings, evidence and submissions of the parties, I consider that the issue for determination in the judicial proceedings before the Court is whether the challenge on an order of the Magistrate's Court to grant leave to privately prosecute a person is competently filed as a Judicial Review application, or it ought to be pursued by way of appeal from the decision of the lower Court.

11. In other words, the Court will determine whether the High Court in exercise of its judicial review jurisdiction may correct a decision of a competent tribunal or subordinate court on the merits of a matter properly before it, on the ground of a misinterpretation or misapprehension of applicable law.

#### **Submissions by the Counsel for the parties**

12. In urging the Notice of Motion, the ex-parte applicant submitted by counsel's submissions dated 26/11/2010 that:-

*My Lord, we shall begin our submission here by reference to the provisions of the CPC. Section 88 provides, at (1):*

*"... a Magistrate trying a case may permit the prosecution to be conducted by any person...."(Underlining added).*

*Section 89 CPC itself dwells on how proceedings are to be instituted. At (3) it states that a complaint may be made orally or in writing, but, if made orally, shall be reduced into writing by the Magistrate, and in either case, shall be signed by the complainant and the Magistrate.*

*The crux of our objection before the Court, and which is the core of our submission here, is that much as Section 88 donates the power to grant leave to prosecute privately, the Section presumes that there is first a trial process and that for the Magistrate to be clothed with the power to grant leave to prosecute, he must first fit the description of a Magistrate "trying a case".*

Here, at the time the application was made and granted, Section 89 CPC had not been complied with to the extent there was still not a valid charge before the Court. What there was before it was a “draft charge” annexed to the notice of motion for leave to prosecute, which draft charge was neither signed by the Applicant nor the Magistrate. (See page 14 of the verifying affidavits, still part of annexure KAS-1).

My Lord, in *Kimani v. Kihara* (1985) KLR 79, *Simpson & Sachdeva JJ* considered the circumstances in which leave to prosecute privately would issue, and in particular held.

i. A Magistrate “trying” a case has the power to grant or refuse the permission to a private prosecution to conduct a prosecution, as set out in Section 88 of the CPC.

ii. An applicant for permission to conduct a private prosecution can only be made once the trial has started. The trial begins when the accused person is brought before the Magistrate for the purpose of pleading to a formal duly signed charge. (Emphasis ours).

At page 83, line 30, the learned judges stated:

“We shall revert later to the interpretation of the words “trying a case” but it would be convenient at this stage to consider the effect of the deletion of the words “inquiring into or” by the criminal Procedure Act, 1982 (No. 13 of 1982) ...the learned Magistrate held in his ruling that the effect of this amendment was to remove the power of a Magistrate to grant permission before the commencement of a trial. That is not so. He never had that power. (Underlining ours).

Later, advertent to the import of the words “Magistrate trying a case,” their Lordships pose, at page 87, (see line 40):

“How should the words “trying a case” be interpreted? When does a Magistrate start trying a case?”

Their Lordship, at page 88, starting at line 5:

“In the context of Section 88, however, “trying” we think must include taking a plea. It is we think clear that the trial of a case cannot start of before the accused is before the Court. As soon as an accused person is before Court for the purpose of pleading to a formal, duly signed charge, a Magistrate can properly be described as “trying the case” (underlining added. It is at this stage that an application may be made for permission to prosecute.”

We respectfully submit, my Lord, that there is no contest that as at the time of the application being made, there was as yet no formal, valid charge ready for plea, and grant of the leave at the stage was premature.

[Emphasis added]

13. In response, the Interested Party’s counsel by submissions dated 15/12/2010 urged that a reconsideration of the merits of the application can only be done by way of appeal rather than Judicial Review, as follows:-

It is trite that in considering the Application, the Court will not deal with the merits of the Decision by the Chief Magistrate so long as proper procedure was followed (see Civil Appeal No. 266 of 1996, Kenya National Examination Council Vs. Republic ex-parte Geoffrey Gathenji Njoroge and 9 Others.

The above position was reiterated in Civil Appeal No. 234 of 1995 The Commission of Lands Vs Kunste Hotel Limited where the Court of Appeal reiterated that Judicial Review is concerned not with private rights or the merits of the Decision being challenged but with the Decision-making process. Its purpose is to ensure that an individual is given fair treatment by the Authority to which he has been subjected.

My Lord,

Using the parameters set in the cited Authorities, would it be possible to hold that the Applicant is entitled to the Judicial Review Orders sought? Our answer is strongly in the negative because of the following reasons:

a) The Interested Party’s Application for Leave to Institute Private Prosecution was lawfully hinged on sound Statutory Provisions specifically Section 88 of the Criminal Procedure Codes Chapter 75 of the Laws of Kenya. The Interested Party had laid a reasonable basis for the Orders sought and whether the Application was merited or not is not within this Honourable Court’s Supervisory role.

b) In the event that the Interested Party found the Application unmerited or wrongly brought before the Court, then the same would be purely a point of law and therefore merit and his recourse lies in filing an Appeal and not Judicial Proceedings.

c) The Interested Party was fully heard since he was represented by able Counsel in arguing against the Application for leave. The Court considered the rival arguments by both parties in arriving at its decision and the fact that the decision was against the Applicant does not mean that the same was irregular.

[emphasis added]

### **Determination**

14. At the outset this Court has sympathy with the ethical question of public policy posed by the ex-parte applicant “*whether it is in fact apt that private citizens should in all circumstances have a free hand to prosecute fellow citizens even for crimes as heinous as robbery – readily cognizable offences that authorities can address.*”

Of course, the proper and most suited prosecutor of crimes with such public interest elements as robbery with violence which has direct and substantial impact on public law and order should be the Director of Public Prosecution who in exercise of his prosecution mandate is under Article 157(11) of the Constitution required to consider the impact of “public interest, the interest of the admissions of Justice and the need to prevent and avoid abuse of the legal process.”

15. Where, however, as here found by the Magistrate’s Court, the Justice and the DPP [in the case Attorney General who then had prosecutorial powers] declines to initiate prosecution, a private person may be empowered by the Court to privately prosecute the offender. Needless to state, the DPP has under Article 157 (6) (b) and (c) of Constitution power to:-

***“(b) take over and continue any Criminal Proceedings commenced in any Court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***(c) Subject to clause 7 and 8, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***”

16. As regards the present Judicial Review application, I find that the matters rest with the interpretation of the part of the court under section 88 and 89 of the Criminal Procedure Code in relating to allowing private Prosecutions. There is no question that the Magistrate’s Court has power to grant leave to privately prosecute offences in appropriate cases. A challenge on an order of the court in exercise of its lawful jurisdiction to grant or refuse leave to prosecute privately is a matter for consideration of the merit of the case which is not suitable for determination by a Judicial Review but rather by appeal.

17. The ex-parte applicant’s case that the Chief Magistrate’s Court was wrong in its decision to grant leave rests on a legal argument on the interpretation of the relevant provisions of the Criminal Procedure Code and of a binding decision of the High Court in ***Kimani v. Kihara***, supra, and its application to the facts of the case.

18. By analogy of the regular Civil Procedure Rules procedures of Review and Appeal, a review is reserved for consideration of a matter of error in proceedings rather than adjudication of the merits of a decision by an otherwise competent tribunal. In ***National Bank of Kenya Ltd v. Ndungu Njau*** [1997] eKLR, the Court of Appeal (Kwach, Akiwumi and Pall, JJA) said the following of the difference between review and appeal, which is applicable here:-

***“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”***

***In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”***

[emphasis added]

19. Similarly, in the present case, the Chief Magistrate took submissions from counsel for the ex-parte applicant herein, for the Interested Party and for the Attorney General, and considered the leading case-law on the matter and in a considered ruling held as follows:-

***My perusal of the provisions relating to institution of prosecutions under Section 89 –Section 90 show generally how any prosecution is brought for trial before a Court. Section 88 of the said Act makes provisions for prosecution of cases by private persons other than the public prosecutors who have authority to do so by the Attorney-General. The Court must grant the person intending to institute such proceedings leave to do so. This leave can only be granted once an accused person has appeared before Court because the law presumes that the trial process begins only then. In the case of Kimani –v- Kihara High Court Revision Case of 1983, it was held that a trial cannot start before the accused person is before the Court as envisaged by Section 88 of the Criminal Procedure Codes. Indeed it is a logical conclusion as it is imperative for the accused person to appear in Court and be given an opportunity to respond to the intended application for leave to conduct a private prosecution.***

***In Kimani (ibid) the Court stated that the application for permission to prosecute can only be made when an accused person is before the Court for the purpose of pleading to a formal duly signed charge and it is only then that a magistrate can be termed as “trying a case.” Hence Mr. Mwakisha’s submission that the application brought under Section 88 of the Criminal Procedure Code by the applicant is overtaken by events since accused is now in Court is premised on a misinterpretation of the provisions of Section 88 of the Criminal Procedure Codes. Indeed it is clear that Section 88 did not originate these proceedings but rather is intended to commence the trial.***

There is a complaint in the file in the form of a charge sheet which is filed. The applicant then applied for summons for the respondent under the provisions of Section 90(1) of the Criminal Procedure Codes the assumption being that the Court found that the charge filed was proper.

If the respondent felt that the charge was not properly filed then an objection should have been raised before the summons were affected and the validity of the charge as well. In this case, the complaint by the applicant was made on oath in his affidavit dated 15<sup>th</sup> December, 2009 and the provisions of Section 90(1) including the proviso were fulfilled by the applicant. In any case even if there was a defect occasioned by issuing summons without a valid complaint or charge or at all, Section 90(2) is express that such defect does not affect the validity of the charge. indeed, once a person complies with the summons, then he validates the process and can only object to the applicant proceeding on under Section 88 (1) of the Criminal Procedure Codes where the Court is to decide on whether the applicant can be granted leave to privately prosecute this matter. That is why as a matter of practice, the Attorney General will move in and take over the prosecution of the case or terminate the proceedings under Section 89 of the Criminal Procedure Code (more often the latter) before the person summoned appears. Mr. Mwakisha's objection based on the procedure is thus overruled.

[emphasis added]

20. It is clear from the ruling that the subordinate trial court has already made a finding on the legal and factual contentions made by the ex parte applicant through his counsel on the questions presented before this judicial review court. A reconsideration of the application on the basis of the same arguments on the law and facts as proposed by the ex-parte applicant herein must be by way of appeal on the merits for the determination of the Chief Magistrate and not by judicial review which deals with the legality of the process of the decision making. See Court of Appeal *Civil Appeal No. 234 of 1995 The Commission of Lands v. Kunste Hotel Limited* (1997) eKLR, which has been followed in several court of appeal decisions including *Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority* [2015] eKLR, where on an application by the applicant for mandamus directing the respondent to grant it a lease on a property, the Court of Appeal at Mombasa (Okwengu, Makhandia and Sichale, JJA.) observed that:

“In *Commissioner of Lands v. Kunste Hotel Limited* (1997) eKLR this court held that:

“But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected.”

21. In this case, the higher court in the judicial review proceeding would require to determine disputed facts and for that purpose examine what was before the trial court by way of existence or otherwise of a formal duly signed charge sheet and the presence of the accused for purposes of taking his plea. This exercise can only be done by examination of the trial court file and record of proceedings. That is a process of appeal where the Record of the Appeal is prepared and presented to the higher court.

22. The judicial review Court cannot hold without examining the record of the trial court that there was no duly signed formal charge or that the accused was not before the court, as to make the grant of leave by the trial court premature and a nullity. The trial Court already found in its ruling that it was competent for it to entertain and determine the application for private prosecution. The contention that the grant of leave was premature because the Chief Magistrate's Court was not “trying the case” is a matter that the court already pronounced itself, on and if the magistrate erred, the remedy is in the appeal against her determination. As held in *National Bank of Kenya v. Ndungu Njau*, supra, a wrong conclusion of law is the proper subject of an appeal rather than review.

#### *Effectiveness of remedy*

23. There is, moreover, a concern of the effectiveness of the remedy of a quashing order on the grant of leave for the private prosecution by this Court in that the quashing of the leave to privately prosecute does not finally terminate the criminal proceedings, a subsequent trial court may still grant the permission in presence when the accused is before the court to answer the charges, as determined by the two judge bench of the Court in *Kimani v. Kihara*, supra, at p. 88 Lines 13 -20 as follows:

“If in the absence of the accused permission is purportedly granted to a private prosecutor to conduct a prosecution the power to grant permission cannot be taken to have been exercised by a magistrate trying the case. Such permission is premature and as both Mr. Chunga and Mr. Georgiadis submitted, it is null and void. Hence, the magistrate before whom the trial commences is at liberty to disregard it and make his own decision to grant or refuse permission.”

This, indeed may be the practical result in this matter as the trial magistrate, then Chief Magistrate Mombasa who granted the leave, if wrongly, is not in the Court station and the trial will have to be undertaken by another magistrate.

24. The Office of the Director of Public Prosecution (ODPP) is, of course, at liberty to exercise its mandate to take over and continue the prosecution, with approval of the Interested Party, in accordance with Article (157 (6) (b) of the Constitution, or, if so advised, having taken over, to discontinue the same pursuant to Article 157 (6) (c), subject to permission by the court under Article 157 (8) of the Constitution as the case may be, considering the existence of the Civil Suit, Mombasa CMCCC No. 2991 of 2010 by the Interested Party against the ex parte applicant arising from the same events.

#### **Orders**

25. Accordingly, for the reasons set out above, the Court finds no merit in the judicial review application by Notice of Motion for judicial review orders herein, and the same is, therefore, dismissed with costs to the Interested Party.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY, 2018.**

**E K OGOLA**

**JUDGE**

**Appearances**

M/S Moses Mwakisha & Company Advocates.

Mr. Eredi for the Respondent.

M/S Godfrey Mutubia & Co advocates.