



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. JUDICIAL REVIEW APP NO. 4 OF 2015

**In the matter of: An application for leave to apply for orders of Judicial Review against
The Respondents**

AND

**In the matter of: An application for leave to apply for Judicial Review orders of
Prohibition and Certiorari against the Respondents**

AND

**In the matter of: The universal declaration of Human rights, 1948, the International
Covenant of Civil and Political Rights, 1966 and the African Charter
on Human Peoples Rights (Banjul charter)**

AND

**In the matter of: The provisions of Order 53 of the Civil Procedure Rules, 2010 as read
with the provisions of Section 8 of the Law Reform Act, Cap 26, Laws
of Kenya**

AND

**In the matter of : The doctrines of reasonableness and legitimate expectation in the
discharge of prosecutorial powers under Article 157 of the
Constitution of the Republic of Kenya**

BETWEEN

Benson Riitho Muriithi.....Applicant

Versus

The Director of Public Prosecutions.....1st Respondent

The Chief Magistrate's Court, Nyeri Law Courts.....2nd Respondent

The Hon. Attorney General.....3rd Respondent

and

Robert Maina Githinji.....Interested Party

RULING

This file was coming for Ruling on the application dated 1.4.2015. In the said application the applicant seeks orders that:-

- i. *That this honourable court be pleased to issue an order of certiorari directed at the 1st, 2nd and 3rd Respondent by themselves, their servants any other person acting on their behalf, instructions and authority to bring unto this honourable court for purposes of being quashed the proceedings in respect of Nyeri Chief Magistrate's Criminal Case No. 880 of 2014, **Republic vs Benson Ritho Muriithi**.*
- ii. *That orders of prohibition to issue directed at the 1st Respondents herein whether himself, his agents, servants and or employees or any other person acting on his behalf, instructions and authority prohibiting him/her from and each one of them from proceeding with the conduct and prosecution of Nyeri Chief Magistrate's Criminal Case No. 880 of 2014, **Republic vs Benson Ritho Muriithi**.*
- iii. *That this honourable court be pleased to issue an order of prohibition directed at the 2nd Respondent by himself, servant, agents or any other judicial officer for the time being seized of the hearing or the conduct of the proceedings in Nyeri Chief Magistrate's Criminal Case No. 880 of 2014, **Republic vs Benson Ritho Muriithi** from trying or carrying out any further proceedings on the matter pending the hearing and determination of this matter and or until further orders of this honourable court.*

However, upon perusing the court file I noted that *there is nothing to show that the interested party was served with the court papers pertaining to this case. There is no evidence of service at all.* In fact on 12.10.2015 I directed that the interested party be served. Subsequently the counsels who appeared were holding brief and did not enlighten the court on this position and date for the ruling was given.

I have considered the substance of the allegations made by the *ex-parte* applicant in the substantive application and I note the core of complaints touch on his dealings with the interested party and the key allegations which are crucial in determining this application can only be responded to by the interested party. The interested party is the complainant in the criminal proceedings in question and in my view a necessary party to these proceedings because he has an interest in the outcome of these proceedings because the outcome may have a bearing on the criminal proceedings in question.

The position could have been different if the interested party had been served and failed to respond, but so long as there is no evidence of service, I take the view that it would be improper for the court to render its determination on the matter as this can lead to miscarriage of justice. A just determination can only be seen to be done if all the parties named in the proceedings are served and afforded an opportunity to be heard unless they opt not to file any responses or they opt not to participate in the proceedings. We cannot determine whether the interested party desires to participate or not to participate in these proceedings unless he has been duly served and evidence of service filed in court.

Accordingly, I order that the *ex parte* applicant do serve the interested party with all the court papers filed

in these proceedings **within 21 days** from the date of this order **in default the application filed on 2.4.2015 shall stand dismissed.**

Orders accordingly

Dated at Nyeri this **27th** day of **November** 2015

John M. Mativo

Judge