



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 330 OF 2005

IN THE MATTER OF AN APPLICATION FOR AN ORDER OR CERTIORARI

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF CHIEF MAGISTRATE’S COURT AT NAIROBI MISC. CRIMINAL APPLICATION, PRIVATE PROSECUTION NO.45 OF 2004

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE, NAIROBI.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

EXPARTE

MACLOUD MALONZA.....1ST APPLICANT
BELDINA OGUYA.....2ND APPLICANT
FRANKLIN MUCHIRI.....3RD APPLICANT
MESHACK NYAGUTHE.....4TH APPLICANT
LT COL. RICHARD NGOVI.....5TH APPLICANT
CHARLES KONZOLO.....6TH APPLICANT
NYAMBURA WERU.....7TH APPLICANT
JOE K OUKO.....8TH APPLICANT
CHARLES GENI.....9TH APPLICANT
AMBROSE OLOO.....10TH APPLICANT
MAJOR DENNIS MAKAU.....11TH APPLICANT
HUMPHREY OGETO.....12TH APPLICANT
GEOFREY O ONTIERI.....1ST INTERESTED PARTY
PETER O ODUNDO.....2ND INTERESTED PARTY

CHARLES NDUNGU MWANGI.....3RD INTERESTED PARTY
GEORGE WAKAHIU.....4TH INTERESTED PARTY

JUDGEMENT

In the notice of motion dated 21st March, 2005 twelve ex-parte applicants led by Macloud Malonza pray for orders as follows:-

1. THAT an order of Certiorari do issue to remove into the High court and quash the orders made by the Chief Magistrate (Wilson Muiruri, Esq) on 12th January, 2005 in Nairobi Misc. Criminal application, Private Prosecution No. 45 of 2004.

2. THAT an order of prohibition do issue, directed at the Chief's Magistrate's Court (Wilson Muiruri Esq) or any other magistrate from further hearing or taking further proceedings in Nairobi Misc. Criminal Application, Private Prosecution No. 4 of 2004.

3. THAT cost of these proceedings be granted to the Applicants.

The Chief Magistrate, Nairobi and the Attorney General are named as the 1st and 2nd respondents respectively. There are four interested parties led by Geoffrey.O.Ontieri.

When the application was argued before me on 24th November, 2011 counsel for the ex-parte applicant did not pursue prayer No. 1 of the application in that the magistrate's court had on 31st January, 2005 rescinded the orders issued on 12th January, 2005 allowing the commencement of private prosecution against the ex-parte applicants herein. The ex-parte applicants however opted to proceed with prayers No. 2 and 3 of the notice of motion.

Counsel for the interested parties opposed the application on the ground that since the order that gave rise to these judicial review proceedings had been set aside, and then these proceedings no longer serve any meaningful purpose.

I am of the view that this preliminary issue should be addressed before proceeding further. It is not disputed that on 31st January, 2005 Mr. Wilson Mururi, Chief Magistrate rescinded the order he had issued on 12th January, 2005 in Nairobi C.M. Misc. Application No. 45 of 2004 allowing the private prosecution of the ex-parte applicants herein. In a strange twist of events on 7th March, 2005 the ex-parte applicants came to this court to challenge an order that was no longer in existence.

In the second prayer the ex-parte applicants are asking the court to stop Mr. Wilson Mururi Chief Magistrate or any other magistrate from further hearing or taking further proceedings in the said private prosecution case.

I have carefully perused the reconstructed court file. It is noted that six years down the line the Attorney General & the Kenya Police have not taken any action in respect of the complaints raised by the private prosecutor in the private prosecution case. If this court prohibits the magistrate's court from hearing an application as to whether to grant leave for commencement of private prosecution, the court will be ensuring that the truth about what the private prosecutor alleges may never be known. Issuing an order of prohibition will also amount to the court pre-determining the outcome of the application before the magistrate.

Looking at the application placed before me, I agree with the interested parties that the same has no merit. The same is therefore dismissed. I make no orders as to costs.

Dated and signed at Nairobi this 9th day of February, 2012.

W. K. KORIR
JUDGE