



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

Judicial Review 139 of 2011

**MARGARET WAIRIMU MBIRUA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MARTIN WANJALA WAFULA .....DEFENDANT/APPLICANT**

**JUDGMENT**

On 10<sup>th</sup> June, 2011 Martin Wanjala Wafula was granted leave to commence judicial review proceedings. Through a notice of motion dated 30<sup>th</sup> June , 2011 the applicant seeks an order of certiorari to quash various orders issued on diverse dates by the magistrate in **Thika Chief Magistrate Court Civil Case No. 439 of 2010, Margaret Wairimu Mbirua V Martin Wanjala Wafula**. He also seeks an order of prohibition directed at the Chief Magistrate Thika to stop hearing the said civil case for lack of jurisdiction. The applicant also prays for an order transferring the case to the High Court. From the papers filed in court it is clear that the application is based on the following grounds:

1. That the magistrate acted unlawfully by issuing an order on 3/8/2010 extending a temporary injunction beyond the limit allowed by the law;
2. That the magistrate acted unlawfully on 11/4/2011 by issuing a warrant of arrest against the applicant without giving him an opportunity to show cause;
3. That the magistrate acted unlawfully on 12/4/2011 by issuing a criminal warrant of arrest against the applicant in a civil case and failing to endorse the file copy of the warrant;
4. That the magistrate acted unfairly on 30/5/2011 by refusing to extend stay orders granted on 11/5/2011 which temporarily stayed the warrant of arrest till the hearing of the main application which had been fixed for hearing on 13/6/2011 since by doing so the court had already pre-empted her decision and therefore any hearing by the same magistrate could have been in futility; and
5. That the magistrate had no jurisdiction to adjudicate over the matter.

Margaret Wairimu Mbirua who is the respondent in these proceedings opposed the application by way of a replying affidavit sworn on 29<sup>th</sup> July, 2011. It is the respondent's argument that the proceedings are mischievous, fatally defective, and an abuse of the court process. Her affidavit gives a chronology of events in the lower court and she accuses the applicant of using these proceedings to evade punishment for acting in contempt of an injunction issued by the lower court.

I have carefully perused these proceedings and come to the sad conclusion that I will not have the opportunity of tackling the real issues. This application is wrongly titled and a very crucial party has been left out. In the notice of motion it is indicated that this matter is between

**MARGARET WAIRIMU MBIRUA .....PLAINTIFF/RESPONDENT**

**-VS-**

**MARTIN WANJALA WAFULA .....DEFENDANT/APPLICANT.**

Ringera, J (as he then was) dealt with the issue of the naming of parties in judicial review proceedings in **JOTHAM MULATI WELAMONDI -VS- THE CHAIRMAN ELECTORAL COMMISSION OF KENYA, Bungoma H.C. Misc. Application No. 54 of 2002**. He observed that in judicial review proceedings the applicant is the Republic and the respondent is the public body whose decision is being challenged. The person affected by the decision is named as the ex-parte applicant. Any other person who has an interest in the proceedings is always named as an interested party. In the case before me the substantive notice of motion would have been titled thus:

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE THIKA.....RESPONDENT**

**EXPARTE - MARTIN WANJALA WAFULA**

**MARGARET WAIRIMU MBIRURA..... INTERESTED PARTY**

Order 53 Rule 3(2) of the Civil Procedure Rules clearly provides that when the decision of a court is under attack, the presiding officer of the court which made the decision must be served. There is no evidence of such service in this matter.

In line with Article 159(2)(d) of the Constitution I sometimes overlook the titling of the proceedings so long as all the necessary parties are before the court. In this case, however, the Chief Magistrate, Thika who is supposed to act on any orders issued by this court has been left out. The orders sought are supposed to be issued against the court but the court has not been made a party to the proceedings. That makes the application fatally defective. Luckily for the parties they can still have recourse to this court by way of an appeal. I therefore dismiss the application with costs to the respondent.

**Dated and signed at Nairobi this 31<sup>st</sup> day of July,2012**

**W.K.KORIR, J**