



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
Judicial Review 267 of 2011

REPUBLICAPPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT KIBERA1ST RESPONDENT

OFFICER COMMANDING STATION KILIMANI POLICE STATION2ND
RESPONDENT

AND

MARY NJERI MUIGAIINTERESTED PARTY

EX-PARTE
PETER NYOIKE MUIGAI

JUDGEMENT

On 2nd June, 2011 the ex-parte applicant Peter Nyoike Muigai was granted leave to commence judicial review proceedings. Through a notice of motion dated 7th June, 2011 he prays for orders:-

1. THAT the honourable court be pleased to grant an order of CERTIORARI to remove to the High Court and quash the proceedings and decision of the 1st Respondent, the Senior Principal Magistrate at the Chief Magistrate's Court at Kibera, Nairobi seized of Criminal Case No. 860 of 2009 Republic Vs. Peter Nyoike Muigai made on the 5th February, 2010 to issue warrants of arrest against the applicant herein.
2. THAT this honourable court be pleased to grant an order of PROHIBITION to prohibit the 1st respondent from hearing and determining the proceedings in Chief Magistrate's Court at Nairobi, Kibera Criminal Case No. 860 of 2009, Republic vs. Peter Nyoike Muigai and the 2nd respondent or any person acting for and on his behalf, stead, and direction, from arresting, charging and prosecuting the applicant on the issues and matters arising from and relating to the dissolution of marriage between the applicant herein and the interested party Mary Njeri Muigai.
3. THAT the costs of this application be provided.

The Senior Principal Magistrate at Kibera Chief Magistrate's Court is the 1st respondent and the Officer Commanding Station, Kilimani Police Station is the 2nd respondent. Mary Njeri is an interested party.

According to the statutory statement dated 27th May, 2010 and filed in court on 31st May, 2010, the applicant is the accused person in Kibera CM Criminal Case No. 860 of 2009. The interested party is the complainant in that case.

The applicant and interested party were married in 1971 under Kikuyu customary law but the marriage was subsequently annulled in the United States of America (USA) where the parties were then residing. During the marriage the couple set up a company called Petmar Investments Ltd (PIL) which had investments both in USA and Kenya.

It is the applicant's case that upon the dissolution of the marriage they shared the property they had acquired together and the net result of this division is that he took over all the shares in PIL Kenya. The interested party therefore has no claim over PIL Kenya. It is the applicant's case that the charges against him were brought in bad faith, are unreasonable and malicious and that the interested party has no valid complaint since PIL Kenya became his company upon the dissolution of the marriage. The applicant further argues that the institution of the criminal case against him is an attempt by the interested party to circumvent the USA judgment which dissolved their marriage and distributed the marital property. The applicant cited the fact that there are other three cases between him and the interested party to prove his claim that the applicant is acting maliciously. The applicant avers that the criminal case was filed against him without any inquiry and therefore he was condemned unheard. Finally the applicant argues that the issuance of a warrant of arrest by the 1st respondent without confirming whether he had notice about the case serves to confirm that his prosecution was done in bad faith.

Through grounds of objection dated 21st June, 2011 the respondents opposed the application on the following grounds:-

- 1. The application is misconceived, frivolous, vexatious, incompetent, improperly before court and an open abuse of the court process.**
- 2. The application has not met the prerequisite requirements for the grant of the orders sought.**
- 3. The matters raised by the applicants are their defences which should be raised before the trial court and as such cannot be raised before the High Court in the manner herein.**
- 4. No sufficient grounds have been advanced to warrant the grant of the orders sought.**
- 5. The applicants are guilty of material non-disclosure.**

Prior to the grant of leave to commence judicial review proceedings the respondents had filed replying affidavits in response to the application for leave. In the replying affidavits sworn on 16th June, 2010 and 3rd December, 2010 by Corporal Patrick Muragiri who is the investigating officer in the criminal case it is averred that the respondents have not breached any law in charging the applicant.

The interested party responded to the application for leave by filing grounds of opposition dated 26th July, 2010. She also swore a replying affidavit on the same date. In summary the interested party opposes the notice of motion on the grounds that:-

- 1. The applicant has concealed material facts namely not revealing to the court that she has filed Nairobi Chief Magistrate Divorce Cause No. 89 of 2010 against him and concealing the circumstances surrounding the USA case.**
- 2. The purported consent judgment entered in the USA court has never been registered in Kenya in accordance with the Foreign Judgements (Reciprocal Enforcement) Act Cap 43 Laws of Kenya.**

3. That the charges against the applicant were instituted after careful and comprehensive investigations.

Looking at the positions taken by the parties in this case, I find that there is only one broad issue to be answered namely whether the prosecution of the applicant is in bad faith, malicious and unreasonable?

I do not wish to comment on the evidence that has been placed before this court by the respondents and the interested party as concerns the weight of their case against the applicant in the magistrate's court. Suffice to say that there is material to show that the interested party's signature was allegedly forged so as to facilitate the transfer of her shares in PIL Kenya to the applicant and other parties. That is a matter that falls under the criminal jurisdiction of the Kenyan courts. The 2nd respondent is by law allowed to investigate criminal offences. Where the 2nd respondent is satisfied that a criminal offence has been committed he has powers to prefer criminal charges against the person or persons suspected of committing such crime. There is no evidence to show that the 2nd respondent has abused those powers.

The applicant has invited this court to hold that the judgement in case **NO.00-0142-FM, IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA, IN THE MATTER OF THE MARRIAGE OF PETER NYOIKE MUIGAI AND MARY MUIGAI** is a valid judgement for the purposes of Kenyan law. The interested party has challenged the validity of the said judgment. Without oral and documentary evidence being adduced, it is difficult for this court to make any decision about the validity of the said judgment. Even if indeed PIL Kenya was given to the applicant by the USA Court, then the fact that the signature of the interested party may have been forged has not been explained. The best court to come up with an answer as concerns the alleged forgery is the court hearing the criminal case.

There is the claim that the applicant is being charged many years after the alleged crime was committed. The interested party swore that she reported the forgery to the police immediately she learned about it. I do not think that the evidence placed before this court is enough to assist the court in deciding whether the delay in taking the applicant to court was unreasonable. A magistrate is a trained lawyer who is capable of interpreting whether the charges brought against an accused person are an abuse of the court process.

Another argument by the applicant is that the case is brought in bad faith since the interested party has filed other cases against him. The interested party argued that the fact that they had filed civil cases against the applicant does not extinguish the criminal element in the applicant's action. Section 193A of the Criminal Procedure Code clearly provides that:-

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

There is therefore no offence in the criminal proceedings running hand in hand with the civil cases.

The applicant argued that the issuance of a warrant of arrest by the 1st respondent was done in bad faith. The respondent's case is that the applicant was being accused of committing a felony and he could have been arrested without a warrant of arrest. I do not find any basis for the applicant's argument. The 1st respondent cannot be faulted for issuing the warrant of arrest upon the application of the 2nd respondent. On a related issue the applicant submitted that he was not given an opportunity to explain his side of the story before the warrant of arrest was issued. It would have been better had the applicant been asked by the 2nd respondent to state his side of the story before the issuance of the warrant of arrest. However, the fact that this was not done does not amount to a breach of the rules of natural justice since the applicant will have an opportunity of explaining himself in the criminal trial.

In conclusion, I find that the applicant's application has no merit. The same is therefore dismissed with costs to the respondents and the interested party.

Dated and signed at Nairobi this 27th day of **September**, 2012

W. K. KORIR, J