

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Miscellaneous Application 207 of 2010

SHAMSHERALI TARMO
HAMED.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE COURT, NAIROBI.....ST
RESPONDENT

THE ATTORNEY GENERAL.....^{2ND}
RESPONDENT

TOM AKOYO MBIRIKA.....INTERESTED
PARTY

JUDGMENT

The applicant herein is a director with a company known as Shamsh Holding Limited which operates an exhibition shop at Sun rise plaza River Road Nairobi. The company entered into a licence agreement with one Tom Akoyo Mbirika. This licence agreement had its own rules and regulations to govern the parties therein. At some stage the parties fell out and the applicant moved to enforce some of the terms in that agreement. This forced the other party Tom Akoyo Mbirika to launch a criminal complaint against the applicant which led to criminal case No. 1680 of 2009 Republic versus Shamsherali TarMohamed wherein he was charged with the offence of stall breaking and stealing contrary to Section 306 (a) of the Penal Code and in count 2 Forgery contrary to Section 349 of the Penal Code.

The applicant then moved the court for orders that leave be granted to institute Judicial Review proceedings for an order of *Cetiorari* to move to this court for purposes of being quashed the said Criminal charges against him. On 9th October, 2009 Gacheche J heard the application for leave which she allowed and ordered that the substantive application be filed within the next 21 days of that date. The applicant complied and served all the respondents including the interested party. Counsel appearing then filed their respective submissions in which they have also cited several authorities which I have read. The bottom line of the applicant's case is that he did not breach the terms of licence agreement between himself and the interested party and that in any case if there was any breach, which is denied, then it lies within civil jurisdiction and therefore the criminal charge against him is malicious and misplaced.

On the other hand, it is the position of the respondent and the interested party that the criminal charge against the applicant is well founded and that it should be allowed to proceed. Going by the material before me, that is the facts and authorities cited, there is a very thin line between the charges leveled against the applicant and the civil jurisdiction which he has pleaded. I do not deem it necessary to go into detailed analysis of the cited authorities. What I can discern however is that, prima facie a criminal charge has been established against the applicant. What he has stated in his grounds, statement and verifying affidavit are matters he can raise in the defence of the said charge when called upon to answer thereto.

I do not deem it appropriate to delve any deeper into the material before me because to do so may prejudice the cases of both the applicant and the respondents in this matter. My view is that, the application for judicial review is misplaced and therefore should be dismissed with costs to the

respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of July, 2011.

A. MBOGHOLI MSAGHA
JUDGE