



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CRIMINAL APPLICATION NO 626 OF 2010**

REPUBLIC.....APPLICAN  
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**-VERSUS-**

THE CHIEF MAGISTRATES’ COURT, NAIROBI.....1<sup>ST</sup>  
RESPONDENT

THE COMMISSIONER OF POLICE.....2<sup>ND</sup>  
RESPONDENT

EX-PARTE.....ROSEMARY WANGUI  
KIMAKU

**AND**

AUTHUR MUNYAO MUUO.....1<sup>ST</sup> INTERESTED  
PARTY

AFRICAN RUBY INVESTMENTS.....2<sup>ND</sup> INTERESTED  
PARTY

**RULING**

By a Notice of Motion dated the 8<sup>th</sup> day of July, 2009, pursuant to the *leave granted on the 7<sup>th</sup> July, 2009* and order LIII Rules of the Civil Procedure Rules, the applicant seeks orders:-

- a) That an order of prohibition prohibiting the respondent whether by themselves, or any of their

officers or agents from proceeding with criminal proceedings in criminal case Number 462/2009 (***R-Vs-Rosemary Wangui Kimaku***), sustaining Criminal Proceedings against Ms Rosemary Wangui Kimaku and any member or partners, in Simple Forex Online, to arrest, harass, intimidate, coerce and/ or compel, charges, interrogate or prosecute the applicant with any alleged criminal offence in respect of a dispute arising from the Foreign Exchange Management Agreement dated 6<sup>th</sup> June, 2008 made between Simple Forex Online and Africa Ruby Investments.

**b)** An order of Certiorari to remove into the Court for purposes of quashing the proceedings in ***Criminal Case No. 462/ 2009 R Vs Rosemary Wangui Kimaku***).

c) Costs occasioned by the application.

The application is based on the grounds set out in the statutory statement filed herein and dated on the 3<sup>rd</sup> day of July 2009, The said grounds are as follows:

a) That the Chief Magistrates Court has two powers to hear, determine and cause the execution of an offence not recognizable by the statute.

b) That the alleged bad cheques were post-dated ones which are specifically and expressly excluded by section 316A (2) of the Penal Code [Cap 63] Laws of Kenya.

c) That the complaint relates to and arises from a contract which has a valid arbitration clause.

d) That the applicant in issuing the post-dated cheques anticipated that she would be in funds. That when the funds were not timely wired into the account she advised the interested parties not to deposit the cheque(s).

e) That the Criminal process is being abused to the detriment of the applicant and her business interests.

f) That the respondents and their officers are acting in excess of their powers or such powers and/ or invoking the same for ulterior motives.

g) The respondents continued acts of harassment are greatly prejudicing the applicant who cannot now peacefully engage in her legal business pursuits.

h) The issues, herein, if any, are purely civil in nature.

The application is predicated upon the verifying affidavit of Rosemary Wangui Kimaru sworn on the 3<sup>rd</sup> day of July, 2009

### ***THE PARTIES TO THE SUIT***

Rosemary Wangui Kimaku (hereinafter referred to as the “***accused***” and “***applicant***” interchangeably is a partner to Nelson Aseka Munyasa. She filed this suit against:

1) The Chief Magistrates Court, Nairobi, a Judicial Officer duly constituted under the Magistrates' Courts Act [Cap 10] Laws of Kenya ( hereinafter referred to as the "**1<sup>st</sup> respondent**")

2) The Commissioner of Police, incharge of the police with powers to investigate the commission of recognizable offences, lawfully arrest, cause the arrest, interrogation and detaining of person within Kenya ( hereinafter referred to as the "**2<sup>nd</sup> Respondent**")

3) Authur Munyao Muuo is a member of the 2<sup>nd</sup> interested party ( hereinafter referred to as the "**1<sup>st</sup> interested party**")

4) African Ruby Investments is an investment body operating situated in Nairobi with membership thereat (hereinafter referred to as the "**2<sup>nd</sup> interested party**").

### ***THE APPLICANT'S CASE***

Rosemary Wangui Kimaku, the accused/ applicant and her partner Nelson Munyao Muuo [**"first interested party"**] entered into a Foreign Exchange Management Agreement with the 2<sup>nd</sup> Interested party.

It was ***inter-alia***, an express term of the said agreement that:-

1. They would be paid a monthly management fee of US\$ 150 for the managed assets.
2. Upon termination thereof they would refund to the 2<sup>nd</sup> interested party the principal amount invested.

3. The 2<sup>nd</sup> interested party as the principal assumed the risk attendant to the business.

The agreement could be, at the option of either party, be terminated by a 30 day written notice upon which parties would afford each and exhibit due care while winding up the management account.

4. That any proceedings arising from the agreement in Nairobi would be by way of an arbitration.

5. On 15<sup>th</sup> November, 2008 the first interested party issued a termination notice which was to mature on 15<sup>th</sup> December, 2008.

6. Thereafter the parties embarked on a process of winding up the account but the interested parties began exhibiting undue impatience in the process.

7. The two partners thereafter issued the interested parties and/or its members post-dated cheques on the understanding that while the affairs were being wound up monies would be transmitted by agents outside the jurisdiction by the due date.

8. The funds were not remitted timely. And hence the first interested party and other members with a view to “fixing the partners” presented the cheques for payment against the advice of the two partners which now forms the basis of the criminal proceedings being No. 462/2009. R Vs Rosemary Wangui Kimaku)

9. The charge in Count I is that of issuing a bad cheque contrary to section 316(A)’(C) of the Penal Code as amended by the Finance Act No. 4 of the year 2004.

The particulars in Count I are that on the 23<sup>rd</sup> day of December, 2008 at Hazel Apartments within Nairobi Area, jointly with another not before the Court issued a certain cheque No. 000045 for US Dollars 2875 to Munyao Authur Muuo drawn on account No. 13710000676 in the name of Rosemary Wangui Kimaku and Nelson A. Munyasa held at NIC Bank Westlands branch knowing the said account had insufficient funds.

The Charge in count 2 is that of issuing a bad cheque contrary to section 316(A) (I) (a) of the Penal Code as amended by Finance Act No. 4 of the year 2004.

The particulars in Count II are that on the 15<sup>th</sup> day of January, 2009 at Agip House along Haile –sellasie Avenue in Nairobi, within the Nairobi Area, jointly with another not before the Court issued a Certain Cheque No. 000046 for the amount of US Dollar 12500 to MUNYAO AUTHUR MUUO drawn on account No. 1371000676 in the name of ROSEMARY KAMAKU and NELSON A. MUNYASA held at NIC Bank Westlands Branch knowing that the said account had insufficient funds.

10. That the said cheques were post dated ones which are excluded courtesy of section 316(A)(2) of the Penal Code. Hence no offence recognizable in Criminal Law can be based on them.

11. That since the agreement between the parties had a valid arbitration clause the dispute arising from the issuance of the said cheques cannot but be resolved through arbitration process.

12. That in the premises the prosecution of the applicant/ accused is thus malicious and amounts to harassment and intimidation.

### ***THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS CASE***

1. The Hon. The Attorney General has powers under section 26 of the Constitution to institute and undertake criminal proceedings against any person before any Court of law.

2. That the powers of the Hon. The Attorney General may be exercised by him in person or by officers subordinate to him in accordance with his general or special instructions.

3. That the applicant/ accused cannot therefore purport to restrain and/or prohibit the respondents from exercising that powers.

4. That the core mandate of the police under The Police Act [Cap 84], Laws of Kenya is to maintain law and order, preserve peace, protect life and property, ensure the prevention and detection of crime, apprehend offenders and enforce all laws.

5. That the applicant has not demonstrated that the respondents have either acted ultra-vires their powers or have no jurisdiction in the exercise of their powers or contravened the rules of natural justice.
6. That in any event the cheques issued by the applicant/ accused were not post dated as they were banked on the dates specified. Hence an offence recognizable in law has been established when the said cheques bounced.
7. In the premise the applicants application is frivolous and an abuse of the Court process.

### ***THE 1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES CASE***

1. Authur Munyao Muuo is the Vice-Chairman and Director of the 2<sup>nd</sup> interested party and have authority of the Board of Director to reply to the affidavit of the applicant.
2. In that capacity he has knowledge that the cheques issued by the applicant/accused were not post-dated. In the support is exhibited “**AMMI**”, and “**MM2**” hence the issue at hand is criminal in nature.
3. That the agreement at clause 17 provides for settlement by criminal proceedings/ suit or arbitration. They have elected criminal proceedings.
4. That Nelson Aseko Munyasa habitually issues bouncing cheques. For example in Criminal Case No. 1316 of 2006. REPUBLIC VS NELSON ASEKA MUNYASA he was prosecuted by the respondent.
5. That this application is brought in bad faith since the applicant had intimated to Court vide exhibit “**AMM4**” that they intended to negotiate a settlement.

### ***ANALYSIS OF EVIDENCE***

It is clear to me, on the available evidence that there was an agreement between the applicant/ accused and her partner, on the one hand, and the 1<sup>st</sup> and 2<sup>nd</sup> respondent, on the other hand.

The agreement embodied payment of certain sums which form the basis of the criminal charge against the applicant/ accused.

The applicant/ accused issued the cheques that form the basis of the criminal charges. The said cheques bounced on presentation for payment on their due dates.

The first and second respondents then complained to the police, who upon investigation preferred the subject charges against the applicant/ accused.

While the 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that the charges are in order based on the agreement, the applicant/ accused contends that the charges are preferred in bad faith because the agreement between them provides for arbitration.

For that reason, the applicant/ accused has moved this Court to prohibit the first and second respondents

from pressing the charges against her. Hence the prayer for an order of certiorari to remove into this Court for purposes of quashing the criminal proceedings in the Chief Magistrates Criminal Case No. **462/2009. Republic Vs Rosemary Wangui Kimaku.**

The issue to be decided is whether on the available evidence the prerogative orders of prohibition and certiorari are available to the applicant/accused.

## **THE LAW**

### **i) Certiorari**

An order of certiorari quashes a decision if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

In the case of **Sergent Singonjan Vs. The Principal Magistrate Court Kibera & Anor; Nairobi High Court Misc Application No. 579 of 2005** (unreported) the applicant sought an order of certiorari to quash the charge sheet in a criminal case pending before the subordinate Court. It was held, *inter-alia*, that it was always available for the applicant to invoke the provisions of section 89(5) of the Criminal Procedure Code so that the trial Court rejects the charge for being defective or failing to disclose an offence known to the law. Hence the decision that would reserve and quash was that made to commence the proceedings as opposed to a charge which has already been registered. The application was therefore dismissed.

### **ii) Prohibition**

An order of prohibition is an order from the High Court directed an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings in excess of its jurisdiction or absence of it.

The question to pose is this? When does an order of prohibition lie? It does not, however, lie to correct the course proactive or procedure of inferior Tribunals, or wrong decision or the merit of the process. For that legal proposition, I call in aid the authority of **HALSBURYS LAW OF ENGLAND, 4<sup>TH</sup> EDITION, VOLUME 1 at Page 37 paragraph 128** which states:-

***“Prohibition looks to the future so that if an inferior Tribunal were to announce in advance that it would not consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice”***

However, where a decision has been made, whether in excess of its jurisdiction or in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Hence an order of prohibition is powerless against a decision which has already been made before an order is issued.

## **CONCLUSION**

In respect of this case, I find and hold that it is always available to the applicant/accused to invoke the provisions of section 89(5) of the Criminal Procedure Code so that the trial Court rejects the charge for being defective or failing to disclose an offence known to the law.

Equally in respect of this case the decision to charge the applicant/accused has already been made and the charges have been preferred hence the prerogative orders of prohibition sought is, in law, not tenable.

The High Court therefore lacks jurisdiction to pre-empt the trial on Nairobi CM **Criminal Case No. 462/2009 [R V Rosemary Wangui Kimaku]**.

Section 193(A) of the Criminal procedure Code (Cap 75) Laws of Kenya similarly reinforces the same

view. It confers the Courts with concurrent jurisdiction i.e civil and criminal jurisdiction to run side by side. It is significant that this amendment was done after the celebrated ***Kangwana case***, Hence the Kangwana case is no longer good law.

In the premises, the said criminal case shall proceed as enjoined by law up to its logical conclusion. In the process of the hearing, the applicant/accused shall be at liberty to use the defences alluded to herein during the criminal trial. Whatever the outcome due process shall have been followed.

For the above reasons, the application fails and is accordingly dismissed. In the event, there are any exhibits in this file which shall be used in the criminal case the same shall be returned to the Chief Magistrate's Court to be used during the criminal trial in Nairobi Chief Magistrate's criminal case No.462/2009 aforesaid.

It is so ordered.

Dated and delivered at Nairobi this 26<sup>th</sup> day of October, 2011.

**N.R.O OMBIJA**  
**JUDGE**