



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Application 128 of 2010**

**IN THE MATTER OF: AN APPLICATION BY STEPHEN KIPKENDA KIPLAGAT FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS
AND**

**IN THE MATTER OF: ANTI-CORRUPTION CASE NO.36 OF 2009; REPUBLIC THROUGH KENYA ANTI-CORRUPTION COMMISSION VS. STEPHEN KIPKENDA KIPLAGAT & 2 OTHERS IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI
AND**

IN THE MATTER OF: THE CONSTITUTION OF KENYA; THE PENAL CODE, CAP 63 OF THE LAWS OF KENYA; THE KENYA ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003 AND THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

**THE SENIOR RESIDENT MAGISTRATE,
ANTI-CORRUPTION COURT, NAIROBI.....2ND RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE STEPHEN KIPKENDA KIPLAGAT

R U L I N G

Notice of Motion is brought under Order 53 Civil Procedure Code (Judicial Review).

The orders sought are Certiorari to remove into High Court for purpose of quashing the charge sheet and all proceedings in Anti – Corruption Case No 36 of 2009. And an order for Prohibition to prohibit 1st and 3rd Respondents from prosecuting or continuing with prosecution of Anti-Corruption Case No 36 of 2009 against the Ex parte Applicant and others in the Chief Magistrate’s Court at Nairobi or any variation thereof or any charge in substitution, subtraction, addition akin or identical thereto be and is hereby issued.

Further order prohibiting the 2nd Respondent from continuing with the hearing conduct and or determination of Anti Corruption Case No. 36 of 2009 against Stephen Kipkenda Kiplagat and others in the Chief Magistrate’s Court at Nairobi.

Prohibition is sought prohibiting the first and third Respondents from arresting harassing penalizing detaining or in any manner whatsoever interfering with the personal liberty and freedom of the Applicant on the basis of facts and circumstances upon which Criminal Case ACC No. 36 of 2009 are based.

An order for mandamus compelling the Respondents within 21 days of the order to issue and refund to a Mr. Bernard Sang on behalf of the Applicant the sum of Shs.500,000/= being cash bail paid to Chief Magistrate Court Nairobi in ACC No 36/2009. The orders are sought on the ground that the said criminal proceedings are based on exclusively commercial transaction between client and advocate which is not in any way related to criminal justice system and other grounds set out in the notice numbered to ® and verifying affidavit sworn by Applicant on 19/1/2010.

It is to be pointed out at this stage that this Notice of Motion arises out of the dispute in the same transaction as in the Notice of Motion filed by Ex parte Edward Kamau in Criminal Application M. Kamau vs. Rep. No. 80 of 2010 in which transaction of sale of certain land the Applicant Stephen Kipkenda Kiplagat was the advocate for the VENDOR (NSSF) and Mr. Kamau was for the purchaser (Delta Resources Ltd).

A Sale Agreement was exhibited and it is sworn that a large sum of money Shs.1,237,500,000/= was deposited in a joint account between advocate for both parties. After transfer of the plots of land subject of agreement. There was a dispute as to actual acreage of land despite the agreement provision that the purchaser had inspected the land and was purchasing it "as it was".

It is not clear why the Vendor NSSF chose to nullify the transaction. Anyway NSSF filed suit No 353 of 2008 in which case a consent was filed on 11/6/2009 to bring the dispute to an end. A decree was issued. The balance of purchase price was paid to the purchaser. The fees for the firm of the Applicant was stated at 24,115,050 but only Shs.8,071,724.15 was paid by way of deposit. The Applicant swears that his firm conducted the transaction professionally on behalf of NSSF.

In view of what is stated the charge sheet is invalid. As the trial before Anti-Corruption proceeded the prosecution prayed to add a new accused and new charges. The court granted orders and allowed substitution of the charge sheet and it is this time that Edward Kamau was added in the charge sheet.

That is the charge sheet exhibited in Criminal Application No. 80/2010

The facts are stated in the same manner. That acts of the first Respondent are declared ultra vires, unlawful malicious capricious unreasonable and in bad faith the Applicant was handling a brief as a member of a firm under the provisions of Advocates Act Cap. 16 Laws of Kenya. There was violation of the rules of natural justice. The Verifying Affidavit is in similar terms like that of the Ex parte Kamau in Notice of Motion No. 80 of 2008. All these allegations are not proved. It is clear that Attorney General took decisions to prosecute the Applicant and decided on the charges in accordance of his powers granted under the Constitution and no grounds that does warrant the granting of certiorari prohibitions and mandamus. He acted within his powers. The purpose of this application is not to examine the merits of the application but to ensure that the proceeds of law is followed according to law.

I have examined the authorities cited by the Applicant

(1) R vs. Commissioner of Police exparte Tarus 2003 KLR

The court said Holding 6, although the Attorney General is not subject to control in the exercise of his power to prosecute criminal offences he must exercise that power upon reasonable grounds. In Republic vs Chief Magistrate Ex parte Ganijee, Waki J as he then was explained the abuse of the process of court saying how serious the criminal charges may be they should not be allowed to stand if their predominant

purpose is to further some ulterior purpose.

In the case of Tirop vs. Attorney General Misc. Application No. 1201 V. 2001 The Judge said “The situations under which a trial can be said to be unfair and oppressive are where there is no lots of evidence and where it is selectively monitored as to await to a prosecution for ulterior motives looking at the said explanations there is no ground here to show that the Attorney General was acting in a way of abuse of court process.

I have already examined the facts placed before the court and I am clear that the Attorney General acted within his constitutional powers and that the Trial Magistrate has full jurisdiction to try the ACC No 36 of 2009.

The Applicant is already on bail and he ought to use then raise the matters in his defence in the Anti-Corruption prosecution. I dismiss the application with costs in favour of the Attorney General.

Dated and delivered at Nairobi this 20th day of April 2010.

J. N. KHAMINWA

JUDGE