



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Miscellaneous Application 265 of 2009**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF  
PROHIBITION**

- REPUBLIC.....APPLICANT

- VERSUS -

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

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

EXPARTE: JOSEPH WARUIRU MUIGAI

**J U D G E M E N T**

Joseph Waruiru Mungai, the ex-parte Applicant herein seeks to prohibit the Commissioner of Police or his subordinate officers from charging him in a court of law with any offence pursuant to the complaint of Nathaniel Mbugua Kang'ethe as disclosed in this application and that the costs be awarded to him. He filed the Notice of Motion dated 18/5/2009 which is supported by the statement of facts dated 4/5/2009, verifying affidavit of Waruiru dated 30/4/2009, annexures thereto, a further affidavit dated 29/10/2009 and skeletal arguments dated 9/12/2009.

The Notice of Motion was opposed and Joseph Kiragu, the investigating officer in the criminal matter swore a replying affidavit dated 9/9/2009 and skeleton submissions were filed by Mrs. Obuo, counsel who appeared on behalf of the State. Nathaniel Mbugua Kang'ethe was joined to these proceedings as an Interested Party and was represented by Wandugi Advocate but did not file any papers in opposition to the motion and neither did Mr. Wandugi appear at the hearing although he was aware of the hearing date.

It is Waruiru's case that he joined the firm of Kang'ethe & Associates as a partner in 1998, following a memorandum of understanding that they would execute the necessary deed and make necessary entries with the Registrar but Kang'ethe the Interested Party, the managing partner has withheld the said documents. That in 2008 Kang'ethe started to malign his professional image. Vide a memo (JNM 1) in which Waruiru suggested on how they

could dissolve the partnership and that vide a letter of 19/11/2008 Kang'ethe wrote back indicating that they failed to meet the expectations of their '*anticipated partnership*' but it is Waruiru's view that a partnership existed as supported by a profile sent to their clients (JNM 4), a copy of a letter from the Institute of Certified Public Accountants of Kenya (ICPAK) dated 29/4/2009 (JNM 4 [a]) and a memorandum of understanding in Kangethe's custody. The parties exchanged some correspondence and on 16/12/2008, Kang'ethe alleged that Waruiru solicited work from his clients (JWM 8, 9 and 10). That on 18/2/2008 Kang'ethe again wrote to Waruiru alleging that he had taken certain items, the property of Kang'ethe & Associates (JWM 11) which was not true. That the assets and liabilities of the partnership are yet to be determined and that should be done in accordance with the Accountants Act Cap 531 Laws of Kenya and ICPAK guidelines. On 2/3/2009, CID officers went to Waruiru's offices armed with a search warrant issued in CRC 199/09 (JWM 12) and also alleged that he had stolen Kshs.50,000,000/-.

According to Waruiru all that was meant to intimidate and embarrass him and that the police did carry away many files from his firm despite protestation. He was also threatened by police that he should co-operate with Kang'ethe or face dire consequences. That on 3/3/2009 while at the Provincial Criminal Investigation offices, Kang'ethe said that Waruiru would be taken to court if he did not co-operate and on 28/4/2009, he was summoned to CID Headquarters following Kang'ethe's complaint. He is apprehensive that the complaint is meant to harass and intimidate him. In his further affidavit, Waruiru deponed that he went to the High Court in Misc. Appl. 84 and obtained bail to avoid arrest by police but despite that court order charges were preferred against him in CRC 1934/09 when he was away in Mombasa and warrants of arrest were issued. He faces two charges of stealing contrary to Section 281 of the Penal Code in which it is alleged that he stole fifty seven files worth Kshs.7,490,000/- and a lap top worth Kshs.60,000/- the property of Kang'ethe Associates the criminal case was stayed upon application by his counsel. It is Waruiru's contention that he was never an employee of Kang'ethe Associates but a partner and that is why the charges can not be sustained. He tried to demonstrate that from the correspondence exhibited as WAIRURI 7A, there is evidence that he was a partner of Kang'ethe. He has also tried to demonstrate that he has not stolen away any clients from Kang'ethe Associates but has exhibited the letter of appointment from the various clients at WAIRURI 9 - 20.

In opposing the motion CPL Kiragu deponed that he was instructed by the PCIO Nairobi, to investigate a complaint of stealing by servant, which had been made by Nathaniel Kang'ethe, of Kang'ethe & Associates. That the theft was allegedly committed by his former employee who had been sacked on 5/12/2008. Upon investigating he found that Waruiru had stolen office files and other items upon his being sacked and also a sum of Kshs.2,315,462 which was clients money. He exhibited fraudulent invoices and client's payment vouchers (JK4). He also received a complaint that Waruiru had formed a rival company and was soliciting for work from Kang'ethe Associates clients and that Waruiru had forged the signature of Kang'ethe showing that he was a partner in Kang'ethe Associates. That upon obtaining search warrant in Kibera CRC 119/2009 he searched Wairuri's offices where he recovered some of the files that were

allegedly stolen and cheques (JK 7). That the cash book showed payments from Kang'ethe Associates which were camouflaged as clients of W. Muigai Associates. That Waruiru was invited to record a statement with the police and he disclosed that he was a partner with Kang'ethe Associates which justified his taking the property away. He annexed a letter dated 19/2/1998 as the letter of employment (JK 8). According to CPL Kiragu, evidence received from the Registrar General's Department shows that Nathaniel Kang'ethe is the sole partner in Kang'ethe and Associates (JK 9). That is when CPL Kiragu preferred the charges against the Waruiru and that instead of Waruiru attending the Chief Magistrate's court in CRC 1934/09 to take plea, he preferred to come to the High Court in this application.

It was the Respondent's contention that failure to join the Chief Magistrate's Court to these proceedings renders the Applicant incompetent. Order 53 Rule 3 (2) requires the notice of motion to be served on the court or officer of the court if the object of the application is to quash the proceedings or any order made in relation thereto. The Rule provides as follows:-

***“The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”***

The above provision is mandatory. The orders sought in Notice of Motion was partially directed at the Chief Magistrate's Court Kibera where charges were preferred against the Applicant. It was necessary that the Chief Magistrate's Court be served otherwise if orders are given by this court against that court then the court would have been condemned unheard. It is a tenet of rules of natural justice that no party to proceedings shall be condemned unheard. Failure to serve the presiding officer of the court renders the application incompetent.

Under Order 53 Rule 4 CPR, an Applicant is required to rely on the grounds contained in the statement in support of his Notice of Motion. In the statement at pars 11 and 14, Waruiru contends that the action taken by police is malicious, capricious, unreasonable, vexatious and made in bad faith. Those are the grounds relied upon and which the Applicant must prove.

Section 26 (3) of the Constitution entrusts the Attorney General with inherent powers to prosecute. The said powers are delegated to the Commissioner of Police by Section 26 (4) of the Constitution and under Section 26 (5), the powers of the Attorney General may be exercised by the Commissioner in person or by officers subordinate to him acting in accordance with the general or special instructions given to him. Further to the above, under Section 14 of the Police Act, Cap 84 Laws of Kenya, the police have a statutory duty placed on them to detect, prevent and investigate crime. In the instant case, the investigating officer received a complaint and commenced investigations into the alleged offences and came to the conclusion that an offence may have been committed. On the evidence available before this court, there is no evidence of malice, caprice or bad faith. It is the duty of the Applicant to demonstrate that the grounds

which this application is founded upon are proved. The mere fact that a matter is investigated and charges preferred is not per se, evidence of malice on the part of the police or the court. The police investigation according to the investigating officer, was triggered off by the complaint of Kang'ethe and there is nothing to suggest that the police have not conducted themselves professionally and independently before the charges were preferred against the Applicant. As earlier pointed out, whether or not the Applicant and the Interested Party were partners in the partnership is a matter to be determined in the civil court and whether or not the Applicant stole the said goods from the former place of work, is also an issue for the trial court. What the Applicant is trying to introduce in the further affidavit are matters that happened after filing of this application and also the defence that should be raised in the trial court or in the civil proceedings. Judicial Review can not determine the existence of a partnership nor can it determine the culpability or innocence of a person. The principle espoused in **WILLIAM & OTHERS – VS – SPAUTZ (1993) 2 LRC 659** is that the purpose of criminal proceedings generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account, is deserving of punishment. In the context of this case, theft is an offence under the law and it will be necessary that the same be determined by a competent court. There is no evidence that the court in which the Applicant has been charged is incompetent or partial.

In conclusion, I find nothing alien to the criminal process that would attract an order of prohibition. I therefore dismiss this application with costs to the Respondents.

**Dated, and Delivered in Nairobi this 24<sup>th</sup> day of September, 2010.**

**R.P.V. WENDOH**

**JUDGE**

**Present:**

Mr. Mayamba H/B for Nyakundi - for Applicant

Muturi - Court Clerk