REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 84 of 2009

REPUBLIC …….……..
APPLICANT

VERSUS

HON. ATTORNEY GENERAL …… 1ST RESPONDENT

CHIEF MAGISTRATE NAIROBI ……..…...…….. 2ND RESPONDENT

OCS LANGATA POLICE STATION ……..…… 3RD RESPONDENT

RULING

The Notice of Motion dated 25th February 2009 is brought pursuant to Order 53 Rule 1 (3), Rule1 (4) Order 50 Rule 17 of the Civil Procedure Rules, S.3A and 63 (e) Civil Procedure Act and the inherent powers of the court. The Hon. Attorney General seeks orders that the court do set aside the ex parte orders made on 6th February 2009 granting leave to the ex parte Applicant to apply for an order of certiorari; that the ex parte orders made on 6th February 2009 directing that the decree do operate as stay of the criminal proceedings in CRC 267/09 and execution of warrant of arrest issued therein for 60 days be set aside and that the proceedings in their entirety be dismissed and the Attorney General be awarded the costs.

The grounds upon which the application is brought are that the ex parte Applicant failed to disclose material facts to the court at the hearing of the application for leave when the ex parte orders were obtained, that the orders were obtained through deceit and deliberate misrepresentation of facts. That the application is therefore an abuse of the court process and is meant to delay the cause of justice; that the applicant has not come to court with clean hands because the charge facing the applicant was preferred after thorough investigations.

The application was opposed and Mr. Kibe Advocate for the Applicant filed a Notice of Preliminary objection dated 10th March 2009 which is to the effect that the application is incurably defective having been instituted under inapplicable rules of procedure, that the court has no jurisdiction to dismiss the proceedings and the application is an abuse of the court process. The Applicant ex parte also swore an affidavit on 10th March 2009.

In his submissions Mr. Okello, State Counsel, argued that the ex parte Applicant failed to disclose

material facts to this court at the leave stage in that the offence he faces in the Criminal court is not about privileged communication between the Applicant and his client but it is perjury in an affidavit and it is not covered under S. 134 of the Evidence Act. His contention is that the Applicant was charged on the basis of evidence gathered after thorough investigations and denies that the Attorney General and police are trying to advance the course of one Jacob Juma. In his affidavit, in support of the application, Robert Mabera an Inspector of Police with CID Langata Police Station deponed that in the cause of his investigations, in ELC HCC 351/08 he established that the Applicant, drew, signed and filed falsified documents in that case because he signed documents on behalf of one Aureliah Marie Joy Kimemiah who resides in Harare who had never come to this country till 2008. That the said Aureliah came to Kenya about 4th February 2009 and signed an affidavit on 5th February 2009 which the inspector took to the Government Document Examiner for comparison with the previous signatures on her other documents and he obtained the Forensic Document Examiner's report RM 2 and got leave of the Attorney General to proceed to charge the Applicant who went underground and rushed to this court for Judicial Review orders. According to the deponent, the Applicant is trying to evade the Criminal justice process under the guise of Judicial Review. He further deponed that he had learnt of the possibility of the Applicant absconding from from the jurisdiction of this court.

Mr. Okello Counsel for the Respondent relied on the decision of **NIPUN NAGINDAS PATEL V THE A.G. HMISC APPLICATION 463/05** and **FRANCIS GICHUKI MACHARIA V SRM KARATINA HMISC 339/06** where the courts struck out Judicial Review applications for material non-disclosure. Counsel also made reliance on HMisc 1295/05 **TERESIA WANJIRU GITHINJI V THE A.G.** where the court held that the Applicant should have submitted herself to the jurisdiction of the court but instead went into hiding.

In HMISC 61/06 and 196/06 BRYAN YONGO V A.G., the case involved documentary evidence and the court found that there were triable issues and should proceed in the Constitutional Court.

In opposing the application, Mr. Kibe urged that the application as brought is incurably defective for having been brought under Order 50 Civil Procedure Rules and S. 3 A Civil Procedure Act. He relied on the decision of **KUNSTE HOTEL V COMMISSIONER OF LANDS (1995-1998) IE A** which was cited in **MANCHESTER OUTFITTERS LTD. V REGISTRAR OF COMPANIES HMISC 1115/07** which the court struck out for having been brought under the wrong provisions of law. That even Order 53 Rules 1(3) and (4) that were cited do not apply to an application of this nature. Mr. Kibe also argued that since the Notice of Motion had been filed the Respondents should have filed a Replying affidavit in opposition instead bringing this application. He further submitted that the conduct of the Attorney General and Police are the subject of the substantive Notice of Motion and the Applicant is entitled to the defence that the Attorney General as acting improperly and what the Respondent states as facts are actually what is in controversy in the main Notice of Motion.

The ex parte Applicant also contends that despite the allegation that the applicant is guilty of material non-disclosure , the material facts that were not disclosed have not been shown to the Court. That in Misc. Application 339 of 2006 FRANCIS GICHUKI MACHARIA case (supra) and NIPUN (supra), the facts that were in dispute were disclosed in the affidavit. Counsel argued that the allegation that the applicant is about to abscond from this Court's jurisdiction and went into hiding to avoid arrest are not substantiated. He distinguished the TERESIA WANJIRU CASE AND BRYAN YONGO case with the present in that in this case the, substantive motion was heard and the court made findings on the pleadings.

I have considered the application, all submissions by Counsel and the case law that has been relied upon. The main ground upon which the Respondent seeks to have the orders of this Court given on 6th February 2009 set aside and the application dismissed are that there has been material non-disclosure by the applicant in seeking leave. That the applicant failed to disclose facts that were essential to their case and had the Court been aware, it may not have granted the prayers of leave and stay. As correctly observed by Mr. Kibe, the Respondents have not disclosed what material facts the applicant withheld from the court at the time leave was granted. In the cases that were cited in support of that contention i.e. **NIPUN** case and **FRANCIS GICHUKI** case (supra) the court after hearing the Notice of Motions found

that there had been withholding of material facts from the court.

I am also in agreement with the applicants Counsel that what the Respondents are seeking in this application is what should be sought in the main Motion. IP Mabera has deponed to what he found the applicant to have done and the basis of the charges before the criminal court. These are facts in dispute since the applicant is alleging that the charges are an abuse of the powers by the Attorney General and Police and Section 134 of the Evidence Act. These are issues to which the Respondent should file an affidavit in reply so that they are canvassed at the Notice of Motion stage once and for all.

The other ground upon which the Respondent brought the application is that the applicant is likely to abscond from the jurisdiction of this court. That allegation has no basis as no evidence was laid before the court to support that allegation.

Mr. Kibe had urged the Court to dismiss the application for having been brought under the inapplicable provisions of law. It is trite that provisions of the Civil Procedure Act and Rules do not apply to Judicial Review applications save Order 53 Civil Procedure Rules. S. 8(1) of the Law Reform Act Cap 210 clearly provides that Judicial Review jurisdiction is neither civil nor criminal and that position was reiterated in the **KUNSTE** Case (supra). The Respondent wrongly invoked Order 50 Civil Procedure Rules, S. 3A and 63(e) Civil Procedure Act. However the Respondent had also invoked the inherent powers of the Court. I believe if the application had any substance, this Court would have agreed to consider it under its inherent powers since there is no provision for setting aside ex parte orders under S. 8 and 9 of the Law Reform Act and Order 53, Civil Procedure Rules.

In my view, the application by the Respondent is brought prematurely and it lacks merit and the Respondent should file the reply to the main Notice of Motion and prepare arguments to the main Notice of Motion. Otherwise such an application is a waste of the Court's time and results in unnecessary delays and costs unless it was plain and obvious that the orders for setting aside would issue. The application dated 25th February 2009 is dismissed with the costs abiding the main Notice of Motion.

Dated and delivered this 13th day of February 2009.

R.P.V. WENDOH

JUDGE

Present

Mr. Kibe for Applicant

Muturi – court clerk