



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW 1 OF 2009

IN THE MATTER OF: AN APPLICATION BY RIMONDI GABRIELLA FOR

LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

AND PROHIBITION

AND

IN THE MATTER OF: MALINDI SENIOR PRINCIPAL MAGISTRATE'S

MISC. CRIMINAL APPLICATION NO. 935 OF 2008

RODOLFO GRECCHI –VS- RIMONDI GABRIELLA

AND

IN THE MATTER OF: CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS

OF KENYA

RULING

Before this court is the Chamber Summons dated 4th May 2009 by which the ex-parte application seeks the following orders:-

- a) That this application be certified as urgent and be heard expeditiously
- b) The Applicant Gabriella Rimondi be granted leave to apply for an order of certiorari to bring to this court the orders issued in Malindi Senior Principal Magistrate Misc. Criminal Application No. 935 of 2008 on 22/12/2008 and 10/3/2009 requiring the applicant to attend that court for purposes of quashing them.
- c) The applicant be granted leave to apply for an order of certiorari to bring to this court the proceedings, ruling, order and the warrant of arrest in Malindi Senior Principal Magistrate's Misc. criminal Application No. 935 of 2008 made and issued on 10/3/2009 for the purpose of quashing them.
- d) The applicant be granted leave to apply for an order of Prohibition to prohibit the Senior Principal Magistrate, Malindi and any other Magistrate at Malindi from executing the warrant of arrest

ordered to be issued on 10/3/09 in Malindi Senior Principal Magistrate Misc. Criminal Application No. 935 of 2008 and from proceeding any further with the said criminal application.

e) Upon grant of leave this Honourable Court be pleased to order and to direct that the grant of leave shall operate as a stay of further proceedings in Malindi Senior Principal Magistrate Misc. Criminal Application No. 935 of 2008 and of the execution of the said warrant of arrest.

The basic facts of this case are as follows. The Respondent in this matter one Rodolfo Grecchi is the estranged husband of the ex-parte applicant Rimondi Gabriella. The Respondent did file an application Misc. Criminal Application no. 935 of 2008 in the Malindi Senior Principal Magistrate's Court seeking permission to commence private prosecution against the applicant herein. On the basis of the Respondent application and his supporting affidavit the learned SPM Malindi issued a summons requiring the attendance of the Applicant in court.

On 10.3.2009 when the matter came up the applicant who was in Italy her native country was not in court although Mr. Ole Kina learned counsel was present on her behalf. The court then proceeded to issue a warrant of arrest against the applicant. Mr. Kinyua for the applicant in the present proceedings argues first that the summons issued against the Applicant ought not to have been issued by the SPM Malindi as no charges have as yet been preferred against the Applicant. He argues therefore that the summons issued on 16/7/08 is null and void. Secondly Mr.Kinyua argues that the warrant of arrest issued by the SPM Malindi against the Applicant was irregular, incompetent and was issued without or in excess of jurisdiction for the reason that there are no valid summons requiring the attendance of the Applicant in court. He tells this court that the Applicant who lives in Italy would have to expend her time and money to travel to Malindi for the case and she is fearful of doing so due to the warrant of arrest in existence against her.

This court will not delve into the merits or otherwise of the Respondent application to commence private prosecution against the application as that is not the matter before this court. Having listened to the submission of learned counsel Mr.Kinyua and having also perused the annexed supporting affidavit as well as the annexure hereto this court is satisfied that the exparte application has shown a *prima facie* case within the meaning ascribed to the term in the celebrated case of **GIELLA –VS CASSMAN BROWN**. This court therefore allows this present application in terms of prayers (a) (b) (c) (d) and (e) thereof. This court further orders that this matter be mentioned before the Honourable Judge Malindi High Court on 9th June 2009 for further directions.

Dated and delivered this 28th day of May 2009

M. ODERO

JUDGE

28.5.09

Read in open court in absence of both parties.