

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Application 213 of 2009

MARTIN TINDI KHAEMBAAPPLICANT

VERSUS

THE ATTORNEY GENERAL..... 1ST RESPONDENT

THE COMMISSIONER OF POLICE 2ND RESPONDENT

THE CHIEF MAGISTRATE KIBERA LAW COURTS.....3RD RESPONDENT

RULING

By the chamber summons dated 2/4/09, Martin Tindi Khaemba seeks leave of this court to commence Judicial Review proceedings to apply for an order of certiorari to remove into this court and quash the proceedings in **Cr.c 3253/08 R V MARTIN TINDI KHAEMBA AND MARY NJERI MBURU** as relates to the Applicant and an order of prohibition to stop the Chief Magistrate's Court Kibera or any other court from proceeding with Cr. C 3253/08 as relates to the Applicant. The respondents are the Hon. Attorney General, the Commissioner of Police and the Chief Magistrate's Court Kibera — 1st to 3rd Respondents. The chamber summons is supported by an affidavit dated 2/4/09, a supplementary affidavit dated 12/8/09 and a statutory statement dated 2/4/09.

The court directed that the chamber summons be heard inter partes. The application was opposed and PC David Kubabi, a Police Officer from Kilimani Police Station who has been investigating the Criminal case in which the Applicant was charged swore an affidavit dated 14/7/08, in reply. Though the Respondents counsel was aware of the hearing date, he did not attend the hearing of the application. It proceeded ex parte.

The Applicant seeks to stop and quash the criminal proceedings that were commenced by police against him in Cr. C 3253/08. The charges arise from a land sale transaction in which he acted as an advocate for the seller. His co-accused Mary Njeri Mburu who acted as the advocate for the buyer also moved the court for Judicial Review orders and was granted and that the prosecution against her has been halted by Justice Nyamu's ruling **R V AG ex parte MARY NJERI MBURU HMS CC 726/08**.

I have considered the statutory statement herein, the two affidavits filed in support of the chamber summons, the replying affidavit of the investigating officer and the annexures thereto. It is true that the charge arises from a sale transaction in which the applicant acted as an advocate for the seller. But there is a question whether the Applicant was in possession of a practicing certificate as at the time of the transaction? The investigating officer has exhibited a letter from the Law Society of Kenya indicating that the Applicant had no practicing certificate since 2004. This sale transaction commenced early 2007 and was entered into in March 2007. I have seen the exhibited practicing certificate for 2007 which is dated 28th August 2007. It would be upto the Applicant to establish when he got his certificate and whether indeed he had a practicing certificate as of March 2007. That can not be established at this forum. Evidence should be adduced in the criminal case or at another forum.

I have read the affidavit of the investigating officer and the statements of witnesses. The fact that the court stayed the prosecution of Mary Njeri Mburu advocate who acted for the buyer does not mean it automatically intervenes in the case of the Applicant. The advocates were acting for different parties. From the statement of the investigating officer, the Applicant will have to explain how he came by the title deed, what he did with it. There is an allegation by one of the witnesses that the original title was given to him in good faith and he failed to surrender it but the Applicant has an explanation to make and this is not the forum for doing that. Judicial Review proceedings are brought by way of affidavit evidence. If there is a reasonable cause established for the police to commence a prosecution they have a right to do so. This is not a forum where the issues raised in this matter can be determined. It must be heard and determined by the criminal court.

For the reasons given above, this is not a matter for this court to determine by way of Judicial Review. There is no good reason why the criminal case should be stopped. Justice will best be served if the criminal case proceeds instead of this court interfering and therefore delaying that criminal case. The application is dismissed with costs to Respondent.

Dated and delivered at Nairobi this 28th day of September 2009.

R.P.V. WENDOH

JUDGE

Delivered in the presence of:-

Mr. Mwaniki for Applicant

No appearance for Respondents

Muturi – court clerk