



IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW (ORDER OF PROHIBITION AND CERTIORARI) OF JOSHUA MULI KIILU

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S CRIMINAL CASE NO. 2338 OF 2005 (NAIROBI)

BETWEEN

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE COMMISSIONER OF POLICE 2ND RESPONDENT

THE CHIEF MAGISTRATE (NAIROBI) 3RD RESPONDENT

AND

JOYCE MUKUHI NJENGA 1ST INTERESTED PARTY

MARY M NZIOKI 2ND INTERESTED PARTY

MARY WEKESA BAKULI 3RD INTERESTED PARTY

RULING

1. The Notice of Motion before me is dated 17/5/2006 and is premised on Order LIII Rule 3 (1) of the Civil Procedure Rules. The order sought is that of certiorari to remove into this court and quash the decision of the Commissioner of Police and the Attorney General to commence criminal proceedings against the ex-parte Applicant, Joshua Muli Kiilu.

2. I have read the Statement of Facts and Verifying Affidavit and these are the facts relied upon;

That sometime between 1997 and 1998, the ex-parte Applicant set up a real estate business and in the course of that business, he acquired L.R. No. 209/15385 Nairobi and begun developing the same. He wanted to sell the individual units for Kshs.3 Million and one of his clients was Joyce Mukuhi Njenga who paid Kshs.700,000/= and when she failed to pay the balance within 90 days, as was the condition in the Sale Agreement, she lost 10% of the Kshs.3 Million and so she was refunded only Kshs.400,000/= of the deposit paid.

3. Another client was one Major (Rtd) Sinengo who paid Kshs.300,000/= as deposit but died before finalizing the transaction. The Applicant later agreed with the wife of his deceased client that she would occupy one housing unit as a tenant and utilize the deposit of Kshs.300,000/= as a tenant and paying Kshs.20,000/= per month as rent. However, the said tenant, one Mary Wekesa Bakuli, ran a bill of Kshs. 900,000/= and ran off without paying Kshs.600,000/=.

4. The ex-parte Applicant also entered into a sale agreement with one Mary Nzioki whereby, she would purchase motor vehicle reg. No. KAG 643T at the price of Kshs.2 Million. She was to pay him Kshs.500,000/= and the balance of Kshs.1.5 Million would be paid to his financiers, National Industrial Credit Bank. She took possession but failed to pay the bank and the vehicle was repossessed and sold by the financier.

5. It was his case that the three ladies then hatched a conspiracy and made a false report that he had obtained money from them illegally and by false pretences. He was thereafter arrested and charged with the offence of obtaining money by false pretences in **Nairobi CM'S Court Criminal Case No. 2338/2005.**

6. His case is that the police never investigated the matter and his arrest and arraignment in court was oppressive and should be quashed because there is **“no evidence with which to take (him) to court”**.

7. I do not seem to see any response by either the Attorney General, the Commissioner of Police or the Chief Magistrate, Nairobi. I initially wondered why a prosecution being conducted in Nairobi was filed in Machakos but I have seen correspondence between the Deputy Registrar, Machakos and the then Chief Court Administrator and the matter seemed to have been settled and no application to transfer it was made. By fact of Section 60 of the Constitution, the High Court at Machakos can properly handle the dispute although practicality would dictate that the matter be heard in Nairobi.

8. Having so said, it would seem to me that there is only one issue to address; was the ex-parte Applicant's arrest and arraignment in court a matter that should attract the sanction of this court? In **Githunguri vs R (1986) KLR 1** it was held that where the Applicant's prosecution was an abuse of court process, oppressive and malicious and would not be in the public interest, judicial review orders of prohibition would be properly issued. In that case, the Applicant had been assured that no criminal prosecution would be conducted against him but four years later, he was arrested and charged. The present Applicant was arrested and charged on 21/10/2005 for offences that were allegedly committed in 2004 or slightly before although the initial transactions as regards the housing units may have taken place in 1998. It is argued that like in **Githunguri's** case, the charges were oppressive. Were they? I think not.

9. In **Githunguri**, it was *inter-alia* held that there is no time limit for prosecution of serious offences unless statute has set such a limit and therefore the Attorney General is always free to prosecute. The only rider is that the Attorney General should not offend the rights conferred by section 77 (1) of the Constitution and protected by Section 84 (1) of the same Constitution. I have seen no evidence that the Commissioner of Police or the Attorney General have offended those provisions in any way. Further, the Chief Magistrate's Court in Nairobi has been enjoined as a party and yet the decision sought to be quashed does not emanate from it. No orders to prohibit it from trying the case have been sought and so there is really no order sought to stop that court from performing its constitutional duty.

10. I also think that the motion is misguided because Section 26 (4) of the Constitution provides as follows:-

“26. (1)

(2)

(3)

(4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.”

11. Section 26 (3) (a) provides as follows:-

“26. (1)

(2)

(3) (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b)

(c)”

12. And Section 26 (8) of the Constitution then provides as follows:-

“26. (8) In the exercise of the functions vested in him by sub-sections (3) and (4) of this section and by sections 44 and 55, the Attorney-General shall not be subject to the direction or control of any other person or authority.”

13. It would be an abuse of its powers if this court without proper evidence being laid before it, interfered with those constitutional duties and worse, to purport to determine the merits of a criminal case pending before a court subordinate to it and without hearing the evidence and its value. Let the Applicant face his accusers in court and vindicate himself if he is truly innocent.

14. In the end therefore, the Motion before me is incompetent and has no merits whatsoever. It is dismissed with no orders as to costs since none of the Respondents appeared at the hearing and I see no response from any of them.

15. Orders accordingly.

Dated and delivered at Machakos this 29th day of **October** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Miss Otieno h/b for Mr Masika for Applicant**

ISAAC LENAOLA

JUDGE