



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Judicial Review 33 of 2009**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE NAKURU LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**OFFICER COMMANDING NAKURU POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**JEREMIAH MUTUURA KINYANJUI.....SUBJECT**

**AND**

**FRANCIS KAMAU NJUGUNA.....INTERESTED PARTY**

**RULING**

In his Notice of Motion dated 29<sup>th</sup> April 2008 and brought under **Order 53 Rule 3** of the **Civil Procedure Rules**, Jeremiah Mutuura Kinyanjui the ex-parte applicant seeks the Judicial Review orders of certiorari to quash the charge sheet presented against him by the 2<sup>nd</sup> respondent in Nakuru CM Criminal Case No.1487 of 2009 and prohibition to prohibit the 1<sup>st</sup> respondent from proceeding with the hearing of that case. The application is based on the grounds that the charge is an abuse of the process of the court as it has been presented with the objective of coercing the ex-parte applicant to yield ground in Nakuru HCC No.181 of 2008.

In his submissions Mr. Githui for the ex-parte applicant started by raising a preliminary point that the interested party having not been granted leave by court to oppose this application and his counsel having not entered appearance as required by **Order 53 Rules 6 and 8 and 9** of the **Civil Procedure Rules**, his affidavit in opposition to the application as well as his counsel's submissions should be expunged from the court record.

On the merits of the application Mr. Githui submitted that Francis Kamau Njuguna, the complainant in the said criminal case, is one of the plaintiffs in the High Court case and that he lodged the complaint on the basis of the exhibits annexed

to the applicant's affidavit in the High Court case. In his view the criminal process in this case is being used as a pawn in the settlement of personal feuds and individual vendeta in the said High Court case. That is an abuse of the court process and this application should therefore be allowed as prayed.

The interested party could not hear of that. After setting out the charges against the applicant in the criminal case and referring to the documents in support thereof, his counsel, Mr. Waiganjo, submitted that the criminal charges against the applicant are well founded and are therefore not an abuse of the process of court. He urged me to dismiss this application with costs.

In criminal cases as we know, the burden is on the prosecution to prove the charge against the accused person beyond reasonable doubt. However, where an accused person applies to prohibit the state from prosecuting him, the burden shifts to him to show that the criminal charge is mala fides or frivolous and therefore an abuse of the court process.

A criminal charge can arise from the same set of facts which give rise to a civil dispute and I know of no law barring both of them from being simultaneously instituted. Any criminal proceedings commenced and based on the same facts is not always an abuse of the process of the court. It is therefore not enough to simply state that there is a civil dispute pending in court in respect of the same matter. The applicant has to show the basis of his claim that his rights are being undermined. For him to succeed he must place before court evidence to show that the criminal proceedings against him have no basis whatsoever and are only meant to coerce him to yield ground in the civil case. In **Macharia & Another Vs Attorney General & Another, [2001] KLR 448**, the applicants placed before court evidence to show that although their rival in a civil suit lodged a criminal complaint with the police in 1997, he concentrated in attempts to enforce the judgment he had obtained in some civil cases. It was not until 2000 when he had lost his bid to recover the decretal sum in the civil cases that he prodded the Attorney General to institute criminal charges against them. The charges were shown to have been intended to bring pressure to bear upon the applicants to settle the civil dispute.

In this case the applicant has not placed before court any evidence to support his claim. He himself states in paragraph 11 of the affidavit in support of his application that he is the one who obtained from M/S Kaplan and Stratton Advocates the letter alleged in the criminal case to be a forgery. Immediately after being served with the application to which the letter was annexed, the interested party's advocates sought M/s Kaplan & Stratton Advocates' comments on it and they were advised that it was a forgery and that the matter should be reported to the police and that is how the criminal proceedings against the applicant were commenced. In the circumstances the charges against the applicant cannot at this stage be dismissed as frivolous.

For these reasons I agree with Mr. Waiganjo for the interested party that if anything it is this application which is an abuse of the process of court. Consequently I dismiss this application with costs.

**DATED and delivered at Nakuru this 8<sup>th</sup> day of December, 2009.**

**D. K. MARAGA**  
**JUDGE.**