



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

**Misc Appli 645 of 2007**

**GEOFFREY NJUGUNA KABUGU.....PETITIONER**

**Versus**

**DIRECTOR OF CID & 2 OTHERS.....RESPONDENTS**

**JUDGMENT**

Geoffrey Njuguna Kabugu filed the Notice of Motion dated 2<sup>nd</sup> July 2007 seeking Judicial Review orders against the Chief Magistrate's Court Nairobi, the Commissioner of Police, Director of CID and the Hon. The Attorney General, for the following orders:-

- 1) an order of certiorari to remove to the High Court and quash the criminal proceedings in the CM'S Court 415/07, 416/07, 829/07, and 890/07, **R V Geoffrey Njuguna Kabugu;**
- 2) An order of prohibition directed at the Commissioner of Police and or Director of CID and Attorney General or any other person prohibiting the arrest, detention and/or institution, filing and prosecution of criminal charges against the Applicant in respect of any such money or monies received by Geokam Insurance Investigations Ltd. and such other money or monies received by the Applicant on account of and at the instance of Geokam Insurance Investigations Ltd. prior to 21<sup>st</sup> June 2005 pursuant to complaints made by the clientele, customers and or creditors of Geokam Insurance Investigations Ltd;
- 3) Costs be awarded to the applicant.

The Application is supported by a statutory statement dated 14<sup>th</sup> June 2007 and a supporting Affidavit of the same date. The Applicant also filed a replying affidavit dated 11<sup>th</sup> October 2007 and skeleton argument dated 17<sup>th</sup> October 2007. The Applicant appeared in person.

The Notice of Motion was opposed and a Replying Affidavit was sworn by Lilian Mutio Kiamba an Acting Senior superintendent of Police in charge of Serious Crime Unit and who was the Investigating Officer in the case of obtaining money by false pretences which the Applicant faces. The Respondent also filed grounds of opposition on 1<sup>st</sup> October 2007 and skeleton arguments dated 18<sup>th</sup> July 2007.

The Applicant is challenging the decision of the Respondents to charge him with several counts of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. He faces CRC 415/07, 416/07, 259/07, 829/07 and 890/07. The charge sheets are exhibited to the supporting Affidavit. The Applicant claims to be the Director and General Manager of Geokam Insurance Investigations Ltd. which was incorporated in 1998 and it was contracted in 2004 by Association of Kenya Insurers (AKI) to trace, search for and identify all stolen and recovered motor vehicles lying in police yards country wide

and neighbouring countries. The said company sought and obtained permission from the Commissioner of police to enter police stations to carry out its mandate. During his work, he created animosity with senior police officers and was on 10<sup>th</sup> January 2007 summoned to CID Headquarters for interrogation and was then informed by Lilian Kiambi that he was under investigations for offences of obtaining money by false pretences and was arrested in February 2007, detained at Pangani Police for 3 days, was arraigned in court on Criminal Cases 415/07 and 416/07 where he was given bonds but was denied bond in 259/07, CRC 829/07 and 890/07 which were also preferred. In the meantime, the offices of Geokam Insurance were closed due to police harassment as police wanted to interfere in the auction of recovered vehicles as evidenced in HMISC 50/06 where Justice Nyamu granted orders to AK1. When the Applicant stood his ground that the police officers should not interfere with his work, he was charged with more offences. It is also the Applicant's contention that he is non suited because the complaints should have been levelled at Geokam Insurance Ltd not him as a person.

In opposing the Motion, Ag. Senior Superintendent Kiamba deponed that on 23<sup>rd</sup> November 2006 the investigation Section of the Criminal Investigation Department (CID) referred on him complaints from James Kinuthia, Paul Njoroge, Akweye Jairus Simekha, Priscilla Wangai, Esther Njeri and Lucy Waturi that the Applicant had fraudulently obtained from each of them money totalling Kshs.1.5 million by falsely pretending that he was in a position to sell to them lost and found motor vehicles. Upon interrogating the Applicant, she found that the Applicant had made an agreement with the parties to refund the monies and he promised to produce documents as evidence of the agreements by 19<sup>th</sup> January 2007. He was released from custody on 10<sup>th</sup> January 2007 but he never reported back on 19<sup>th</sup> January 2007. That the Applicant reported on 25<sup>th</sup> January 2007 and agreed to bring the documents by 2<sup>nd</sup> February 2007 but he never reported back and the police registered a charge sheet with the court on 13<sup>th</sup> February 2007 and a warrant of arrest issued. The investigating officer has further deponed that the police have powers to investigate. Counsel for the Respondent Mr. Owino submitted that the Notice of Motion is improperly instituted, is improper for mixing Judicial Review with Constitutional Application and that the remedies are not available to the Applicant.

Having considered the Application, Affidavits filed, the statutory statement, the skeleton arguments filed by both the Applicant & Counsel for the Respondent, I wish to point out from the onset that the Application/Motion is fatally incompetent because it is not brought in the name of the Republic and is not properly intitled. The Applicant in the Notice of Motion is named as Geoffrey Njuguna Kabugu. However, it is trite that in Judicial Review applications, the Applicant is the Republic who brings the Application on behalf of the aggrieved party or the ex parte Applicant. This has been the law since the case of **FARMERS BUS & OTHERS V TRANSPORT LICENSING APPEALS TRIBUNAL 1959 EA 779**. In that case, the East African Court of Appeal held that prerogative writs which are now Judicial Review orders must be sought in name of the crown (now Republic) and the Notice of Motion should be properly intitled. Justice Ringera adopted that decision in **JOTHAM MULATI WELAMONDI V THE CHAIRMAN OF ECK (2002) 1 KLR 486**. In that case Justice Ringera set out the format of Judicial Review Application's both at the leave stage and the Notice of Motion stage. Justice Nyamu adopted the **FARMERS BUS CASE** in **PAGREX INTERNATIONAL VS MINISTER OF FINANCE HMISC APP 875/01**.

Judicial Review applications are brought in the name of the Republic because Judicial Review is a mechanism that the State put in place to check on the excesses of its officers or authorities in the exercise of their administrative functions. So that the Republic, which replaced the crown, brings the Application on behalf of the aggrieved party who is referred to as the ex parte applicant. In the instant case, the ex part Applicant has brought the Notice of Motion in his name. He has no capacity to bring the motion in his name and the Application is therefore fatally defective and is for striking out.

It was the Respondent's contention that the Application is also defective in that the Applicant has brought the Application under the Constitutional provisions as well as the Law Reform Act and Order 53 see p 97 Civil Procedure rules. In the title of the Application the Applicant invoked Sections 26, 77 of the Constitution Order 53 Civil Procedure Rules and the Law Reform Act.

I do agree with the Respondent that the jurisdiction under S. 8 and 9 of the Law Reform Act which donates jurisdiction to Order 53 Civil Procedure Rules is a special jurisdiction, which is sui generis. Section 8 of the Law Reform Act provides that the said jurisdiction under the Law Reform Act is neither Civil nor criminal and the Court of Appeal echoed this in its decision in **KUNSTE HOTEL LTD. V COMMISSIONER OF LANDS CA 34/1995**.

The procedure for bringing Judicial Review Applications is provided for in Order 53 Civil Procedure Rules while procedure for bringing Constitutional Applications under Chapter V of the Constitution is set out under the Rules made pursuant to Section 84 (6) of the Constitution Legal Notice 6/2006. I would adopt the Court of Appeal decision in **SPEAKER OF THE NATIONAL ASSEMBLY V NJENGA KARUME CA 92/1992** where the court said that where there is clear procedure for redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The Applicant cannot therefore seek Constitutional remedies through a Judicial Review Application. The Applicant would however obtain Judicial Review orders through a Constitutional application made pursuant to Section 84 (2) of the Constitution which mandates the High Court to make such orders, issue such writs and give such directions as it may consider appropriate for purposes of securing or enforcing fundamental rights.

In **REP V COMMISSIONER OF POLICE ex parte NICHOLAS KARIA**, Nyamu, Ibrahim & Makhandia JJJ agreed with the position that the court can only grant orders when properly moved under the prescribed rules and procedures. The fact that the Applicant moves the court under two different jurisdictions renders this Application incompetent and it is for striking out.

The above observations notwithstanding, the question is whether the Application by the Applicant has any merit. The first ground raised by the Applicant's that the criminal charges should have been directed against Geokam Investigations Ltd. instead of him in his individual capacity; that the police have abused power as this is a personal vendetta by police officers whom he refused to allow to purchase motor vehicles at auctions irregularly.

There is no doubt that the Attorney General has inherent powers to investigate, institute and undertake criminal proceedings against any person before any court. To realise this, the Attorney General uses police to carry out this function. The Attorney General's mandate can only be challenged under S. 123 (8) of the Constitution if the Attorney General acts beyond his jurisdiction by for example acting in bad faith, capriciously or in excess of his power.

The investigating Officer has deponed that they received complaints from different people whom she has named, that the Applicant had received monies from them pretending that he was able to sell to them cars. There is no evidence that he promised to sell the cars he was acting on behalf of the company Geokam Investigations Ltd. Mr. Mutua deponed that though the Applicant had promised to avail the agreements entered into with the complainants, he never did produce them. If indeed it is the company that transacted with the complainants in the criminal cases, the Applicant will prove that at the hearing of criminal cases. He was given a chance to prove it by availing the agreements but he did not avail the documents despite being given ample time.

The Applicant also alleges bad faith on the part of the police but he has not mentioned any name nor has he referred to any specific incident of an officer whom he failed to sell the vehicles irregularly and who then instigated the criminal proceedings. The purpose of criminal proceedings is to hear and determine whether the accused has engaged in conduct which amounts to an offence and on that account is deserving of punishment. The Applicant has to demonstrate that the criminal justice process has been used for an improper purposes, is mala fides, vexatious, oppressive or harassment. The courts have so held in the case of **JARED KANGWANA V R HCMISC 446/1995; ex parte INTERNATIONAL LTD HMISC 144/1997; MOHAMED GURAM HUSSEIN FAZAL (SMMK) HMISC 2006; and KURIA & OTHERS V AG (2002) 1 KLR 70** In the instant case the Applicant has merely alleged but has not demonstrated that there was any personal vendetta or with whom or there was any mala fides on the part of any police officer. It seems the criminal charges were justified following the complaints made to police and were properly instituted and the Chief Magistrate's Court should go ahead to hear them.

There is be no merit in the motio+n even if it were properly before the court. And for all the reasons given in this judgment, none of the orders would issue and the motion is therefore dismissed with costs.

Dated and delivered this 14<sup>th</sup> day of March 2008.

R.P.V. WENDOH

JUDGE

Geoffrey Kabugu for the Applicant in person

Daniel: Court Clerk.