



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 706 of 2003**

**CYPRIAN KUBAI MIRINGO.....APPLICANT**

**Versus**

**STANLEY KAIYONGI MWENDA.....RESPONDENT**

**JUDGMENT**

The Originating Summons dated 27<sup>th</sup> April 2005 was filed by Cyprian Kubai M'iringo (the Applicant) against his step brother Stanley Kaiyongi Mwenda (the respondent).

The two brothers have been embroiled in a Succession dispute over their deceased father's estate. Their deceased father Daniel M'iringo Kirigo died on 3<sup>rd</sup> June 1999 and left a will as to how his estate would be distributed (CK 2). The Applicant claims to have been named as an executor of the estate and he filed Succession Case 219/1999 which was opposed but ultimately the grant was confirmed by Justice Tuiyot on 20<sup>th</sup> July 2000 and the estate was fully distributed. The Respondent being dissatisfied with the High Court decision appealed to the Court of Appeal which appeal was struck out on 17<sup>th</sup> May 2002 (CK 23).

The Applicant contends that before the father's death, the deceased transferred his shares in Kangeta Beer Distribution Ltd. to him while the other shares were held by the Applicants mother Joyce M'iringo. It is the Applicants case that the Respondent visited the Companies Registry, has altered Form 203A to show that the forms were altered after the father's death and following that alteration the Respondent commenced a private prosecution against the Applicant in CRC 2/2002 in which the Applicant is alleged to have forged the signature of their deceased father changing Directors of Kangeta Beer Distribution Ltd. purporting it to have been signed by their deceased father. The charge sheet is exhibited as CK 21. the Applicant was supposed to appear before the Chief Magistrate's Court on 9<sup>th</sup> April 2002 but he has not yet taken plea. The Applicant contends that the said private prosecution is malicious and vindictive and brought in bad faith. That is why the Applicant filed this Originating Summons pursuant to S. 84 (3) and rule 11 of Legal Notice 133/01 alleging breach or threatened breach of his fundamental rights under Sections 75 (1) 77(1), and of the Constitution. He seeks the following orders:

5. That this court do declare that the prosecution has contravened, is contravening and is likely to contravened the Applicant's constitutional rights and freedoms in the manner alleged in paragraphs 1, 2, 3 and 4 hereof and in breach of Sections 75(1) and 77 (1) of the Constitution.
6. That the Hon. Court stops, terminates and prohibits the proceedings in NRB CM'S COURT NO. 2/2002 (private prosecution) or make such orders, issue such writs and give such directions as it may

consider appropriate for the purpose of enforcing or causing the enforcement of the Applicants constitutional rights and freedoms;

7. the court orders the Respondents to pay costs of the Application.

In addition to the affidavit sworn by the Applicant, Joyce Kaiganoma M'iringo, one of the three widows of the deceased, Daniel M'iringo swore an Affidavit dated 27<sup>th</sup> February 2006 confirming that she was the only other director in Kangeta Beer Distributors with her husband who transferred his shares to the Applicant on 31<sup>st</sup> December 1998 before his demise. The Applicant filed skeleton arguments on 27<sup>th</sup> February 2006.

The Originating summons was opposed and Stanley Kaiyongi Mwenda swore an Affidavit dated 9<sup>th</sup> March 2004. The Respondent also filed skeleton arguments on 10<sup>th</sup> November 2006. In the said Affidavit the Respondent depones that the Originating Summons is incompetent because he had filed Misc. application 1239/02 which was finally determined in favour of the Respondent. That earlier a reference was filed, Misc Application 612/03 which raised similar issues and the same was struck out by Justice Khamoni on 22<sup>nd</sup> October 2002 with liberty to the Applicant to institute and serve fresh proceedings within 7 days (SKM 1). That fresh proceedings were filed in Application No. 1239/02 which did not comply with J. Khamoni's directions and the Chief Justice in his ruling of 17<sup>th</sup> October 2003 dismissed the Reference. The Chief Justice's ruling was exhibited as SKM 2 and that the Applicant cannot bring a similar Reference. The Respondent also deponed that having been allowed by a competent court to commence Criminal Proceedings against the Applicant, the Applicant should let him adduce evidence and the Applicant will be given a chance to mount his defence before the Chief Magistrate. That in any case, paragraph 4-27 of the Complainant's Affidavit is irrelevant to this case as it refers to the Succession Cause and that paragraphs 28-35 of the Affidavit should form part of his defence. That the constitutional reference has prejudiced all the beneficiaries of the deceased's estate but not only the Applicant and the same should be dismissed.

On 4<sup>th</sup> October 2007 the Hon. The Chief Justice directed that this matter be heard on 8<sup>th</sup> November 2007. On the same, date the Applicant's Advocate JAB Orenge served a Hearing Notice on the firm of Waithaka Wachira who had conduct of this matter on behalf of the Respondent. On 8<sup>th</sup> November 2007 when the matter came up for hearing, the Respondents Counsel did not attend and the court being satisfied that the Respondents were duly served, proceeded to hear the matter. Ms. Aulo urged the Originating summons on behalf of the Applicants.

In addition to the Affidavits filed in support of the Applicants case Mr. Aulo submitted that the private prosecution is brought for extraneous purposes in that it seeks to reopen the Succession Cause through the back door having failed in his objection raised in that matter and the Appeal that was ultimately struck out. Counsel urged that the private prosecution is an abuse of the court process and the court should look at the predominant purpose for which it was brought. That the Respondent having been overlooked by his deceased father in the distribution of the estate, wants to have it reopened to vent his personal vendetta on the Applicant. Counsel relied on the cases of **GITHUNGURI V REP (1986) KLR 1** and **KURIA & 3 OTHERS V AG (2002) 2 KLR** where the courts held that the court should look at not at the alternative remedies available but what the objective of the prosecution is and if it is for an improper purpose or vendetta, then the court should intervene and stop such prosecution.

Ms. Aulo further submitted that the Attorney General has inherent powers to prosecute but those powers can be challenged if found to be exercised oppressively, vexatiously or in bad faith, and more so a private prosecution brought by an individual, if found to be oppressive or brought in bad faith.

On the Respondent submission that the Applicants case is Res judicata, Ms. Aulo submitted that the Reference had not been determined on merit and Res judicata does not therefore apply. In **BOOTH IRRIGATION V MOMBASA WATER PRODUCES LTD. HMISC 1052/04** the court observed that the principle of res judicata applies to constitutional references so that if an issue has been litigated upon & determined, it cannot be relitigated. Counsel further said that the issue of forgery now raised by the

Respondent in the Criminal Case should have been raised as an objection in the Succession Cause but it was never raised.

Having considered the Originating summons, the Affidavits in support, the Replying Affidavit, skeleton arguments and the authorities that were relied upon I think the 1<sup>st</sup> issue to consider is that raised by the Respondents, whether the Originating Summons is Res judicata. The 1<sup>st</sup> Reference to be filed by the Applicant challenging the private prosecution was Misc 612/02 which Justice Khamoni found to be incompetent and bad in law and ordered it struck out with liberty to the Applicant either to institute and serve fresh proceedings within 7 days from that day or to appeal in accordance with the law. The Applicant took the 1<sup>st</sup> option and filed another reference 1239/02 but on 17<sup>th</sup> October 2002, the Hon. The Chief Justice Gicheru, found there to be no compliant constitutional reference in respect of which directions could be given as there had been no service of fresh proceedings instituted or served by the Applicant within 7 days from the date of the ruling as ordered by Justice Khamoni. The court rejected the reference and the order staying the proceedings in the Chief Magistrate's Court was lifted. Does the rejection of the reference by the Chief Justice render this matter res judicata? S. 7 of the Civil Procedure Act stipulates what res judicata entails. It reads:

**“S. 7 No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom or any of them claim, litigating under the same title, in account competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.** “(In HMisc 612/02, the Constitutional Reference was struck out for being incompetent. It was never heard on merit and a determination made. In Misc 1239/02, though the parties and issues are similar to the present, the matter was never heard on its merit. It was rejected because the Applicant had not complied with the directions given by the court in HMisc 612/02 for filing another reference. It had not been finally determined as required by Section 7 of Civil Procedure Act. This Reference is not Res judicata.

But can the Applicant bring another reference. In my considered view, he cannot. Justice Khamoni was very clear in his Order in HMisc 612/02. the court order read:-

**“Accordingly, the said Originating summons be and is hereby struck out with liberty to the Applicant either to institute and serve fresh proceedings within 7 days from today or to appeal as provided by the relevant law.”**

The Applicant took the 1<sup>st</sup> option to institute and serve fresh proceedings. However, in the proceedings in 1239/02 the court found that the Applicant had not complied with the order of 22<sup>nd</sup> October 2002 to serve fresh proceedings. The 7 days within which the fresh Reference could have been filed had long expired. The Applicant was absent at the time the Chief Justice gave directions and did not seek extension of the time within which to file another reference or time within which to comply with the orders of 22<sup>nd</sup> October 2007 by Justice Khamoni. The Applicant could only file a reference within the directives or conditionalities given by the court on 22<sup>nd</sup> October 2007. Having failed to do so, he cannot move the court with the same reference without leave of the court. I find that this reference is improperly before this court and is an abuse of the court process.

The private prosecution is already pending before the Chief Magistrate's Court as CRC 2/02. The Chief Magistrate's Court would be a party that would be affected by this court orders, in this Reference and should have been enjoined to these proceedings. In constitutional matters, it is pertinent that any party that may be directly affected by an order of the court should be served or enjoined to the proceedings. See **MEME**

Further to the above, it is trite that it is the state that guarantees fundamental rights and freedoms under Chapter V of the Constitution. The same cannot be enforced against an individual.

In **TEITWINNANG V ARIONG & OTHERS 1987 LRS CONST 517** the court had this to say:

**“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the constitution. The rights and duties of individuals are regulated by private law. The constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the Government of the day to the Governed. I am of the opinion that an individual or a group of individuals as this case cannot owe a duty under the fundamental rights provisions to another individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the constitution.”**

The Kenyan courts have adopted this decision in the following cases, amongst others:

1. **MARTHA KARUA V RADIO AFRICA & OTHERS HMSC 288/04**
2. **RICHARD NDUATI KARIUKI V LEONARD NDUATI KARIUKI HMISC 7/06**
3. **KBS LTD & OTHERS V AG HMISC 413/05**

In the instant case, the Attorney General, who is the legal adviser of Government should have been enjoined to these proceedings as a representative of the State which guarantees or owes the right to a fair hearing under S.77 (1) of the constitution and right to property under S. 75 of the constitution which the applicant has invoked. So that even if this court were to grant the orders sought, without the state being enjoined to the proceedings the orders would be made in vain.

For the above reasons this court sees no reason why it should deal with the merits of this case and it will be struck out for those reasons. Besides I found earlier that this Originating Summons is not properly before this court the Applicant having failed to comply with Justice Khamoni’s order in HMisc 612/02 and is therefore an abuse of the court process. I hereby strike out the Originating Summons with costs to the Respondent. The order of the Hon. The Chief Justice in 1239/02 was that the matter before the Chief Magistrate’s court do proceed. I reiterate the same. Costs of this Originating Summons to be borne by the Applicants.

Dated and delivered this 13<sup>th</sup> day of March 2008.

R.P.V. WENDOH

JUDGE