



**REPUBLIC OF KENYA**

**IN THE REPUBLIC OF KENYA**

**AT KITALE**

**Miscellaneous Civil Application 503 of 2006**

**N THE MATTER OF AN APPLICATION BY GREGORY KARUNGO NG'ETHE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 1043 OF 2006 MALINDI**

**J U D G M E N T**

Before me is a Notice of Motion dated 6<sup>th</sup> October, 2006 filed by M/s Walter Kontos advocates on behalf of the ex parte – applicant **GREGORY KARUNGO NG'ETHE**. The Notice of motion is purported to have been brought under Order LIII rule 3 (1) of the Civil Procedure Rules, and pursuant to leave of the court granted on 27<sup>th</sup> September, 2006 by Hon. Justice Emukule. It seeks for the following orders-

- (a) An order of certiorari quashing the decision of the District Criminal Investigation Officer Malindi to prosecute the Applicant.***
- (b) An order of certiorari quashing the charge sheet in criminal case No. 1043 of 2006 Malindi Republic -Vs- Gregory Karungo Ng'ethe, Peter Muriithi Mwaniki and Josphat Theuri Gitonga.***
- (c) An order of mandamus directed at the Senior Resident Magistrate's Court Malindi compelling it to refund to the applicant the cash bail paid of Kshs.60,000/- in respect of Gregory Karungo Ng'ethe, Peter Muriithi Mwaniki and Josphat Theuri Gitonga.***
- (d) An order of prohibition directed at the Senior Resident Magistrate's Court Malindi and any other manner whatsoever dealing with case No. 1043 of 2006 Malindi Republic -Vs- Gregory Karungo Ng'ethe, Peter Muriithi Mwaniki and Josphat Theuri Gitonga or any variation thereof in respect of any charge or charges in substitution thereof or akin to the same.***

The application was grounded on the statutory **STATEMENT** and the supporting affidavit filed with the Chamber Summons application for leave. The summary of facts relied upon as stated in the **STATUTORY STATEMENT** are that-

- Ø ***The applicant is an advocate of the High Court, practicing as such in the firm of Walter Kontos, Nairobi.***
- Ø ***The applicant is the lawyer for Ezio Dubbini, partly resident in Malindi and partly resident in Italy.***

Ø While in Malindi, Mr. Ezio Dubbini had purchased various properties in Malindi including motor vehicle KAR 561 K Toyota Hilux Pick Up, which he purchased from one Ali Bakari through one Mr. Hussein, his trusted agent in Malind, in or about the year 2004.

Ø On 18<sup>th</sup> February, 2005, the applicant received instructions, through the firm of Walter Kontos Advocates, to act for the said Ezio Dubbini in the recovery of assets and monies stolen from him and his companies by a former girlfriend in Malindi, one Mercy Wanjiru Gachengo.

Ø That there were disputes between Mercy Wanjiru Gachengo and Ezio Dubbini regarding ownership of assets, especially motor vehicle Toyota Hilux Pick up KAR 561 K in a number of High Court cases at Malindi High Court.

Ø That on 22/6/2006, the applicant was instructed by Ezio Dubbini to go to Malindi and establish from the police progress of investigators on theft of assets of Ezio Dubbini by Mercy Wanjiru Gachengo, and was at Malindi police station on 25.6.2006.

Ø As a result of his enquiries, on 25/6/2006 the applicant was denied permission to leave Malindi and was formally arrested by the 2<sup>nd</sup> respondent and charged in court together with Mr. Gitonga and Mr. Mwaniki, before the 1<sup>st</sup> respondent.

Ø That Mercy Wanjiru Gachengo has submitted through the applicant's lawyers in Malindi, Khaminwa & Khaminwa advocates, a list of her demands to be met before she can withdraw the criminal case.

At the stage of granting leave, the court granted stay of the criminal case in the following terms-

***“THAT the leave hereby granted do operate as a stay of all proceedings including mentions and hearings in Criminal Case Number 1043 of 2006- Republic -Vs- Gregory Kerungo Ng’ethe, Peter Muriithi Mwaniki, and Josphat Theuri pending the final hearing and determination of this suit.”***

At the hearing of the Notice of Motion Mr. Allan Gichuhi for the applicant, submitted that though the interested party **MERCY WANJIRU GACHENGO** was served, she had not filed any response. Counsel submitted that the interested party was the complainant in the criminal case at Malindi, the subject of the case herein. Counsel argued that the ex-parte applicant herein was arrested, put in custody and charged in court for acting in the course of his professional work. Counsel urged me to allow the application.

The learned State Counsel, Mr. Wahoro, who appeared for the respondents conceded to the application. Counsel argued that this was a peculiar case in which the police cannot explain the basis of the Criminal Case at Malindi. Counsel submitted that in the replying affidavit under paragraph 9, it was deponed by Inspector **WILSON MATI** of Malindi, that if there was any blame it was on the complainant (3<sup>rd</sup> party) **MERCY WANJIRU GACHENGO**.

This application, having been conceded to, I will have to allow the same. The charging of the exparte applicant in the subordinate court at Malindi, clearly smacks of malice by **MERCY WANJIRU GACHENGO**, and failure by the police to take their work seriously. The police have no reason to act carelessly simply because somebody has made a report to them. It is apparent that, in fact, the police knew that the ex-parte applicant was acting in the course of his professional calling as an advocate. The circumstances show that they should, in fact, have known that the ex-parte applicant was acting in that capacity, as an advocate, and therefore should not have charged him.

Consequently, I allow the Notice of Motion and grant prayers (a), (b), (c) and (d) of the Notice of Motion.

The ex-parte applicant has not asked for costs in the Notice of Motion. I order that each party will bear their own costs of these proceedings.

Dated and delivered at Nairobi this 21<sup>st</sup> day of May, 2008.

G.A. DULU

JUDGE.

In the presence of-

Mr. Ngethe for the applicant.

Mr. Gikera holding brief for Mr. Wahoro for Respondent.

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