



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

**Civil Case 1093 of 2003**

**MARGARET WAMBUI NJOROGE..... 1<sup>st</sup> PLAINTIFF/APPLICANT**

**JOAKIM NGURE KAGEMA ..... .. 2<sup>ND</sup> PLAINTIFF /APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**R U L I N G**

Substantial prayers in the Chamber Summons dated 14<sup>th</sup> December, 2004 are:-

“1. *THAT the defendant’s defence dated 7<sup>th</sup> January 2004 and filed herein on 12<sup>th</sup> January, 2004 be struck out.*

2. *THAT the suit be set down for formal proof.*”

The Plaintiffs/Applicants want costs of this Chamber Summons.

Without going into issues such as malice requiring proof in the evidence during the trial of the main suit, I will state that this Chamber Summons is filed in this suit which the two Applicants, as Plaintiffs, jointly filed against the Respondent, as the Defendant, because the two Applicants had been arrested in connection with the death of a former member of Parliament, Hon. Anthony Wambua Ndilinge, and were charged with murder in High Court Criminal Case No. 5 of 2000 at Nairobi. Hearing of the case commenced before Justice Samuel Oguk. But early in the year 2003 Justice Oguk was forced to retire when that case was still pending before him after hearing 16 out of the 56 listed prosecution witnesses.

On 27<sup>th</sup> March 2003, that trial before Justice Oguk was euphoriantly declared a mistrial by another Judge as the allegations against Oguk J causing his early retirement had nothing to do with that murder trial which was therefore properly and lawfully in progress before Judge Oguk and ought to have either continued or started de novo before another Judge.

As a result the Applicants who were in the prison remand were removed and remanded at Kasarani Police Station until 23<sup>rd</sup> May 2003 when they were unconditionally released, apparently following strong representation from an organization known as “People Against Torture” in their letter dated 31<sup>st</sup> March 2003; at the time the Defendant appears not to have been keen to prosecute the Plaintiffs further.

If the Defendant at that time thought was appealing the Plaintiffs, the Defendant was wrong as immediately after the withdrawal of the criminal case, the Plaintiffs filed this suit on 24<sup>th</sup> October 2003. The suit was, however, one which the Defendant could have very easily defended successfully on the basis of a filed good written statement of defence. But surprisingly, the Defendant's statement of Defence dated 7<sup>th</sup> January 2004 and filed on 12<sup>th</sup> January 2004 gives the impression that it was drafted and filed by a foreign State Counsel not more than one week old in the Attorney General's Chambers and without briefings from senior State Counsels in that office who were aware of the withdrawn H.C. Criminal Case No. 5 of 2000 which was so registered in the High Court as a result of committal proceedings in which a Committal Order was made by a Senior Magistrate with competent jurisdiction on the basis of evidence in the Committal bundle compiled following police investigation supervised by the Attorney General's office, who through the Director of Public Prosecution decided to charge the Plaintiffs.

The Defendant's defence dated 7<sup>th</sup> January 2004 therefore keeps on saying

"The defendant is a stranger ----"

to the facts about which the Defendant ought not to say he is a stranger, so that when the Defendant comes to claim that the arrest and subsequent arraignment of the Plaintiffs "was done upon reasonable ground being established", the Defendant only says so on the basis of

*"the defendant (averring) that if indeed the plaintiffs were arrested and subsequently arraigned in court."*

In other words the Defendant is disputing even facts which ought not be disputed such as the facts that indeed the Plaintiffs were arrested and subsequently arraigned in court and the Defendant goes on to deny knowledge of everything else in the Criminal Case boldly saying:

*"and the plaintiffs are put to strict proof thereof."*

In the circumstances, I do not see why I should disagree with the grounds set out in support of the chamber summons before me stating that there is no reasonable defence, that the defence filed therein is scandalous, frivolous and vexatious, that continuing with these proceedings with the Defendant's defence will only prejudice, embarrass and delay the fair trial of the suit herein, that the defence amounts to an abuse of the process of the court and that the defence is a bare denial and do not in any way answer the Plaintiff's case.

Accordingly, this Chamber Summons dated 14<sup>th</sup> December, 2004 is hereby granted as prayed with costs to the Plaintiffs/Applicants.

Dated and delivered at Nairobi this 5<sup>th</sup> day of December, 2007.

**J.M. KHAMONI**

**JUDGE**