



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC CRIM APPLICATION 269 OF 2006

REPUBLIC.....APPLICANT

Versus

CHIEF MAGISTRATE, NAIROBI.....RESPONDENT

EX PARTE: GATHERU GATHEMIA

RULING

When the Notice of Motion dated 10th September 2001 came up for hearing on 27th November 2007 the ex parte Applicant raised a Preliminary Objection in terms of the Notice of Preliminary Objection which had been filed on 20th November 2007. The said objection relates to the appearance of Kahuthu & Kahuthu Advocates in these proceedings. The grounds as contained in the notice of Preliminary Objection are as follows:

- 1) That the participation of Kahuthu & Kahuthu Advocates in these proceedings offends the principle and tenets of justice as the lawyer from the said law firm is a potential witness who has recorded Statements with the police in the Criminal Case 472 of 2001;
- 2) That Kahuthu Advocates has usurped the role of the public prosecutor in these proceedings and proceeded to make submissions and utterances that offend & undermine the applicants rights to a fair trial;
- 3) That is there is no order made by this court permitting the Interested Party to be joined to these proceedings.
- 4) That the pleadings having been drawn by the said Advocates, they should be struck off or expunged from the record.
- 5) That the Affidavits sworn by the Interested Party in support of the Application offend the tenets and principle of Judicial Review proceedings because they seek to draw this court to usurp the disputed allegations of fact.

Mr. Mburu, Counsel for the Applicant submitted that the basis of the objection is based on Rule 9 of the Advocates Practice Rules which prohibits an Advocate from appearing before a court or tribunal in any matter in which he has reason to believe he may be required as a witness to give evidence. That G.J. Kahuthu Advocate swore an Affidavit on 23rd August 2006 and filed it in court on 25th August 2006 and

that at paragraph 6 thereof, he depones to being aware that the applicant was charged with Criminal Case 472/01, where he forged a consent letter using their law firm name and he proceeded to withdraw money from the court on that consent. That the firm of Kahuthu being a necessary party to the Criminal trial, he may be invited in that court to prove whether or not the consent letter originated from their office.

In his submission Counsel relied on the Case of **JARED BENSON KANGWANA V AG MISC APPLICATION 445/95** in support of his submission that the Advocate was usurping the prosecutorial powers of the Attorney General. That the pleadings filed by the Advocates should be struck out so that this matter proceeds to hearing between the Attorney General and the Applicant. Mr. Kahuthu opposed the Preliminary Objection on grounds that it is brought late in the day to delay the hearing of the main Notice of Motion. That these being Judicial Review proceedings, any party can walk into the proceedings and be enjoined thereto. That there is no evidence that they will be called as witnesses in the Criminal case and that there is no consent referred to the proceedings. That they came into the proceedings when served and they cannot be barred from acting for the Interested Party.

I have considered the arguments of both counsel on the Preliminary Objection. There is no doubt that Mr. G. J. Kahuthu swore the Affidavit dated 23rd August 2006 in which he alleged at paragraph 6 that the Applicant herein forged a consent letter allegedly signed by their office which he used to withdraw money from the court. That Statement has a bearing in the Criminal Case out of which this Judicial Review Application emanates. The Advocates Statement on oath means that he knows how the money was withdrawn and he can be called as witness in the Criminal case. He cannot therefore act for a party in this Application. In my view, G.J. Kahuthu is an Interested Party in this matter. For that reason, Rule 9 of the Advocates (Practice) Rules bars Kahuthu Advocate from acting as an Advocate in a matter where he can be called to testify as a witness. He cannot represent the Interested Party as an Advocate in this matter and I would uphold the Applicants Preliminary Objection on that point.

Terry Wanjiku is named as the complainant in the Criminal case which the Applicant faces in Makadara. She is an Interested Party in this matter having been enjoined following the orders of Justice Nyamu on 23rd November 2006. Under Order 53 R 3 (2) Civil Procedure Rules the Notice of Motion is supposed to be served on all persons who are directly affected. Locus standi in Judicial Review is normally wider than in other Civil matters where direct interest has been shown. Terry being the complainant in the Criminal case, is an Interested Party and can come into these proceedings even on the hearing date and be heard even if she has not been served. There was no need for her to come on record formally by way of Application. Under Order 53 Rule 6, any person who wishes to be heard in presentation to the Application can be heard despite the fact that they are not served with the Notice of Motion. Both Terry and even Kahuthu Advocate can be heard in opposition to the Application even without having filed any papers. However Terry Kariuki is already on record and properly so.

It is trite that Preliminary Objections should be raised at the earliest time possible. G. J. Kahuthu Advocate have been on record for the Interested Party since about August 2006. In fact this court has delivered a ruling on an Application for leave to file contempt proceedings in which the said Advocate was acting for the Interested Party but there was no objection raised in respect of Mr. Kahuthu's appearance. It is true that the objection comes late in the day. In fact the documents that the Applicants were seeking to strike out were what the court considered in the Application for leave to commence committal proceedings. I would find it irregular to strike the said documents off the record, having relied upon them in another Application. I however wish to point out that this court is conscious of the length of time this matter has taken in court without any effort to prosecute it. The Applicant is enjoying stay orders. The raising of the Preliminary Objection at this time instead of doing so in 2006 would in my view tend to be an indicator of the intentional delay by the Applicant in this matter. The court will allow the Preliminary Objection to the extent that Mr. Kahuthu be struck off the record as Counsel for the Interested Party and is barred from representing Terry Kariuki in this matter. The said Terry Kariuki is given 5 days within which to get another Counsel and file the relevant reply if necessary, for the court to proceed with the hearing of the main Notice of Motion. Because of the delay caused by the Applicant in bringing this Preliminary Objection, each party bears their own costs.

Dated and delivered this 3rd day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Okello for Respondent

Mr. Henry holding brief for Mburu for Applicant.

Daniel: Court Clerk