



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA
Misc Civil Appli 35 of 2005

IN THE MATTER OF DISTRICT CRIMINAL OFFICER (D.C.I.O.)

BUSIA DISTRICT AND POLICE ATTACHED TO BUSIA POLICE DIVISION AND OR

ANY OTHER POLICE STATION TO ARREST, CHARGE OF ARRAIGN THE

APPLICANT IN COURT ON MATTERS RELAYED TO BUSIA SENIOR RESIDENT

MAGISTRATE COURT CIVIL SUIT NO. 639 OF 1998

AND

IN THE MATTER OF BUNGOMA PRINCIPAL MAGISTRATE

COURT CRIMINAL CASE NUMBER 361 OF 2004

AND

IN THE MATTER OF PENAL CODE, CAP 63 AND THE LAWS OF KENYA

IN THE MATTER OF THE ATTORNEY GENERAL

R U L I N G

The matter before this court is the chamber summons dated 2nd February 2005. The same is said to have been filed pursuant to the provisions of Order LIII rule 1 (2), (3) and (4) of the Civil Procedure rules, Sections 3 and 3A of the Civil procedure Act and Section 8 of the Law Reform Act. The application is ex parte in nature under order LIII rule 1(2) of the civil procedure rules.

The applicant is seeking for leave to apply for orders of prohibition, mandamus and certiorari. The summons is accompanied by a verifying affidavit sworn by Manuel Otiangala. The summons is also accompanied by a statement. The Deputy Registrar of this court was served with the statutory notice pursuant to the Provisions of order LIII rule 1 (3) of the civil procedure rules.

At the ex parte stage this court has a wide discretion either to allow or reject the application for leave. However the test is whether the applicant has an arguable case which can be heard when the substantive motion is filed. The court of appeal considered at length this matter in the case of **NJUGUNA VS MINISTER OF AGRICULTURE (2000) 1 E.A. 184** in which it held:

“That the test as to whether leave should be granted to an applicant for Judicial Review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application. As the High court had gone

beyond its limited jurisdiction at the stage of application for leave to institute judicial review proceedings and considered the merits of the case, its order would be reversed and as the applicants had demonstrated that they had an arguable case, leave would be granted.”

In this matter the substance of the material placed before me clearly shows that the applicant has an arguable case. However I have examined the record and it is apparent that the applicant, respondent and interested parties have not been clearly stated on the face of the application. What is stated therein are the matters in issue without the parties.

It is well settled that prerogative orders as they were then known are issued in the name of the Republic. This issue was settled in the case of **FARMERS BUS SERVICE AND OTHERS VS THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779** where the East African court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted.

Failure to correctly commence the proceedings renders the whole application fatally defective. I am of the view that I have no competent application before this court to enable me exercise my discretion to grant leave.

The upshot therefore is that leave is refused.

DATED AND DELIVERED THIS 8th DAY OF February 2005

J.K. SERGON

JUDGE