



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Civil Case 1535 of 2004**

**JAMES MUTUA MUSILA.....PLAINTIFF**

**VERSUS**

**THE CHIEF MAGISTRATE KIBERA & 2 OTHERS.....DEFENDANT**

**RULING**

By a Notice of Motion dated 25.11.2004 and filed in Court on 26.11.2004, the Ex-Parte Applicant James Mutua Musila seeks the following orders against the respondents-

- (1) (a) ***An Order of Certiorari to remove to this court and to quash the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents decision to charge and prosecute the applicant for the offence of obtaining money by false pretenses from one Rose Mbuli Ndingo***
- (b) ***An Order of Certiorari to remove to this court and quash the charge sheet filed by the 2<sup>nd</sup> and Respondent in the 1<sup>st</sup> Respondent's Court vide Criminal case No. 7422 of 2004 against the Applicant.***
- (c) ***An Order of prohibition against the Respondents prohibiting them from prosecuting, charging and taking any proceedings against or relating to the Applicant in the 1<sup>st</sup> Respondents Cr. case No. 7422 of 2004.***
- (d) ***An Order of mandamus compelling the 3<sup>rd</sup> Respondent to terminate the Respondents Cr. case No. 7422 of 2004.***

(2) That the costs of this application be paid by the Respondents.

The application is supported by the Affidavit of the Applicant sworn on 25.11.2004 and filed with the application on 26.11.2004 and the grounds that-

- (a) ***the said Criminal Case NO. 7422 of 2004 has been brought maliciously and with utmost bad motives to intimidate the Applicant***
- (b) ***the Respondent does not have jurisdiction to try the Applicant in respect of the said charge or alleged offence***
- (c) ***the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have acted ultra vires their statutory powers:***
- (d) ***the charge does not disclose any offence as the matter is strictly civil in nature.***

**(e) The proceedings in the said case will prejudice the Applicant and infringe his constitutional rights.**

Mr. Musyoki learned Counsel for the Applicant in his submissions relied upon the said grounds and the said Supporting Affidavit of the Applicant. Counsel however submitted that the Applicant was arrested and detained at Kitui Police Station for 5 days and at Milimani Police Station for a period of 2 days before he was taken to court. He submitted that this was ultra vires the powers of the Police. Counsel also submitted that the entire prosecution is trumped up and is brought to intimidate the Applicant so that he could refund moneys which had been paid for a purchase of a motor vehicle which had been repossessed by the financier for failure to pay the financial charges. Charging his client was therefore an abuse of the criminal process, and the orders prayed for should therefore issue.

Mr. Kaigai, Senior State Counsel for the respondents opposed the application, and his basic argument is that the Applicant has been charged in a competent Court of Law and for an offence known to the law and none of his rights have been infringed in any way. Counsel submitted that the Respondents as stated in the Replying Affidavit of Albert Kimathi the investigating Officer attached to CID Nairobi Area acted strictly in accordance with the law. A complaint was made to the Police by the complainant, the matter was thoroughly investigated, and evidence sufficient to charge the Applicant was found. The complainant was seeking a replacement vehicle and this had not happened by the time the complaint was made. There was evidence that money was obtained, there is an investigation file and copies of the statement of witnesses are available to the Applicant if he or his counsel would only apply for them.

Having considered the respective parties rival arguments as submitted by their Counsel, I wish to observe that there has arisen a practice among litigants and their Counsel to peg their lives upon some breach of their fundamental and rights of the individual to defeat any pending prosecution. This is not necessarily a bad thing, in fact, in a sense it is a good thing, it shows Kenyans and litigants in particular are becoming aware of their constitutional rights and will take every available opportunity to secure those rights for it is said ***eternal vigilance is the price of freedom***. It is however important to observe that this freedom is also subject to the strict observance of the law. Indeed Section 72(1) of the Constitution provides-

**“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases**

**(a)-(d)**

**(c) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.**

The Applicant was charged and is being tried for an offence authorized by law, namely obtaining money by false pretences contrary to section 323 of the Penal Code (Cap 63 Laws of Kenya) and by a competent court, namely a Court of the Chief Magistrate. The Applicants rights are preserved by section 77(1) of the Constitution that if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Court of the Chief Magistrate is an independent and impartial court established by the Magistrates Court Act (Cap 10, Laws of Kenya) pursuant to the provisions of Section 65(1) of the Constitution of Kenya. The Applicant did not complain that he was not being given a fair trial. The prosecution says it has the statements of the witnesses and these can be made available to the Applicant if he so applies.

What emerges from the Application is that the Applicant is trying to ventilate his defence in this court, but this Court is not the trial court. The proper place to do so is in the trial court. The Applicant's Counsel urged the court to find that the complaint herein related to a purely a civil and not a criminal offence.

It may well be so. If there is however no breach of the law or procedure by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in particular, and I could find none, there is no ground for staying the proceedings in the subordinate court. Besides there is no bar in law from bringing a criminal charge for matters which *prima facie* are civil in nature. Section 193 A of the Criminal Procedure Code (Chapter 75, Laws of Kenya) confers concurrent jurisdiction, on civil and criminal matters which appear to be civil in nature. The said Section says-

***“193. Notwithstanding the provisions of any other within law the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*”**

The said provision applies where any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending Civil Proceedings. In this case there are even no proceedings of a civil nature pending on the same or substantially the same issue as in the Criminal proceedings. The Applicant cannot therefore claim that the matter is purely of a civil nature.

It is thus abundantly clear that the applicants case is worse off because there are no pending civil proceedings which this court could even consider staying.

In light of the foregoing therefore the Applicant’s application dated 25.11.2005 is incompetent and the same is dismissed with costs, and I direct that the criminal case no. 7422 of 2004 do proceed at the Kibera Chief Magistrate’s Court without undue delay.

Dated and delivered at Nairobi 30th day of September, 2005

**ANYARA EMUKULE**

**JUDGE**