

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

MISC APPLI 170 OF 2005

REPUBLIC.....APPLICANT

VERSUS

HON. ATTORNEY- GENERAL.....1ST RESPONDENT

DISTRICT LABOUR OFFICER MERU CENTRAL DISTRICT...2ND RESPONDENT

R U L I N G

The ex parte applicant herein sought leave of this court to file a Notice of Motion for the superior order of Certiorari and Prohibition directed against the respondents, to call for and quash the charges brought against the applicant in Meru Cr.Case No.1860 of 2005 at the Chief Magistrate's court, Meru and prohibit the respondents from charging and prosecuting the ex parte applicant on the information borne on the charges filed in the case. The applicant also prays that if the leave is granted, it should be ordered to operate as stay of the proceedings in the said Cr. Case No. 1860 of 2005 aforesaid.

The application is supported by a statement of Facts and a Supporting Affidavit. The notice required to be served upon the Registrar of this court was properly served on him on 15.9.2005.

During the prosecuting of this application, Mr. Gikunda Anampiu, for the Ex parte applicant, basing his arguments upon the facts contained in the Statement of Facts and the Supporting affidavit, stated that the Labour Officer who filed the charges against the Ex Parte applicant, was not supported by actual facts. He stated that the complainant (who incidentally is not joined as a respondent in this matter), is not and has never been an employee of the Ex Parte applicant. Accordingly, he argued, to bring criminal charges against him based on a contract of employment which does not exist is malicious and mala fides. He said further that the prosecutor's intention is to embarrass the ex parte applicant socially, economically and financially. He argued also that the prosecutor, neither sought the ex parte applicant's response in writing or personally before he filed the criminal case in court. That no investigations were done in the matter, which had it been done, it would have led the prosecutor to obtaining a statement from the ex parte applicant which would have informed the prosecutor that the ex parte applicant had indeed never had any employer-employee relationship with the complainant in the case. He concluded that failure to carry out such investigation showed malice from the prosecutor part. For that reason, he sought to quash the charges and prohibit further proceedings in the case above.

I have carefully considered the material and arguments presented by the Ex parte applicant. I have always believed that a citizen who intends to access the court for some relief, should not be hindered, less so by the court itself. If therefore a party demonstrated a prima facie facts which might form an arguable case, I would on my part assist such a party to access the court, provided also he approached the court in the manner provided by the law.

In this case the ex parte applicant has approached this court under Order 53 rule 1, 2, & 3 of the Civil Procedure Rules and S.8 and 9 of the Law Reform Act. It is my view that those are the right provisions to approach this court for the leave sought. Furthermore the application is properly supported by a Statement of Facts but I notice that there is no verifying affidavit required to verify the facts in the statement. Although the documents were properly served upon the Deputy Registrar of this court for his notification on behalf of the Attorney-General, it cannot in this case be argued that the ex parte applicant has complied with Order 53 rule 1, 2 and 3. It is my further view and finding that Order 53 of C.P.R, being a creature of the Law Reform Act which is a special legislation, must be strictly complied with before the

reliefs it donates are granted. Such is not the case in this case as stated hereinabove. For the reason therefore, that this application is not supported by a verifying affidavit, the same stands liable to be struck out or ruled as incompetent.

There is another issue that invites comment. The ex parte applicant's prayers include ordering the sought leave to be applied as a stay of proceedings in the Meru Cr. Case No. 1860 of 2005. This to me means that the stay order has as well to be directed against the Chief Magistrate or any other Magistrate under him who would be presiding over the trial of the above case. And yet the Chief Magistrate aforesaid is not made party to these proceedings. How can an order of this court be directed at him when he is not a party? In my opinion and finding also, failure to include the Chief Magistrate in these proceedings is an error which would have denied the ex parte applicant the stay of the proceedings of Cr. Case No. 1860 of 2005.

Having come to the conclusion that I have, that this application is incompetent, I find it unnecessary to rule whether or not the material and arguments before me make a prima facie case which would entitle the ex parte applicant the leave sought. Accordingly this application is struck out as incompetent.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF SEPTEMBER, 2005

D. A. ONYANCHA,

JUDGE