



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISC. CIVIL CASE NO. 11 OF 2004

JOSEPH MBUGUA WAWERU, HOLYWOOD MOTORS LTD, BLUE
LAND MOTORS LTD, FATHERLAND MOTORS LTD AND WAIYAKI
HIGHWAY MOTORS LTD FOR LEAVE TO APPLY AN ORDER OF
PROHIBITION AND CERTIORARI
(EX-PARTE)

AND IN THE MATTER OF

CRIMINAL CASES NO. 1517/03 (CMS COURT KIBERA), 2495/03,
2280/03 AND 1204/01 (CMS COURT NAIROBI) 22521/02 (CMS COURT
MAKADARA), 1189/02 (CMS COURT NAKURU, REPUBLIC VERSUS
JOSEPH MBUGUA WAWERU

RULING.

The Applicant Joseph Mbugua Waweru has filed the notice of motion seeking for orders of certiorari and prohibition to quash all the criminal cases being

- a) Criminal case No. 1517/2003, Kibera Chief Magistrate's Court.
- b) Criminal Case No. 2495/2003, 2280/2003 and 1204/2001 at Chief Magistrate's Court Nairobi.
- c) Criminal Case No. 22521/2002 at Chief Magistrate's Court Makadara.
- d) Criminal Case No. 1189/2002 at Chief Magistrate's Court Nakuru.

The Applicant has been charged in these six criminal charges which are all pending. He is held in remand at the Nairobi Remand Home as he claims he is unable to raise bail in all the cases. The application is supported by his affidavit a statement of facts, which details the circumstances under which the criminal cases arose. The applicant is the shareholder and managing Director of the 2nd 3rd, 4th and 5th applicants. These are Limited Liability Companies. The applicant states that in the course of business

transaction, he received money from the various complainants to deliver to them motor vehicles either from Dubai or Japan. He contents that failure to deliver the vehicles is a breach of contract this should be pursued within the perview of the Civil Procedure Act and the Companies Act, but not the Criminal Jurisdiction where he has been charged with various charges of obtaining money by false pretence.

According to the charge sheets attached to the Notice of Motion, the

applicant is charged with:-

- 1) Criminal Case No. 2280/2003, the accused is charged with an offence of obtaining money by false pretense contrary to section 33 of the Penal Code.
- 2) The charges in the cases No. 1189/2002 and 1517/2003 are similar to the above. But in file No. 2252/2003, the applicant is charged with the offence of stealing by servant, which is contrary to section 283 of the Penal Code.

The particulars of the offence state that the applicant stole a vehicle registration No. KAN 192 Z, which was entrusted to him to sell. The offences the applicant is facing are provided for under the Penal Code.

The applicant does not deny that he received money from the complainants but states that given time he will deliver the vehicles. The provisions of order LIII (2) of the Civil Procedure Rules provides and I quote

‘‘Leave shall not be granted to apply for an order of certiorari to rename any inugement, order, decrees, conviction or other proceedings for the purposes of its being quashed under the application for leave is made not later than six months after the date of the prosecuting as such shorter as may be prescribed by any Act: and whether proceeding is subject to appear and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time of appealing has expired’’.

It is clear that some of the charges were instituted in the year 2001. It is not clear when the charges in Criminal Cases No. 2495/2003 were instituted but the other charges were instituted six months before the applicant sought leave and I find the application for leave incompetent in respect of these cases where leave has been sought after six months.

As regards case No. 2495/2003, 1517/2003 and 2280/2003 which I am not able to tell when the charges were brought, I have perused the charge, the particulars and the provisions of the Penal Code and with respect to the applicant, the said offences are provided for under the penal code, that is obtaining money by false pretences and stealing by Agent. I am not satisfied that the Police or the Chief Magistrate have exceeded or abused their powers. There is no provision under the Penal Code that offences arising out of commercial transactions should be dealt with under the law of contract. An offence is an offence. Accordingly the application by way of Notice of Motion is hereby dismissed. There will be no order to costs.

Orders Accordingly.

M. KOOME J.

14/1/2004