

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPLICATION NO.706 OF 2003

STANLEY KAIYONGI MWENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The complainant in this private prosecution STANLEY KAIYONGI MWENDA and the subject CYPRIAN KUBAI are sons of the deceased DANIEL KIRINGO.

The complainant alleged that the subject on or about the 24th September 1999, in Nairobi, with intent to defraud forged the signatures of the deceased DANIEL KIRINGO and transferred a company known as KANGETA BEER DISTRIBUTORS LTD to himself. He also issued a NOTIFICATION of change of Directors for the said company.

The complainant reported the matter to the police but no action was taken. He decided to file a criminal case against the subject through private prosecution. The subject claiming that his fundamental rights and freedom under section 72, 75 and 77 of the constitution would be infringed if the private prosecution in allowed to proceed filed an application by in the High Court by way of originating summons seeking determination of various questions as contained on the face of the originating summons.

The originating summons came up for hearing before KHAMONI J and was struck out with liberty to the applicant to institute and serve fresh proceedings within 7 days from the date of the ruling or appeal against the same.

The parties appeared before the HON. THE CHIEF JUSTICE on 17th October, 2003 for directions. But counsel for the respondent submitted that there was no competent constitutional reference in respect of which directions can be given, the applicant having failed to comply with the directions of Khamoni, J as to the service of fresh proceedings. The reference was rejected. Counsel for the applicant never rested. He has now complied with the directives of Khamoni J and ha served the respondent. But when the matter came up before me for hearing, counsel for the respondent raised a preliminary objection on a point of law on the ground that this constitutional reference is incurably incompetent, the same constitutional issues having been raised in an earlier reference being High Court Miscellaneous Civil Case No.612 of 2002 which has been finally determined in favour of the Respondent by Khamoni, J

That subsequently the Applicant commenced fresh proceedings being High Court Misc. Application No.1239 of 2002. When the same came up for directions before the Chief Justice, it was rejected in his ruling dated 17th October, 2003.

The preliminary objection was opposed on the ground that the issues raised in the application have not been finally determined in favour of the respondent.

First when the matter came up before Khamoni, J it was struck out with liberty to the applicant to institute and serve fresh proceedings. Secondly when the applicant filed fresh proceedings and went before the Hon. The Chief Justice for directions, the same was rejected for non-compliance of Khamoni, J's orders in respect of service. When an application is struck out or rejected for being incompetent. the applicant is not barred from filing a competent application.

The preliminary objection is therefore disallowed and I order that the matter do proceed to hearing.

Dated and delivered at Nairobi this 29th day of March, 2004.

J.L.A. OSIEMO

JUDGE