



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 82 OF 2003

**IN THE MATTER OF AN APPLICATION BY IJAZ HUSSEIN GANIJEE FOR
ORDERS OF PROHIBITION AND CERTIORARI**

A N D

**IN THE MATTER OF CRIMINAL CHARGES IN CHIEF MAGISTRATE'S COURT
MOMBASA CRIMINAL CASE 1790 OF 2002**

BETWEEN

REPUBLIC

A N D

CHIEF MAGISTRATE'S COURT MOMBASA.....RESPONDENT

EX-PARTE IJAZ HUSSEIN GANIJEE

IBRAHIM MUSA MOHAMED.....INTERESTED PARTY

R U L I N G

This is an application in Judicial Review by Notice of Motion dated 13/3/2003. The Applicant seeks orders of Prohibition directed to the Chief Magistrate's Court at Mombasa or any other subordinate court within the Republic of Kenya from hearing or further hearing and/or determining the private prosecution being Criminal Case No.1790 of 2002 **Ibrahim Musa Mohamed vs Ijaz Hussein Ganijee**. The grounds supporting the application are set out in the body of the application in Verifying Affidavit and in the Statement filed together with Chamber Summons seeking leave.

The statutory statements show that the charges subject in Criminal Case No.1790 of 2002 were prohibited by High Court order dated 15/11/2002 between the same parties in HCC Misc. No.64 of 2001. That the previous prosecution No.19/2001 was dismissed by Chief Magistrate on 21/6/2002. That no appeal has been filed in that High Court matter.

Further, no consent has been sought and obtained from the Attorney-General. Furthermore, the Applicant shows that he had a longtime friendship and business association with complainant the details of which are set out in the statement namely purchasing property jointly, borrowing and guaranteeing loan of 17 Million to a Limited Company by a bank on security of the joint property, etc.

I have perused the charge-sheet presented to court in Criminal Case No.1790/02. It displays 3 counts

of:

i) Obtaining execution of security by false pretences,

ii) Stealing by agent, iii) Obtaining credit by false pretences

The complainant in the 3 instances is Ibrahim Musa Mohamed and the amount of money mentioned is Kshs.17,500,000/- from Fidelity Commercial Bank Ltd.

In view of what is stated in the statement and affidavit I find these charges are not supported by the facts. The complainant participated in all the dealings complained of and there is no criminal intent disclosed on the part of the Applicant.

I have perused the Ruling of Waki, J., as he then was, who said and I quote:- "It seems to me whichever way I look at it that the Interested Party (Ibrahim Musa Mohamed) in this matter is more actuated by a desire to punish the Applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public crime committed. The predominant purpose is to further that ulterior motive and that is where High Court steps in."

I have considered the application and the submissions of both counsel. I am convinced that the prosecution of the Applicant under the same charges however couched, has already been prohibited by High Court in its Judicial Review jurisdiction.

The matters raised in the replying affidavit are not substantiated. I believe the explanations given by the Applicant. Indeed I find the replying affidavit contains the true confirmation that the dealings were of civil nature and at all times the complainant participated with full knowledge of what was going on. The documents attached to the further affidavit are clear. The complainant participated in application for Land Control Consent to the Charge of the property. He was a part and parcel of the Loan Deed and Charge drawn by M/s Sharpley Barret & Co., Advocates.

I therefore find that the complainant is acting in flagrant abuse of court process for the sole purpose of harassing and exerting pressure on the Applicant to submit to the demands of himself (Ibrahim Musa Mohamed) who is subject of a civil case.

I therefore allow the application and issue orders sought with costs.

Dated at Mombasa this 18th day of June, 2004.

JOYCE KHAMINWA

J U D G E

18/6/04

Khaminwa, J.

Chege – Court Clerk

Mr. Ndegwa – for Applicant

Ms Njeru Kibe – H/B – Respondent

Mrs. Umaara – State Counsel

