



**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civ Misc Appli 17 of 2002**

**JOSEPH MUIA MBITHI AND 2 OTHERS .....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL AND 3 OTHERS..... RESPONDENT**

**RULING**

The application dated 25.2.2002 is a Notice of Motion brought pursuant to Order 53 Rule 2 Civil Procedure Rules. The ex parte applicants Joseph Muia Mbithi, Muinde Muasya Mbithi and Johnson Mutua Mailu are charged before Machakos Court in Criminal Case No. 2534/2001 which is consolidated with Criminal Case 2785/2001 which relates to a Traffic accident that occurred on 29.4.1994. The applicants are asking this court for an order of prohibition to issue directing the Machakos Senior Principal Magistrate's Court or any other court in the Republic of Kenya from entertaining, conducting or proceeding with the above mentioned cases.

They also seek an order prohibiting the 1<sup>st</sup> respondent (Attorney General) his agents or servants from prosecuting the charges relating to the cases mentioned above and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent who are Commissioner of Police and Director of Criminal Investigations Department be prohibited from harassing, rearresting or taking away the liberty of the applicants in connection with the above named cases. They also ask for costs of the suit.

The Chamber Summons in relation to this application was filed in court on 12.2.2002 which was accompanied by the supporting affidavit of Muinde Muasya Mbithi, annexures, statement of facts and grounds upon which the application is brought.

A brief background of the applicants' case is that the three applicants were among people travelling in motor vehicle KAA 793 when an accident occurred and they were injured. They were issued with P.3 forms which are part of the annexures. They later instructed Mwangangi and Company Advocates to file suits PMCC 760/94 and 762/94. The vehicle had been insured by United Insurance who instructed a lawyer Mr. Mungai Gakuru to defend the suits. The suits were heard on merit and judgement was given on 18.11.1997 where the appellants were awarded damages. There has never been an appeal against the said judgement by anybody. Only 3<sup>rd</sup> applicant was paid the full decretal sum of Ksh.131,908/50 but despite promises to pay and cheques issued, they have been returned to insurers as they were issued in the names of both Advocates but not the applicants. While awaiting to get money to file other execution proceedings the 1<sup>st</sup> and 2<sup>nd</sup> applicants were arrested on 25.10.2001 and charged in Criminal Case 2534/2001 and 3<sup>rd</sup> applicant was arrested on 29.1.2001 and charged in Criminal Case 2785/2001 which was consolidated with Criminal Case 2534/2001. That between 1997 - 2001 their representatives of United Insurance had severally summoned and persuaded them to drop their claims but they declined and were then arrested and it is the contention of the applicants that this is an abuse of criminal and civil

process and that the criminal cases are oppressive, unjust and unfair and are meant to harass applicants to make them forfeit their civil claims, and are ill-motivated meant to aid a party avoid to settle the applicants' claims.

The application was opposed by a State Counsel who denied that the 4<sup>th</sup> respondents who were the Senior Principal Magistrate Machakos had been served with the application. A return of service filed herein on 11.4.2002 clearly shows that all parties including the Executive Officer of Machakos Court was served with the Notice of Motion herein. The court has no idea whether the chamber summons had been served but I believe if had not the parties would have raised the issue of lack of service. The respondents filed grounds of opposition on 4.2.2003 and a replying affidavit by John Mwambili the District Criminal Investigating Officer Machakos. It is the respondents' contention that the application is bad in law, incompetent, lacks merit and affidavit has not disclosed sufficient grounds to warrant grant of the prayers and that the prayers sought would violate Section 26(8) of the Constitution.

Section 26 (3) of the Constitution of Kenya provides as follows:

The Attorney General shall have the power in any case in which he considers it desirable so to do.

(a) To institute and undertake Criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person.

(b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person ..... under sub section C, the Attorney General can discontinue any criminal proceedings and under Section 26(4) the Attorney General can ask the Commissioner of Police to investigate any offence allegedly committed. Under Section 26 (8) the Attorney General is not subject to the direction or control of any person or authority. This authority of the Attorney General can only be challenged if the applicant can show that the Attorney General has acted ultra vires his power or the rules of natural justice have been breached.

Judicial review is concerned with the decision making process. An order of prohibition is made by the High Court directed to an inferior tribunal or body forbidding the body from continuing to hear and or adjudicate on proceedings in the tribunal or body. The said order of prohibition will lie only for excess or total absence of jurisdiction or where there is breach of rules of natural justice. It is to ensure that the individual gets fair treatment by the authority to which he is subjected in this case, the Principal Magistrate's court. It is therefore up to the applicants to show that the Respondents have acted ultra vires their powers or authority have acted in bad faith, or capriciously.

The criminal proceedings before the lower court were instituted by the police acting on the authority of the Attorney General. The investigating officer has sworn an affidavit in which he has explained how the cases came to be investigated by police and charges preferred. The complaint in respect of the cases was made to him by one Barnabas Muasa an investigating officer with United Insurance who claimed that P.3 forms, treatment notes, medical reports, Abstract forms from police, had been falsified and used in civil cases 764/94, 761/94, 760/94 where the applicants were plaintiffs and the civil courts had made awards based on the alleged falsified documents. The said Barnabas recorded a statement and it is then the investigating officer commenced investigations and took possession of the alleged falsified documents. He recorded statements from the driver of the vehicle involved KAA 793 K, recorded statement from hospital staff where applicants allegedly attended as well as perusing the civil cases and found there to be sufficient grounds to justify criminal prosecutions of the applicants.

Despite the fact that the accident occurred in 1994, it is only after the conclusion of the civil cases that the alleged fraud was discovered. Once the matter was reported to investigating officer he started investigations in the same year 2001 when the applicants were arrested and arraigned before the court. There was no delay occasioned by the police in charging the applicants.

There is no doubt that there were civil proceedings by the applicants and judgement given in their favour. That is not a bar to criminal prosecution. Section 193 A of the Criminal Law Amendment Act 2003 is very

clear. It provides as follows:

*Notwithstanding the provisions of any other written 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.*

-This section means that both civil and criminal proceedings in respect of the same issues can proceed in the different courts at the same time irrespective of the outcome and there is no reason to stay either of them.

From the earlier Section 26 of the Constitution quoted above it is clear that the constitution being the supreme law of the land which has conferred on the Attorney General the power to investigate and institute criminal proceedings nothing can take that authority away unless the applicant proves excess of jurisdiction or breach of tenets of natural justice.

The applicants are before a court of law. Their cases have not been heard. So far there is no evidence of malice, excess of jurisdiction or bad faith on the part of the police. The investigating officer investigated after a complaint was made and placed the

case in right hands, that is, the courts to decide after hearing the evidence of both prosecution and defence. The applicants will have a chance to present their cases if the need arises. There is so far no evidence that the court is biased or has exceeded its jurisdiction or acted capriciously. The court will decide whether or not the documents produced before the civil courts were genuine or not and the police have to be given a chance to do that. Even United Insurance who made the report do not seem to have harboured any malice as alleged by the applicants. They had actually paid one of the applicants the full decretal sum. They were committed to settling the claims before these investigations were commenced by police and they stopped payments.

So far the applicants have not shown that they merit an order of prohibition to prohibit the respondents as prayed in that notice of motion and application is hereby dismissed with costs to the respondents.

Dated, read and delivered at Machakos this 7<sup>th</sup> day of June 2004

R. V. WENDOH

JUDGE