



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 448 OF 2003

BERKELEY HACKETT 1ST APPLICANT

BERNARD NTHULI 2ND APPLICANT

EZEKIEL NANDAMA 3RD APPLICANT

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE CHIEF MAGISTRATES COURT KIBERA .. 2ND RESPONDENT

THE REGISTRAR OF SOCIETIES 3RD RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DEPARTMENT 4TH RESPONDENT

AND

THE KENYA CHURCH OF CHRIST INTERESTED PARTY

JUDGMENT

This is an application for Judicial Review stated to be brought under Sections 8 and 9 of the Law Reform Act, Section 20 of the Societies Act, Section 129 of the Penal Code, The Constitution of Kenya, Section 3A of the Civil Procedure Act, Order LIII Rules 1, 2, 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the law.

In the application, Berkeley Hackett, Ezekiel Nandama and Bernard Nthuli (the Applicants) seek the following orders:

“1. An order of Prohibition directed at the Chief Magistrate’s court or any other court from hearing determining or in any manner whatsoever dealing with Criminal Case Number 1712 of 2003. (Republic versus Berkeley Hackett & Bernard Nthuli) or any variation thereof or an y charge or charges in substitution thereof or akin to the same in Criminal Case No 1712 of 2003

2. *An order of Prohibition directed at the Chief Magistrate's court or any other court from hearing, determining or in any manner whatsoever dealing with Criminal Case No 2681 of 2003, Republic vs Ezekiel Nandama, or any variation thereof or any charge or charges in substitution thereof or akin to the same in Criminal Case No 2681 of 2003*

3. *An order of Certiorari to remove to bring to the High Court for purposes of being quashed the charge sheet dated 1 st April, 2003 by the 1 st Respondent (i.e the Attorney General) in Criminal case No 2681 of 2003*

4. *An order of Certiorari to remove to bring to the High Court for purposes of being quashed, the charge sheet dated 27 th February, 2003 by the 1 st Respondent in Criminal Case No 1712 of 2003*

5. *An order of Prohibition directed at the 1 st, 3rd (the Registrar of Societies) and 4 th (the Director of Criminal Investigation Department) Respondents barring them from further prosecuting or preferring the prosecution of Criminal Case no 1712 of 2003 in its present form or in any intended variation of the charges therein*

6. *An order of Prohibition directed at the 1 st, 3rd and 4th Respondents barring them from further prosecuting or preferring and prosecuting Criminal Case No 2681 of 2003 in its present form or in any intended variation of the charges therein*

7. *Order of Mandamus directed at the 3 rd Respondent to remove, bring and produce to the High Court the original file of the Kenya Church of Christ at the Registry of Societies.*

8. *(Costs)". In short, the Applicants seek mainly to challenge the prosecution of the Criminal cases brought against them in the subordinate court. They challenge both the prosecuting authority (the Attorney General) and the forum in which they are being prosecuted (the Chief Magistrates Court).*

Before I consider whether this court should grant the orders sought, I am compelled to set out the matters leading to the application. The important facts are not in dispute. These are set out in the affidavits of Berkeley Hackett sworn on 2nd June, 2003, the statement dated 30th April, 2003, the Verifying Affidavit of Bernard Nthuli sworn on 30th April, 2003, the affidavit of Berkeley Hackett sworn on 2nd May, 2003 and the Replying Affidavit of Wilmore T Kiplagat sworn on 17th February, 2004.

Sometimes between 1994 and 2002 (According to Mr Kiplagat's affidavit it is between 1994 and 2001, but this does not really matter) the Applicants were officials of the Kenya Church of Christ (hereinafter referred to as "the Church"). It is not disputed that the Church is a society registered under the Societies Act. On 14th February, 2000, one of the Applicants (i.e Mr Hackett) wrote a letter to the Registrar General (of Societies) enclosing a copy of the revised constitution of the Society and a copy of the minutes of a Special Annual General meeting held on 30th December, 1999 to facilitate the amendment of the Society's Constitution. Based on that communication, the Registrar General approved the amended constitution and communicated this fact to the society vide his letter of 15th March, 2000. One year later, some of the members of the society wrote to the Registrar stating that the amendment of the constitution was illegal as there was no Annual General Meeting called for that purpose as required in law. The complaining members took the position that no meeting of the Society was held on 30th December, 1999. It appears that in fact there was no meeting on 30th December, 1999 and this is admitted in a letter dated 21st August, 2001 signed by all the Applicants.

Faced with the controversy above, the Registrar of Societies was left with no option but to cancel his approval for amendment of the Society's constitution.

As a result of these matters, the Applicants were charged with the offence of giving false information to a person employed in the public service contrary to Section 129 of the Penal Code. That charge is the basis of their prosecution in the Chief Magistrate's court.

Miss Kilonzo strongly and most competently prosecuted the application on behalf of the Applicants. I have carefully reviewed her submissions and those proffered by Mr Maanzo for the interested party and I

take the following view of the matter.

This court has recognized and categorically stated previously that it will not hesitate, in a proper case, to intervene and halt an improper and unfair criminal prosecution (**See Republic vs The Attorney General & Another Exparte Kipng'eno Arap Ng'eny HCMC A No 406 of 2001; Ndarua vs Republic (2002) 1 EA 205**).

In doing so, the courts have also recognized that they must be extremely careful not to interfere with the Attorney General's constitutional powers to institute and undertake criminal proceedings against any person before any court in respect of an offence alleged to have been committed by that person.

In discharge of his constitutional functions, the constitution frees the Attorney General from the control of any other person or authority. I had the opportunity to deal with a similar matter with my sister the Honourable Lady Justice Aluoch in the *Ng'eny case (supra)* and I can summarize the principles in these matters as was crystallised in the case of **Stanley Munga Githunguri vs Republic** HCMC Application No 271 of 1985 as follows:

The court cannot curtail the State's Constitutional right to prosecute criminal offences but the mode of the exercise of that power may be checked and balanced in the following instances:

- (a) Where a criminal prosecution is an abuse of the court process
- (b) Where a prosecution is in contravention of a person's constitutional freedoms and rights
- (c) Where the prosecution is contrary to public policy or interest.

I have carefully considered the Applicants' case and I am unable to find that there is sufficient ground to interfere in the State's decision to prosecute them for the offence alleged. The facts which would form the basis of the claim are not disputed by the Applicants – They are, in fact, admitted by them. Looking at the case as a whole it is difficult to say that their prosecution is motivated by ulterior considerations. There was a suggestion by Miss Kilonzo that the matters forming the basis of the prosecution were basically of a civil nature but that is not easy to say in the circumstances of this case. The Applicants do not deny having given to the Registrar the information in question. All matters suggest that that information was false and could implicate them in the offence charged.

Miss Kilonzo also attempted to demonstrate that the charges in issue were defective as the offence disclosed was not the one for which the Applicants were charged but again this is not that simple. The fact that the matters complained of appear to constitute different offences under different Acts cannot entitle the court to interfere with the Attorney General's powers of prosecution. The Constitution leaves it upon him to decide on what to do but this court can interfere with his powers where such exercise of power amounts to an abuse of the court process or an infringement of an individual's fundamental rights and freedoms or the same is contrary to public policy or interest.

Looking at the facts that are before this Court, it is not easy to fault the Attorney General in his decision to institute and pursue the criminal cases against the Applicants and I find it extremely difficult to interfere with them and or otherwise to stop or interfere with the criminal process already set in place. It appears to me that the criminal charges and prosecution are not frivolous, nor did I find any *mala fides* in the action taken by the Attorney General, nor was there any serious concern raised about the rights of the Applicant being unduly jeopardized. There was nothing against Public policy in the prosecution. This is, therefore, not a case in which this court can lawfully interfere with the criminal process and particularly with the Attorney General's unfettered discretion to deal with criminal prosecutions.

I, therefore, dismiss the Applicants' application for Judicial Review dated 2nd June, 2003 with costs to the Interested Party.

Dated and delivered at Nairobi this 8th day of December, 2004.

ALNASHIR VISRAM

JUDGE