



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 1268 OF 2002
VINCENT COLLINS OTIENO OWOKO
NICHOLAS ODONGO RAYOLA APPLICANTS
VERSUS
IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT
NAIROBI RESPONDENT

R U L I N G

There is a Preliminary point herein raised by Mr. Opiyo and supported by Mr. Gachivi Senior Principal State Counsel.

The particulars are set out in the grounds of opposition and Notice of Preliminary Objection dated 4-3-2003 that:-

- (a) the application is frivolous, vexatious and an abuse of court's process.
- (b) The application is misconceived and incompetent in law.
- © the applicants application contravenes section 72 (1). of the constitution
- (d) the trial court is competent to hear and determine the applicants complaints.

At the argument stage however Mr. Opiyo argued two main points, First that the application is incompetent, because there are 2 applicants whereof one has sworn an affidavit purportedly on behalf of another and yet there is no authority showing that he was authorized to do so particularly as the application is done under the Companies Act. That if the proceedings continue they will prejudice the rights of second applicant who is not in court.

Secondly, the objector claims that certiorari envisaged here cannot arise since there is only a charge sheet and there is nothing to quash, that applicant being in jail having failed to meet bail conditions.

Mr. Gacivi supports this position and added that this court cannot stop police from exercising their power of arrest.

In opposition Mr. Onyango the applicant submitted that the second Defendant had asked him to swear affidavit for and on his behalf. On the nature of the application, said that the Attorney General and the police are guilty of abuse of courts process and that the directors are different from the company.

My consideration of this matter is faced on the antecedent factor that a Preliminary Objection to succeed must be based and argued on a pure principle of law or alternatively from agreed facts in the case. Where facts are yet to be ascertained it cannot be argued. Furthermore it cannot be raised where what is required is an exercise of judicial discretion.

Certiorari is a discretionary remedy and issues to quash a decision stated to be ultra vires. It issues from the High Court to bring up a decision of some inferior tribunal or authority in order that it may be investigated and to quash it if it fits the test i.e. ultra vires, against natural justice.

The grounds argued by the applicant that the affidavit is unauthorized is a question of evidence and that ought to be an argument on striking out of that particular affidavit, again the argument that the Order will prejudice the 2nd applicant is not cogent as it is not shown how the prejudice would arise, besides prejudice to applicant number 2 should be seen on the basis that Judicial Review is not a case where there is lis as between any party. It is an Order directed only against the manner in which such order was secured if any and this goes the issue of decision but the exercise of drawing a charge and presenting it is as a result of a decision to charge a person. A decision in this respect is indeed a decision and capable of being cancelled by cancelling the charge itself.

I believe the application cannot succeed and is dismissed with costs.

Delivered this 21st Day of March 2003.

A.I. HAYANGA

JUDGE

Read to Mr. Otieno.

Read to Mr. Kirikia.

A.I. HAYANGA

JUDGE