



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO.206 OF 2002**

**IN THE MATTER OF: AN APPLICATION BY MWALIMU MASOUD MWAHIMA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI AND PROHIBITION**

**A N D**

**IN THE MATTER OF: ATTORNEY-GENERAL AND MOMBASA CHIEF MAGISTRATE’S COURT CRIMINAL CASE NO.1073 OF 2002 REPUBLIC VERSUS MWALIMU MASOUD MWAHIMA**

**REPUBLIC.....APPLICANT**

**=V E R S U S=**

**1. THE HONOURABLE ATTORNEY-GENERAL**

**2. THE CHIEF MAGISTRATE MOMBASA.....RESPONENT**

**R U L I N G**

By a Chamber application dated 3.6.2002 the Applicant herein, Councillor Mwalimu Masoud Mwahima, applied for leave to apply for an Order of Certiorari to remove into this court and quash the decision by the Attorney-General to prosecute him in Mombasa Chief Magistrate’s Court Criminal Case No.1073 of 2002 – Republic –versus- Mwalimu Masoud Mwahima. He also sought further leave to apply for an Order of Prohibition directed to the said Chief Magistrate or any other Magistrate from hearing or further hearing or determining the proceedings in the said case. He further prayed that if and when the said leave sought herein is granted, it should be ordered to operate a stay of the current proceedings in the said case until the determination of the application(s) that are to be filed with the leave being sought. Costs of this application were also to be provided for. I examined the papers filed and confirmed that the application is supported by a Verifying Affidavit sworn by the Applicant and verifying the facts relied on and referring to certain documents referred to in the affidavit which include the charge-sheet in the case herein quoted, copy of a letter dated 10.5.2001 from the Mombasa Municipal Council to one Mwanajuma Mwalimu Mwakileo, a copy of Certificate of Official Search in relation to Title No. Mombasa/IX/390 and a copy of the Green Card to the said Title. And finally, there was annexed to the application, a Statement of Facts to be relied on. A Notice of this application accompanied by all the above documents had with all the above documents been filed in the Court Registry and served upon the Deputy Registrar of this court a day earlier on 3.6.2002.

The Applicant was represented by Mr. Madzayo Advocate being led by Mr. Kinyanjui who argued

the application ex parte, in Chambers.

Mr. Kinyanjui submitted that the leave sought if granted should be ordered to operate as a stay of all the proceedings now being conducted in the said Mombasa Chief Magistrate's Court Case No.1073 of 2002. He stated that if the proceedings are left to advance in the meantime, they will bring loss and damage to the Applicant who according to Mr. Kinyanjui is being prejudiced in his political career by the proceedings. He argued that the proceedings are malafides and unless halted they will inconvenience him and damage him before he is given an opportunity to prove, in the applications to be filed with leave of the court, the falsity and malice of and in the charges now before the court in the referred to criminal case.

I have carefully considered this application. I am satisfied that the Applicant has satisfied the pre-conditions required to be fulfilled under Order 53 of the Civil Procedure Rules under which the reliefs sought can be granted. I accordingly see no impediment to granting the leave sought. I have also carefully considered the application to order for the granted leave to operate as a stay of the proceedings in the said case. This court has a discretion to grant or refuse the stay sought. Such discretion I hold, should be exercised against the Applicant upon good grounds. The Attorney-General will not suffer any loss if the case now being conducted against the Applicant is temporarily halted until the application intended to be filed is heard and determined. On the other hand the Applicant should not be denied a free opportunity to file and prosecute the applications for the Order of Certiorari and Prohibition without undue harassment which would be the case if the trial is proceeded on while the prosecution of the application is also at the same time proceeding..

I am accordingly inclined to order that the said leave to be granted herein shall operate as a stay until the intended application is filed, heard and determined.

I however wish to issue a warning to the Applicant that such exercise of courts discretion should not be used to delay the processes of the court both here and in the Chief Magistrate's court. The Applicant will accordingly speedily file and prosecute the intended application without using the stay granted as reason for unreasonable delay. I accordingly make the following orders.

**ORDER:**

1. Leave to file an application for Orders of Certiorari and Prohibition is hereby granted.
2. The said application shall be filed within a period of 21 days from the date hereof.
3. Service of the application upon the parties concerned shall be effected within 21 days after filing in court of the same.
4. The filed and served application to be mentioned before the court to fix a hearing date inter partes within 15 days after such service. 5. If the Applicant therein fails to fix a suitable hearing date inter partes, the Attorney-General to be at liberty to apply.
6. Costs in the cause.

**Dated and delivered at Mombasa this 13th day of June, 2002.**

D. A. ONYANCHA

J U D G E