



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. APPLICATION NO. 78 OF 2002**

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL  
REVIEW ORDERS IN THE NATURE OF CERTIORARI AND  
PROHIBITION  
BETWEEN

**LEMMY K. MBOGORI ..... APPLICANT**

**AND**

**THE CHIEF MAGISTRATE'S COURT MOMBASA .....REPUBLIC**

**VS**

**THE CHIEF MAGISTRATES COURT.....EXPARTE LEMMY K. MBOGORI**

**RULING**

The applicant Lemmy K. Mbogori applied for Judicial Review Orders after he was granted leave to institute the same. The leave was also to apply as a stay pending the determination of the application which sought two substantive orders:-

1. PROHIBITION directed to the Mombasa Chief Magistrate's court permanently staying any and all proceedings by it touching on Mombasa Chief Magistrate's court Misc. Criminal Application No. 21 of 2002.
2. CERTIORARI directed to the Mombasa Chief Magistrate's Court to bring to the High Court the Record/Proceedings in Mombasa Chief Magistrate's court Misc. Application No. 21 of 2002 to be quashed.

The facts giving rise to the said application are that on 21st February 2002, John Wambugu Macharia applied by way of Motion to the Chief Magistrate for leave to institute private Criminal Prosecution against the applicant. On hearing the ex-parte application the Chief Magistrate did not grant the order but gave the applicant an opportunity to appear in court and show Notice why such orders should not issued.

However, despite 2 attempts to serve him through the police, the applicant was never served after which a warrant of arrest was issued on 21st March 2002. It appears the applicant was laying watching from his safety net because the next day, the application for leave to apply for orders of Judicial Review was filed and a stay obtained on 25th March 2002 pending the filing and determination of the application which

was set down for hearing on 13th June 2002 by counsel for the complaint.

This was after the matter remained in abeyance for a period of over 21/2 months. It would appear the applicant on getting his liberty had not interest in pursuing the application to its finalization.

The applicant was duly served with a Hearing Notice through his counsel on record and an affidavit of service was filed on 13th June 2002. However, at the hearing, Mr. Gisemba held brief for a Mr. Maosa who is said to represent the applicant applied for an adjournment on the grounds that Mr. Maosa had traveled to Bungoma to attend to other matters. The nature of the matters were not disclosed to the court and consequently the application for adjournment was denied. At that point Mr. Gisemba applied to be allowed to withdraw from participating which application was granted.

Mr. Kabuki for the complaint applied for the dismissal of the application for reasons that it was brought with in bad faith and malefides as the proceedings being challenged are not verified by Affidavit as provided under the provisions of Order 53 rule 7 which states as follows:-

*“(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order. Warrant, commitment conviction, inquisition or record unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court”.*

In this case as submitted by Mr. Kabuki, no such Affidavit has been filed. I have also gone through the court file and noted that the provisions of Order 53 rule 3 (2) have not been complied with. It reads:-

*“The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before the court, or an officer thereof to do or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court.....”.*

There is no indication of such service having been affected upon the relevant court officer. I would however want to go a little further and address the main issues in the said application. The orders sought to be set aside were issued under the provisions of Section 88 (1) of the Criminal Procedure Code contrary to the applicants allegation that orders were issued without according him an opportunity to be heard.

There is evidence that he was accorded the same and was indeed aware of the existence of the said application and the courts orders as the 2 Affidavits of Service by Inspector Daniel Nchoro which are on record show. In the circumstances the court declines to grant the said orders, and the application is dismissed with costs.

Dated and delivered this 22nd day of August 2002.

**P. M. TUTUI**

**COMMISSIONER OF ASSIZE**