REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. CRIMINAL APPLICATION NO. 384 OF 2002

REPUBLIC ……..……. APPLICANT

V E R S U S

1. AGREY B.L. MUSIEGA……..……. 1ST RESPONDENT

2. WYCLIFF KILASI KESEWA…..…….2ND RESPONDENT

D R A F T R U L I N G

The Ex-parte applicant who was charged with an offence of corruption in office contrary to section 3 (2) of the Prevention of Corruption Act (Cap 65) has filed this Notice of Motion dated 22nd April, 2002. The application is premised under Law Reform Act (Cap. 26), order LIII of Civil Procedure Rules, Section 3A of the Civil Procedure Act, the inherent powers of the court and all enabling powers and provisions of the Law.

It seeks three orders stated on the Notice of Motion – Namely

> 1. That: an Order of Certiorari do issue to remove into the High Court and quash the record and or the proceedings of the lower court and the consent to prosecute dated and signed by S. Amos Wako Attorney General on 5th February, 2002 in Nairobi Chief Magistrate's Court Criminal Case No. 2910 of 2001 Republic – Vs – Aggrey B.L. Musiega and Wycliffe Kilasi Kesenwa.
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> 2. THAT: an Order of Prohibition do issue prohibiting the Attorney General from prosecuting or further prosecuting or preferring and prosecuting the purported charge or any variation thereof or any charge or any charges in substitution thereof or any charge or charges a kin to the same in Nairobi Chief Magistrate's Court Criminal Case No. 2910 of 2001 Republic –vs- Aggrey B.L. Musiega and Wycliffe Kilasi Kensenwa.
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> 3. THAT: an Order of Prohibition do issue directed at the Chief Magistrate's Court at Nairobi prohibiting that court and or any other magistrate from hearing or further hearing or determining the purported charge or any variation thereof or any charge or charges in substitution thereof or a kin to the same in Nairobi chief Magistrate Court Criminal Case Number 2910 of 2001 Republic –vs- Aggrey B.L. Musiega and Wycliffe Kilasi Kesenwa.

In short, the ex-parte applicant seeks to halt his prosecution by the issuance of writs of Certiorari and Prohibition on the grounds specified in Paragraphs 40 to 48 of the Statement of Facts of 26th March, 2002. The Statement of Facts has been verified by the verifying affidavit sworn on by the ex-parte applicant on 26th March 2002. The application has also annexed a supplementary affidavit sworn by one Barthiolace Okach Lisangati on the same date. It is interesting to note that the averment made by Mr. Lisangati in his affidavit to the effect that he was requested by the ex-parte applicant to deliver the letter

of 3rd December, 2001 to the complainant in the Criminal Proceedings is not supported or made in the affidavit of the ex-parte applicant.

I have also noted that the complainant has not identified Mr. Lisangati in her statement to the Police.

The Respondents have filed a replying affidavit sworn by one Joseph Kinyiti Mugwanja (the investigating officer) on 10th July, 2002.

The gist of the Submissions made by Mr. Eboso the learned counsel for the ex-parte applicant can be stated as under:-

The arrest & charge of the ex-parte applicant by the Police, the consent of the Hon. Attorney General to prosecute him on the charge of corruption are illegal and have been brought to achieve mischievous, extraneous, vexatious and oppressive purposes, and hence the whole proceeding is an abuse of the court process. It was also submitted that the charge was incurably defective and that the plea was taken on the consent submitted by the Attorney General and that in any event the consent is bad in law and invalid.

The grounds & facts on which the aforesaid submissions were made can be summarized as under.

The main attack on the prosecution proceeding was that it was based and brought because of the enmity and bad blood which existed between the ex-parte applicant who was at all relevant time a Senior Resident Magistrate in charge of Karatina Law Courts, and the complainant who is a Senior Personnel Officer at the High Court of Kenya, Nairobi. The matter revolves around an employment and promotion of the interested party herein (who although served with this application has not filed any affidavit or made submissions through his counsel who appeared during the hearing of this application). I also note that for whatever reasons, the complainant has not been served with the application. Mr. Ebosa relied on an observation made in the Republic & Kipeng'no Arap Ng'eny (Misc C.A. No. 406 of 2001) by the court on pages 22 & 23 to justify the non-service. The court considering the peculiar circumstances of that case, stated that joining the complainant with the application would not serve any meaningful purpose. I also observe herein that there was no direct reference of a bad blood between the applicant and the complainant in Ng'eny's case while in the present application the same is its backbone.

I shall only state here that, in the absence of the service of this application on the complainant, it shall be impossible to rule on the issue of bad blood between the two by this court. It shall be very far fetched to presume that the Attorney General ought to be aware of that fact from the correspondence exchanged between them. In my humble opinion, it is difficult to see any bad blood only from the correspondence. Furthermore, it is pertinent to note that the ex-parte applicant did not hint at the bad blood or enmity before the police while making a statement under inquiry. He was made aware that he was being arrested on the intended charge based on the statement of the complainant (See Paragraphs 4 of the replying affidavit of Joseph Kinyita Mugwanja).

I cannot therefore find that the predominant purpose of the arrest, charge and consent to prosecute the ex-parte applicant by the police and the Attorney General was to harass him or punish him because of the alleged bad blood between him and the complainant in the Criminal Proceeding.

I am also not persuaded by the submissions made by Mr. Eboso that there is no proper charge because the offence particularized did not exist. He contended that the wordings of section 3 (2) of the Prevention of Corruption Act (Cap 65) (hereinafter referred to as 'the Act') does not stipulate the committal of the offence jointly. He emphasized on the words *"in conjunction with any other person stipulated "* in the said section. Without much ado, I shall simply refer to section 136 of the Criminal Procedure Code which stipulates which persons can be joined in one charge. I therefore at this stage, cannot find this issue in favour of the ex-applicant.

While I am at the provisions of the Act, I shall also deal with the submission of Mr. Eboso that in this case, because the ex-applicant is a judicial officer, the facts of this case should have been laid before a

Magistrate and then a warrant of arrest should have been issued. As this procedure was not followed the arrest and charge are not lawful. He laid his emphasis on proviso to Section 12 of the Act. I must confess it was difficult to apprehend the submissions because of simple and clear wordings of the proviso which starts with the words *"provided that a person charged with such an offence may be arrested ……."* Where is the non-compliance? The intended charge was intimated before the arrest, the charge was then framed and he was arraigned before the court as per procedure laid down under the Criminal Procedure Code. Accordingly, this ground also must fail.

Mr. Eboso's submissions on the invalidity of the consent filed were that the Attorney General must give individual consent in respect of all the suspects after independent evaluation of the evidence in respect of each suspect individually.

It is submitted that because of the joint consent the exapplicant is prejudiced as there is now the evidence that there was no money as averred in Supplementary affidavit by Lisangati and that the ex-applicant was in Karatina and not at Nairobi when the offence is alleged to have been committed.

The consent is produced in the application. It is a fact that the consent in respect of the prosecution of both the accused persons is combined. But that itself cannot vitiate the consent in absence of any substantiated ground that one of the two suspects is prejudiced because he combined the two charges. There is no chance that one of them cannot be charged.

As earlier stated no ulterior motive or oppression or an abuse of the power of the Attorney General in giving consent is shown before this court. The submissions, in my view, beg the question. There is an unequivocal statement that both should be charged. I cannot therefore nullify the consent in question.

Lastly it was contended that the plea of the ex-applicant was taken on the consent and not on the charge. Relying on the case of *Republic V. Sammy Lugalia Aluda, C*riminal Application No. 51 of 1999 it was submitted that the mandatory provision of the law is not complied with and the prosecution being a nullity ought to be halted.

I shall pause here. The facts of Aluda's case are a bit different than those of the present case. In Aluda's case it was conceded that no formal charge was framed and signed as provided under Section 89 of the Criminal Procedure Code. Because of this fact, the Court of Appeal correctly held that there cannot be criminal trial without a formal charge. The plea in the said case was taken on the sanction to prosecute in absence of a formal charge. This is not the position here. The formal charge duly signed by the police office was in place when they were arraigned before the court on 18th December, 2001 and when the pleas was taken. Not only that the minutes of the Court Proceeding of 4th March, 2002 do record that the Chief Magistrate did note 'C R O a' which ordinarily would read "*charge read over the accused person'* Mr. Ebosa agreed that, that could be so but went on to submit that in the face of specific averment made in paragraph 14 of the affidavit in support which is uncontroverted, the validity of the same cannot be now challenged. With respect I would not agree. The record of the court is the primary evidence which has to be taken on its face value. The averments to the contrary may not be necessary to be controverted because the record speaks for itself.

Interested party as observed earlier has chosen to be silent during this hearing. I also note Section 207 of the Criminal Procedure Code which stipulates inter alia that the substance of the charge shall be stated to the accused persons before asking whether he admits or denies the truth of the charge.

Considering the application as a whole it cannot be denied that primarily the ex-parte applicant is seeking orders of remedy in prohibition. I shall quote the following passages which capitulates the trite Law in respect of issuance of an order of Prohibition.

In the case of *Masaka Growers v/s Mumpiwaka ma Growers (1968) E.A.* 258 at 261 the following pertinent observations were made.

"Prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the

cause, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. (II Halsbury's Law (3 rd Edition) Page 114) ……

A court may also decline to interpose if there is a doubt in fact or law whether the inferior tribunal is exercis ing its jurisdiction or acting without jurisdiction" (emphasise mine)

The above proposition has been adopted with approval by Court of appeal in the case of *Commissioner of Lands & another v/s Coastal Agriculture Ltd* Civil Appeal No. 252 of 1996.

In short, from the premises aforesaid, I am not satisfied that the arrest, charge, consent and subsequent proceedings are an excess or an abuse of powers of Police and the Attorney General and that the prosecution is therefore an excess of the jurisdiction or there is an absence of the jurisdiction.

The exapplicant has, in my humble opinion, failed to show that his prosecution is initiated and maintained to harass, or that the same is vexatious, oppressive or mischievous. All the concerned authorities have complied with the provisions of applicable Laws and have not abused their respective powers. I must emphasise that the sufficiency or otherwise of the evidence per se is not a factor to be considered by me in this proceeding.

The upshot of all the above is that I dismiss the application dated 22nd April, 2002 with no order as to costs.

Dated and delivered at Nairobi this 16th day of August, 2002.

K. H. RAWAL

J U D G E.