



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 328 OF 00
JOHN MUTEMWA WAMBUA..... APPLICANT
VERSUS
THE PRINCIPAL MAGISTRATE'S
COURT KIBERA.....RESPONDENT

RULING

This is the application by John Muthembwa Wambua for leave to apply for orders of Judicial Review and prays for a further order that the grant of leave do operate as a stay of proceedings in Principal Magistrates Court Criminal Case no 2614/2000 at Kibera until the determination of the application for Judicial Review.

The application is supported by the statement of the applicant and his verifying affidavit documents and documents. The statement shows that applicant is employed by Kenya Wild Life services as the Chief Veterinary Officer. He is charged before Principal Magistrate Court Kibera with five counts of making documents without authority contrary to section 357(a) of the penal code and five counts of stealing by servant contrary to section 281 of the penal code.

The applicant intends to apply for an order of prohibition directed to the principal Magistrate Kibera prohibiting her or any other Magistrate from hearing or otherwise proceeding with criminal case no. 2614 of 2000 on the grounds that:

1. The action by Kenya Wild Life Services to prefer criminal charges against the applicant is in bad faith and contrary to the basic rules of natural justice as the applicant has neither been given particulars of evidence supporting the charges against him nor has he been given an opportunity to defend himself.
2. Kenya Wildlife services decision to seek recourse to criminal proceedings in Kibera Principal Magistrate court in criminal and No. 2614/2000 is an abuse of the process of this court as Kenya Wild life services has neither invoked nor exhausted the mandatory domestic disciplinary procedure applicable to the alleged offences as laid down in the "Human Resources policy and Procedure Manual" of Kenya Wild Life services 1995 and revised in 1996.
3. The institution of Criminal proceedings by Kenya Wild Life Services is bad in law and an abuse

of the process of the court as it is a backdoor approach designed to use the criminal process to dismiss and / or retrench the applicant from his employment without paying the lawful terminal dues to the applicant.

In short, applicant is complaining that Kenya Wild Life services instituted the criminal procedure without first exhausting the internal investigative and disciplinary procedure set out in the manual. IN my view the supervisory jurisdiction of the High Court over proceedings and decisions of the subordinate courts, tribunals, body of persons or persons who have statutory power to give decisions affecting the rights of other persons is limited in scope. In the case of **Kenya National Examination Council and Republic Exparte - Geoffrey Gathenji Njoroje and others the court of C. A NO. 266 of 1996** relied on by Mr. Lumumba for applicant the Court of Appeal considered the three remedies for orders of Mandamus, prohibition and certiorari in detail. In respect of the order of prohibition, the Court of Appeal held that it is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings there in excess of its jurisdiction or in contravention of the laws of the land and that it lies not only for excess of jurisdiction or absence of it but also for departure from Rules of natural justice. In most of the cases relied only Mr. Lumumba, the order was sought against a specific body for contravening the law. I refer to only two as an example. In *Re Kisima Farm Ltd.* {1978} KLR 36 leave was sought to apply for an order of prohibition to restrain the Commissioner of Lands from continuing with an inquiry under the land Acquisition Act. The Court granted leave on the ground that the contents of the Notices the Commissioner had issued prima facie constituted an absence of jurisdiction to acquire the land. In High Court at Nairobi Misc Application NO. 182 of 1998 - Republic versus Resident Magistrates court Nairobi and Commissioner of Police (*Exparte Ngecha Industries Ltd*); the High Court - Waweru J. granted an order of prohibition directed to the Chief Magistrate from hearing or otherwise proceeding with a criminal application on the ground the Chief Magistrate had no jurisdiction to endorse a search warrant issued by the Chief Magistrate Kampala. The latter case is a good examples of cases where a Magistrate can be prohibited from proceeding with criminal proceedings on account of lack of jurisdiction.

The cases of Jared Benson Kangwana versus Attorney General High Court Misc Application No. 446/95 and *Re Application by Kamlesh Damji Pattni and two others - Misc Application No. 1296/98* are a class of cases where an order of prohibition prohibiting a Magistrate court from proceeding with a criminal case was issued under Order LIII of Civil Procedure Act on the grounds that criminal proceedings were instituted in abuse of the process of the court. The above two decisions followed the decision in *Stanley Munga Githunguri versus Republic High Court Criminal Application No. 271/85* The application for an order of prohibition in the Githunguri case (*Supra*) was made under order LIII CP Rules but the Court, at page 11 of the typed judgment found that the application came more appropriately as fundamental rights application under S, 77(1) and S. 84(1) of the constitution and amended the application and deemed it to have been brought under S. 84(1) of the constitution.

So the order of prohibition in Githunguri case was issued under S. 84(1) of the constitution.

The law as stated in Githunguri case, Jared Kangwana case and Kamlesh Damji Pattni case that court can prohibit criminal proceedings brought for improper motive and in abuse of the process of the court is no doubt correct.

But my view which I have expressed in *Dipak Panachand versus Attorney General & Anor High Court Misc Civil Application no 189 of 2000* is that if the application for order of prohibition is being sought under order LIII of civil procedure Act to prohibit a Magistrate from proceeding with criminal proceeding before him, then the applicant must show that the Magistrate in conducting or in continuing with the proceedings is acting contrary to the law, that is that, the Magistrate has no jurisdiction to try the case, or conducting the proceedings in excess of jurisdiction or is conducting the proceedings contrary to the Rules of natural justice. I have further expressed the view that a Magistrate cannot be prohibited by was of Judicial Review from doing what the law requires him to do, to conduct trial in accordance with the law, in absence of any complaint of impropriety on the part of the Magistrate, I am strengthened in that view by the fact that In / *Githunguri case (Supra)* the high powered court did not issue an order of prohibition under order LIII CP Rules but under the constitution, the supreme law.

In the present application there is no complaint that the Magistrate court has no jurisdiction to try the applicant for the charges before the court or that the presiding Magistrate has breached rules of natural justice.

The complaint is directed to the Kenya Wild Life services and perhaps the Attorney General for instituting criminal proceedings for improper motives and in abuse of process of the court. It is the decisions of those bodies and the consequences of the decisions which should be targeted by appropriate proceedings.

For those reasons, applicant has not shown that he has valid grounds for prohibiting the Magistrate from hearing or proceeding with the criminal case.

Consequently I dismiss the application for leave.

E. M.Githinji

Judge

12.4.2000

Mr. Musyoka for Applicant present

Mr. Makoloo holding brief for Lumumba also for applicant present

Mr. Makoloo

I apply for leave to appeal and for certified copies of proceedings and Ruling.

E. M. Githinji

Judge

Order: Leave to appeal granted. Proceedings and Ruling to be typed and certified copies to issue to applicants advocates.

E. M. Githinji

Judge