



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**JUDICIAL REVIEW NO. 17 OF 2019**

**IN THE MATTER OF AN APPLICATION BY CPL PATRIC MAKAU, SGT DENNIS MUTEMBEL, PC MICHAEL MUTHIKE,  
PC ISAAC KILAHO, PC ALLAM KANYI FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF SECTION 385, 386, 387 & 388 OF THE CRIMINAL PROCEDURE CODE (CAP 75 LAWS OF KENYA)**

**AND IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF NKUBU PRINCIPAL MAGISTRATE'S INQUEST NO. 1 OF 2015**

**CPL PATRICK MAKAU.....1<sup>ST</sup> APPLICANT**

**SGT DENNIS MUTEMBEL.....2<sup>ND</sup> APPLICANT**

**PC MICHAEL MUTHIKE.....3<sup>RD</sup> APPLICANT**

**PC ISAAC KILAHO.....4<sup>TH</sup> APPLICANT**

**PC ALLAN KANYI.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**THE NKUBU PRINCIPAL MAGISTRATE.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS..2<sup>ND</sup> RESPONDENT**

**FABIANO KAIGARA..... INTERESTED PARTY**

**R U L I N G**

1. By an application dated 16/10/2019, the applicants applied for leave to apply for an order of Certiorari to bring up and quash the decision of the Nkubu Principal Magistrate's Court dated 12/9/2019 in **Inquest No. 1 of 2015**.
2. When the matter came up ex-parte on 16/10/2019, the Court granted the leave sought but directed that the application be served for the hearing of the prayer for stay *inter partes* on 23/10/2019.
3. The order sought to be stayed was the one made on 12/9/2019 by the 1<sup>st</sup> respondent directing that the applicants be investigated and subsequently charged with the murder of one **Martin Gitari Kaigera** in the above noted inquest.
4. It was submitted by Counsel for the applicants that there is a triable issue for determination by this Court. That the substantive Motion would be rendered nugatory if the applicants take plea as directed by the 1<sup>st</sup> respondent. The triable issue was said to be that the applicants were never informed of their right to counsel or to cross examine the witnesses at the inquest.
5. That there was danger of the 2<sup>nd</sup> respondent implementing the 1<sup>st</sup> respondent's order thereby occasioning the applicants irreparable injury

as they will lose their jobs. The cases of **Republic v. Chief Magistrate, Naivasha [2011] eKLR** and **Mirugi Kariuki v. Attorney General [1992] eKLR** were referred to in support of those submissions.

6. On the other hand, it was submitted for the 1<sup>st</sup> respondent that the prayer for stay was an abuse of the court process. That the 1<sup>st</sup> respondent had only recommended that the applicants be investigated and subsequently charged. That the said process would take time. Since the 2<sup>nd</sup> respondent is yet to prefer the charges on the applicants, the prayer is premature.

7. For the 2<sup>nd</sup> respondent, it was submitted that the application does not disclose any prima facie case as the recommendation was for the applicants to be investigated after which the 2<sup>nd</sup> respondent was to make up his mind on whether to charge or not the applicants.

8. What is before Court is a prayer for stay of execution of the order made in the subject Inquest. In such an application, what the Court has to consider is that the substantive Motion on Notice is not rendered nugatory by the mischief sought to be stayed happening.

9. In the present case, the 1<sup>st</sup> respondent ordered that the applicants be investigated and subsequently be charged with the murder of the deceased. No action has been made on those orders yet. Further, the substantive Motion has since been filed. It should be recalled that the incident the subject of the impugned orders occurred in October, 2012.

10. While there may be an issue to be investigated in the substantive Motion as ably submitted by **Mr. Mwanzia**, Learned Counsel for the applicants, this Court does not think that it is sufficient to warrant the grant of the stay sought. There will be no irreparable loss that will be suffered if the stay sought is not granted.

11. The important issue here is to balance between the rights of the deceased to get timely justice and the rights of the applicants not to suffer prejudice by a distorted process. The right of the deceased to justice has been in abeyance for now 7 years any further delay will but lead to either loss of memory or evidence.

12. On the other hand, this Court is alive to the fact that if the applicants are investigated and charged, those proceedings can still be halted and or set aside immediately if and when the substantive Motion in this case succeeds.

13. Accordingly, I find that the prayer for stay is unwarranted at this stage and I decline to grant the same.

**DATED and DELIVERED at Meru this 11th day of December, 2019.**

**A. MABEYA**

**JUDGE**