



**REPUBLIC OF KENYA**

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

**CRIMINAL MISCELLANEOUS APPLICATION NO. 71 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,  
PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE PENAL CODE CAP 63 AND CRIMINAL PROCEDURE CODE CAP 75, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA AND THE FAIR ADMINISTRATIVE ACTION  
ACT**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA, THE CONSTITUTION  
AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**PIUS MATINGI.....APPLICANT**

**VERSUS**

**1. SENIOR PRINCIPAL MAGISTRATES'**

**COURT, KAGUNDO.....1<sup>ST</sup> RESPONDENT**

**2. THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPHAT MULWA MUKIMA alias**

**JOSPHAT MULWA MUKIMA.....INTERESTED PARTY/RESPONDENT**

**RULING**

1. The applicant filed summons dated 20<sup>th</sup> July, 2017 seeking the following orders:

a) An order of judicial review for prohibition directed at the Senior Principal Magistrate's Court, Kangundo prohibiting him, by himself or any other judicial officer acting on his behalf from proceedings, conducting trial, presiding or in any other manner dealing with the charges laid or proceeding in **criminal case No. 346 of 2016** between **Republic v. Pius Matingi**.

b) An order of Certiorari quashing the decision of the Senior Principal Magistrate rendered on 22<sup>nd</sup> June, 2017 to set the 21<sup>st</sup> July, 2017 as the hearing date of **Criminal Case No. 346 of 2016**.

2. The summons was based on grounds that the respondent has demonstrated bias against the applicant since he took conduct of the case in total disregard of the applicant's rights to natural justice. That the respondent has imposed dates that are unfavourable to the applicant's

advocate on record on several occasions, actions that violated the applicant's right to fair hearing and that the overall conduct of the respondent is unreasonable and shows a callous disregard of the applicant's rights to natural justice, right to fair hearing and amounts to procedural impropriety.

3. The applicant in particular stated that he was on 5<sup>th</sup> January, 2017 charged, pleaded not guilty and was released on cash bail of KShs. 50,000/=. On 18<sup>th</sup> January, 2017, the matter was mentioned but the applicant and his counsel were not present. The prosecution applied for warrant of arrest and the same was issued against the applicant and the matter was slated for 30<sup>th</sup> January, 2017. The applicant attended court on 19<sup>th</sup> January, 2017 and the file was placed before the respondent and his advocate applied for the lifting of the warrant citing an error of taking of dates and the warrant was lifted. On the same day, the prosecution applied for review of bond terms of the applicant citing the value of the property as the reason which was same to be KShs.180,000,000/=. The Respondent ordered that the applicant pay a bond of KShs. 5,000,000/= and a surety of a similar amount. The applicant was then remanded for two weeks in police custody while looking for ways to raise the same and thereafter released upon raising the bond and providing surety. That on 12<sup>th</sup> May, 2017 when the applicant's advocate appeared before the respondent, he requested for an adjournment based on the fact that the defence had not been furnished with any statements. The respondent was not accommodative of the applicant's interest and even suggested that the advocate should have been furnished with the statements and should have had an hour to prepare for the hearing.

4. It was contended that the respondent failed to inquire from the prosecution why statements had not been furnished to the Applicant and blatantly stated that it was the duty of the applicant's advocate to pursue the statements and follow the prosecution in order to get the statements. That as the applicant's counsel was addressing the court, an identified lady took photos of the applicant. That the said lady had accompanied the first prosecution witness but that when his advocate brought it to the court's attention, the respondent casually asked the lady to delete the photos and the applicant's counsel to let it go. That on 22<sup>nd</sup> June, 2017, the respondent imposed a hearing date on the 21<sup>st</sup> July, 2017 despite the persistent objection that he had a matter before the High Court on that date.

5. In support of his case the applicant cited **Republic v. Public Procurement Administrative Review Board Ex Parte Syner – Chemie Ltd [2016] eKLR** and **Mirugi Kariuki v. Attorney General [1990- 1994] EA 156; [1992] KLR8** among others.

6. The interested party filed a replying affidavit to this summons on 5<sup>th</sup> December, 2017. He contended that the gist of the Judicial Review is to have the proceedings stopped and the case quashed with a view of rendering the suits related to the property nugatory. That the applicant has not demonstrated bias and that he was denied natural justice but rather that the respondent was exercising his discretionary powers. In support thereof he cited **Joram Mwenda Guantai v. The Chief Magistrate [2007] 2 EA 170**, **Republic v. Attorney General & 4 Others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] e KLR**, **Dream Camp Kenya Ltd v. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012 among others**.

7. Mr. Machogu learned Prosecuting Counsel opposed the summons on ground that; the application is misconceived, incompetent and amounts to abuse of the court process since it has failed to satisfy the minimum threshold of section 7 of the Fair Administrative Action Act; that the criminal process is guided by the Criminal Procedure Code, Evidence Act and the Constitution of Kenya in which must all be read as an integrated whole for mutual sustenance of their provisions such that the applicant's fundamental rights are not violated and that the application is an abuse of the court process duly meant to delay the conclusion of **Kangundo Criminal Case No. 346 of 2016**.

8. I have given due consideration to the application. It is my view that what falls for determination is whether or not the 1<sup>st</sup> respondent conducted the applicant's case in a manner that deprives him of his right to fair trial. The Supreme Court of India had this to say with regard to fair trial in the case of **Natasha Singh v. CB [2013] 5 SCC 741**:

***“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstance can a person's right to fair trial be jeopardized.”***

9. The applicant essentially laments about the following issues, first, that a high bond was imposed on him, that the 1<sup>st</sup> respondent treated the lady who took pictures casually and that a hearing date was imposed on him despite his advocates plea that he had a matter on the same date fixed before the High Court and that his advocates was informed that he should have chased the prosecutor for statements. On the issue of bond, it must be noted that courts have discretion to grant bail upon terms it deems fit. Such discretion cannot be interfered with by this court unless an appeal or review is sought before it. Bearing in mind that this court does not have full facts of how and why the court saw it fit to grant bond of KShs. 5,000,000/=: I shall not pronounce myself on it. As for the lady who took pictures, it is the applicant's own statement that the lady apologized and was ordered to delete the pictures and I find that the court took the correct measure. On the issue of statements, the Court of Appeal had this to say in **Thomas Patrick Gilbert Cholmondeley v. Republic [2008] eKLR**:

***“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under...our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at trial, copies of documentary exhibits to be produced at trial and such like items...”***

Although the applicant took issue with the trial court's way of handling the issue of statements, it was not established that he was completely denied statements but rather that the 1<sup>st</sup> respondent indicated that his advocate should have chased the prosecutor for the statements and had a hearing date imposed on the applicant. Abuse of legal process arises where discretion is being exercised with a view to achieving extraneous goals other than those legally recognized by the Constitution. The applicant failed to establish abuse and that his right to fair trial was deprived. However, what I sense is discomfort with the speed with which the 1<sup>st</sup> respondent is conducting the matter. It must be noted that the court has a duty to conduct matters expeditiously although such speed should not compromise justice. Indeed all parties in a case are expected to adhere to directions issued by the court and should all be geared towards the speedy finalization of the cases which is quite

beneficial to the parties and the court in the end. The Applicant has not convinced this court that the 1<sup>st</sup> Respondent was conducting the matter with an ulterior motive other than the need to ensure a speedy trial.

10. In the result it is the finding of this court that the Applicant's Application dated 20/07/2017 lacks merit. The same is dismissed with costs to the Respondents and Interested Party.

**Orders accordingly.**

**Dated and signed at Machakos this 3<sup>rd</sup> day of May, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

No appearance for Wandugi - for the Applicant

Mogoi - for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Kamwenda for Gachau Kariuki - for the Interested Party

Kituva – Court Assistant