



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPLICATION NO. 1 OF 2018

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITIONS
& CERTIORARI**

AND

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS PURSUANT TO ARTICLE 22 OF THE CONSTITUTION
OF THE REPUBLIC OF KENYA, 2010**

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE ACT, CAP 75 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT, SECTIONS 8 & 9, CAP 26 LAWS OF KENYA

REPUBLIC.....APPLICANT

-VERSUS-

CHIEF MAGISTRATE'S COURT AT KILGORIS...1ST RESPONDENT

OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION.....2ND RESPONDENTS

EX PARTE

STEPHEN SAMUEL PAINO

RULING

1. This is an application brought under Section 53 Rule (1), (2) (3), (4) and 3(1) of the Civil Procedure Rules, 2010 Sections 3A, 3, 1A & 1B of the Civil Procedure Act, Cap 21 Laws of Kenya, 8 & 9 of the Law Reform Act, Cap 26 laws of Kenya and all other enabling Provisions of the law. The applicant seeks the following orders:-

i. That upon hearing the instant Application this Honourable Court be and is hereby pleased to grant a Judicial Review Order of Certiorari to remove into this Honourable Court and quash the Criminal proceedings in Kilgoris Chief Magistrate's Court in Criminal Case No.48 of 2015 between Republic versus Stephen Samuel Paino and Francis Edward Strange.

ii. That upon hearing the instant Application the Honourable Court be and is hereby pleased to grant a Judicial Review Order of Prohibition to remove into this Honourable Court and prohibit the continuation of Criminal proceedings against Stephen Samuel Paino in Kilgoris Chief Magistrate's Court in Criminal Case No.48 of 2015 between Republic versus Stephen Samuel Paino and Francis Edward Strange.

iii. That this Honourable Court be and is hereby pleased to issue any such orders and/or reliefs that it shall deem fit to grant in order to safeguard the rights of the ex parte Applicant.

iv. That the costs of and incidental to this Application be provided for in any event.

2. The application is founded on the following grounds ;

- a) That on or about the 5th day of January, 2015 Criminal charges were commenced against Stephen Samuel Paino the Ex parte Applicant herein on allegations that he together with others before Court had on the 24th day of May, 2014 at Masurura area in Trans Mara West within Narok County broken into and entered a building namely a workshop of **MBOESAMBU RESOURCES LIMITED** and therein stole items valued at the sum of Kshs.42,860,000/= the property of the said **MBOESAMBU RESOURCES LIMITED** vide Kilgoris Criminal Case Number 48 of 2015.
- b) That at the time of the alleged offence and subsequent institution of the criminal charges the ex parte Applicant who is an Australian National was not within the Jurisdiction of the said court and/or within the territory of the Republic of Kenya having travelled back to his home Country on the 18th day of May, 2011 and had not at any time re-entered Kenya prior to the date of the alleged offence preferred against him vide the criminal case alluded to above.
- c) That it is therefore not possible that the ex parte Applicant would have committed the alleged criminal offence as contained in the charge sheet while not within the territorial boundaries of the Republic of Kenya and the 1st Respondent's judicial jurisdiction by extension.
- d) That on the basis of the matter alluded in the paragraphs above, the institution of the charges against the ex parte Applicant is null and void ab initio and the same is amenable to be quashed by this Honourable Court as sought herein.
- e) That the ex parte Applicant had not involved himself in any act, commission and/or omission of any criminal nature prior to his travel out of the Republic of Kenya to Australia on the 18th day of May, 2011.
- f) That at the time of his stay in Kenya the ex parte Applicant engaged himself in lawful gainful economic activities as a foreign investor lawfully in Kenya and with all the requisite approvals to be in Kenya.
- g) That the ex parte Applicant is in possession of documents to prove That he was not in Kenya at the time of the alleged criminal offence and as such it is only fair That the criminal charges hanging on his neck against him are quashed and/or terminated forth with to allow him continue with his lawful and gainful economic engagements without any hindrance whatsoever.
- h) That the ex parte Applicant has never been proscribed and/or banned from re-entering the Republic of Kenya at any given time prior to the institution of the said charges, but their continued being in place against him do not portend well for his future engagements within Kenya.
- i) That the ex parte Applicant risks and stares at imminent arrest and arraignment in Court should he set foot on Kenyan soil so long and he alleged criminal charges remain hanging on his neck.
- j) That the ex parte Applicant does not have any known previous criminal record within the Republic of Kenya and even back in his home Country Australia.
- k) That it is thus necessary and imperative that the Orders sought herein by ex parte Applicant are granted to restore and/or protect the position of the rule of Law and the place of our Honourable Courts in so far as the institution of criminal proceedings and rule of Law is concerned.
- l) That it is trite Law that the ex parte Applicant is entitled to be subjected to fair administrative action and/or be afforded a fair hearing to safe guard his rights against any possible infringement and/or violation.
- m) That both the 1st and 2nd Respondents being institutions in public service respectively are amenable to scrutiny by this Honourable Court and where necessary they are obligated to ensure that the rule of Law is upheld.
- v. The application is premised upon the verifying affidavits of Stephen Samuel Paino the ex parte Applicant herein and the Statutory Statements of fact. The application was not opposed by the Respondents. Mr. Nyauma for the Respondents informed the court that they concede to the application as there have been no instructions from their clients. In the Applicant's affidavit and statement of fact filed on the 28/2/2018, applicant deposes that he was not within the jurisdiction of the court when the alleged offence took place. That he had travelled back to his country Australia on the 18th of May 2011 and had not at any time re- entered the country prior to the date of the alleged offence on the 5th of January, 2015. That is therefore not possible that he committed the alleged criminal offence as contained in the charge sheet before Kilgoris Court in Criminal Case No. 48 of 2015. That the charges against him are null and void and the same is amenable to nullification by the court. That he has no criminal record within Kenya or back in his home.

DETERMINATION

vi. I have considered the Applicant's affidavit and Statement of Facts. The Applicant's averments have not been challenged by the Respondents. The Applicant has attached a copy of his passport indicating that he was to be in Kenya between the 1/4/2011 to 27/3/2013. The Applicant has also attached a letter from Stephen Tarus High Commissioner verifying that Mr. Paino left Kenya on 18th May 2011 through the Jomo Kenyatta International Airport and there is no endorsement on the passport indicating that he has re-entered Kenya since then. The alleged offence as per the charge sheet dated 5/2/2015 indicates that the alleged offence took place on 24/5/2014 at Masurura area in Trans Mara NAROK County. It is clear that the Applicant was not within Kenya on 24th of May

2014 as alleged and therefore could not have committed the alleged criminal offences, unless proved otherwise. The Applicant's application therefore has merit. I therefore grant a Judicial Review Order of Certiorari to remove into this Honourable Court and quash the Criminal proceedings in **Kilgoris Chief Magistrate's Court in Criminal Case No.48 of 2015 between Republic versus Stephen Samuel Paino**. Prayer 2 of Notice of Motion dated 7th March 2018 is not granted. No orders as to costs.

Dated signed and delivered this 17th day of July 2018

R.E. OUGO

JUDGE

In the presence of:

Absent For the Applicant

Absent For the Respondents

Rael Court clerk