



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 6 OF 2014**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE PENAL CODE**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE KITALE.....3<sup>RD</sup> RESPONDENT**

**AND**

**APPOLLO AMBUTSI SHIKANGA.....EXPARTE APPLICANT**

**KOECH CHEPKWONY TARUS ..... INTERESTED PARTY**

**JUDGMENT**

1. The exparte applicant Apollo Ambutsi Shikanga has moved the court for orders that this court be pleased to issue an order judicial review orders of certiorari to remove to this court for purposes of quashing the charge sheet in respect of Kitale chief magistrate court criminal case no. 182 of 2014 and orders of prohibition prohibiting the Chief Magistrate Kitale Law Courts or any other magistrate from prosecuting or proceeding with any case based on the complaint subject of CMCC No. 182 of 2014.
2. The exparte applicant gave the background leading to his prosecution to be an agreement he had entered into with one Koech Chepkwony Tarus where he was to lease a portion of his entitlement in Cherangani/Noigam/66/4/10 being part of the estate of one Barnabas Ambubi Masingili but the

said transaction was frustrated by a court order of 29<sup>th</sup> January, 2013 which restrained all beneficiaries and administrators from leasing out the said land. He did not obtain the money fraudulently therefore the matter between him and the complainant was purely a civil matter, with no criminal element and he therefore ought not to have been charged with a criminal offence.

3. The applicant relied on 3 notable cases namely, A.G & another exparte Hussein Mudolee (H.C. Misc. Appl. No.898 of 2003 (unreported) Nyamu judge (as he then was, R. Vs. Attorney General and Chief Magistrate Court exparte, Kipngeno Arap Ngeny and Githunguri Vs. R (1989) KLR 1.
4. The Deputy Public Prosecutor entered appearance for the 1<sup>st</sup> & 2<sup>nd</sup> respondent and filed grounds of opposition as follows; the application was inept, ambiguous and defective, the application does not meet the basic threshold, it seeks to pre-empt the outcome of criminal charges facing the exparte applicant, the grounds relied on are in form of defence for the charges being faced.
5. At the hearing of the application dispute service of a hearing notice, the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to appear and the matter therefore proceeded exparte.

The exparte applicants counsel in highlighting his submissions reiterated that the matter was not criminal, the charge was malicious and meant to embarrass the exparte applicant who is an advocate.

6. I have considered the pleadings filed, submissions by the exparte applicant and authorities entered. The Director of Public Prosecution filed grounds of opposition but did not file any submissions to expound on the general grounds neither was there representation in court as noted above.
7. The exparte applicant stated and produced documents to the effect that on the 15<sup>th</sup> May 2012 he entered into an agreement with one Koech Chepkwony Tarus to lease 40 acres of L.R. No. Cherangany/Noigam/6614/10 at an agreed price of Kshs. 260,000/= for the period of 1<sup>st</sup> January 2013 to 31<sup>st</sup> December, 2013, a court order stopping transactions on the said land in essence frustrated the lease that had been entered into. The said agreement set mechanisms of termination and/or breaches.
8. Although the exparte applicant says that the interested applicant has not claimed his refund, he does not explain on his part why he has not refunded. None the less this in my view does not mean that failure of the exparte applicant to fulfil his part of the agreement renders him criminally liable. This is a civil/commercial matter and stated earlier the agreement gives mechanisms of dealing where the agreement has been frustrated by an omission or breach by either party.
9. To allow the prosecution in my view, therefore will not only be oppressive but unfair in the circumstances of the case and will serve no other purpose but to embarrass the applicant. In this regard prayers a & b of the application. Each party meet his costs.

Dated at Bungoma this 6<sup>th</sup> day of October, 2015.

**ALI-ARONI**

**JUDGE.**