



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW CASE NO. 1 OF 2014**

**IN THE MATTER OF AN APPLICATION BY JUSTUS GWARO MAGANGI FOR LEAVE TO  
COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW.**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF  
KENYA.**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES.**

**AND**

**IN THE MATTER OF ARTICLE 20(1), (2), 21(1), 22(1), 23(1), 25(C), 27(1), (2), 47(1), (2) 165 (6)  
AND 258(1) OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**BETWEEN**

**JUSTUS GWARO MAGANGI.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATES, KERUGOYA LAW COURTS.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

The Judicial Review application before this court is a chamber summons dated 17<sup>th</sup> September, 2014 where the exparte applicant is seeking the following prayers;-

1. THAT the instant Application be certified as urgent and heard ex-parte in the first instance.

2. THAT leave be granted to the Applicant to apply for a judicial Review order of **CERTIORARI** quashing the decision of the 1<sup>st</sup> Respondent to charge the Applicant herein with the offence of conspiracy to defraud contrary to section 317 of the Penal Code, Cap 63, Laws of Kenya in Kerugoya Law Courts Chief Magistrate's Court Criminal Case NO. 422 of 2014, **Republic versus Justus Gwaro Magangi & another**.

3. THAT leave be granted to the Applicant to apply for a Judicial Review Order **PROHIBITION** prohibiting the 3<sup>rd</sup> Respondent from arresting, investigating and /or preferring any charges whatsoever against the Applicant herein on account of the same facts in Kerugoya Law Courts Chief Magistrate's Court Criminal Case NO. 422 of 2014, **Republic versus Justus Gwaro Magangi & another**.

4. THAT the leave so granted do operate as a stay, staying the proceedings in Kerugoya Law Courts Chief Magistrate's Court Criminal Case NO. 422 of 2014, Republic versus Justus Gwaro **Magangi & another** pending the hearing and determination of the instant application as well as the substantive Notice of Motion.

5. THAT the costs of this application as well as the interest thereon be borne by the Respondents.

6. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.

The application is supported by the affidavit of the ex-parte applicant, **JUSTUS GWARO MAGANGI** and the statement filed together with application.

This Court certified the application urgent thereby spending prayer one of the application and directed the application to be served and be heard in parties to enable court determine the other prayers in the application pursuant to **Order 53 Rule (1) (4)** of the **Civil Procedure Rules**. The directions to serve the ex-parte application was informed by the prayers sought by the ex-parte applicant visa viz the current state of Kerugoya Chief Magistrate's Court Criminal Case NO. 422 /14.

In brief the ex-parte applicant has come to this court for leave to apply for prerogative orders to stop Respondents from trying him in a criminal court and seeks to stay the proceedings in the subordinate pending the determination of the substantive motion.

I have looked at the grounds upon which the application for leave and stay is made plus the statutory statement and also heard Mr **Mukua** in his oral submissions urging this court to grant the reliefs sought in the application. The applicants main bone of contention is that the 2<sup>nd</sup> Respondent discriminated against him by commencing criminal proceedings and that there was no basis for the office of the 1<sup>st</sup> Respondent to charge him in court of law. Further the applicant claims that he will suffer prejudice if the criminal trial continues. **Mr Mukua** has urged this court to find that the ex-parte applicant has an arguable case for leave as opposed to a prima facie case. He contends that unless a stay is granted there will be a scenario where there would be two parallel proceedings going on at the same time. **Mr Mukua** has also urged this court not to look at the merits of the case at this stage but find that there is an arguable case nevertheless. I sincerely do not understand how **Mr Mukua** expects the court to do this but I will come to it later.

The Respondents have mounted strong opposition to the application before court. **Mr Sitati** for the 1<sup>st</sup> Respondent mounted a 13 detailed paragraph affidavit demonstrating the action his office took. This court restricted **Mr Sitati** to confine himself mainly on the issue of stay of proceedings in the criminal trial which he obliged though he went on to ask this court not to grant leave to the ex-parte applicant to challenge his prosecution in the criminal court. **Mr Sitati** contends that the ex-parte applicant was subjected to a lawful process after deciding that the ex-parte applicant should be charged in court. According to the 1<sup>st</sup> Respondent the rights of the ex-parte applicant were respected and upheld and contends that they have sufficient evidence to prosecute him. The 1<sup>st</sup> Respondent has urged this court

not to stay the criminal trial as the same is underway and there is nothing in law to bar two parallel proceedings proceeding at the same time and further more the exparte applicant has not demonstrated any prejudice if he is tried by a competent court with the necessary jurisdiction and that failure to demonstrate prejudice by the exparte applicant is fatal to his application.

The 2<sup>nd</sup> Respondent has similarly opposed the exparte application with **Mr Mogaka** counsel for the 2<sup>nd</sup> Respondent urging the court to find no merit in the entire application. He contends that the 2<sup>nd</sup> Respondent has acted within the stipulated confines of the law as mandated by the Constitution. He further submitted that the proceedings before the court are proper and should be allowed to proceed to its logical conclusion. According to **Mogaka** the application has not met the threshold for Judicial Review and therefore urged this court to dismiss the application altogether.

This Court has considered all the submissions ably made by respective counsels and they are only two issues to be determined at this stage.

1. Whether the exparte applicant has satisfied the court to grant leave to mount substantive application – for prerogative orders of prohibition and certiorari to stop the criminal case against him.
2. Whether a grant for leave should operate as a stay in the criminal court.

On the first issue this court is persuaded by the arguments made by **Mukua** the counsel representing the exparte applicant that the test to be applied when deciding whether leave should be granted or not is the presence of an arguable case rather than a prima facie case. **Mr Mogaka** contends that the exparte applicant has not met the threshold in his application for a Judicial Review. This could be true but it is premature at this stage to make such a finding. The granting of leave at this stage is just a provisional remedy to enable a party access the corridors of justice and I suppose that a party should have his day in court when issues of merit can be ventilated. This position is informed by a similar finding in the case of **REPUBLIC –VS- LAND DISPUTES TRIBUNAL COURT CENTRAL DIVISION AND ANOTHER EXPARTE NZIOKA (2006) I EA pg 321-323** where Hon. Nyamu Justice sitting at High Court Nairobi stated,

***“where a party wants his day in court to be heard on merit in an application where leave has been granted, his right should not be lightly deprived and there must be compelling reasons to warrant taking away of that right.....eg....where the matter is not amenable to Judicial Review and therefore mainly non-justiciable.....”***

This Court is alive to the fact that this application is just at leave stage but going by the grounds set out in the application this court finds that the exparte application though not outright a clear case of Judicial Review, has an arguable case fit to be given a chance in court. A party should not be denied access to justice and it is for this reason and this reason alone that I am persuaded to grant the applicant leave to bring a substantive motion to challenge his prosecution in a criminal court. I do not wish to go into or investigate the merits of such a motion at this stage as **Mukua** puts it but a court of law cannot exercise its discretion judicially without considering all the facts brought before it.

On the second prayer of stay of criminal proceedings in the lower court the state has come out strongly that there is no basis of ordering a stay as the exparte applicant has not demonstrated the prejudice he will suffer. I agree and find that a stay order is normally granted to prevent a failure of justice. The exparte applicant has not persuaded me that there is a real likelihood of prejudice in the criminal trial before the subordinate court. I agree with Sitati for Deputy Public prosecutor (the 1<sup>st</sup> Respondent herein) that the rights of the exparte applicant under **Article 49 and 50** of the **Constitution** have been observed so far. The exparte applicant has not raised a finger on any infringement because had there been any, the exparte applicant could have already moved the court appropriately vide a Constitutional petition to enforce his rights under the Constitution. In any event, the exparte applicant in his pleadings before court and oral submissions before this court has raised anything but infringement of his Constitutional rights. This is informed perhaps by the fact the counsel for exparte applicant is well aware that this court hardly grants the remedies of certiorari or prohibition when other remedies are readily available .

The ex parte applicant has raised the ground of discrimination as a ground for stay of criminal proceedings as well as leave. He contends in his affidavit that he was charged alone and his “accomplice” **JOSIAH GICHANGI NJAGI** left out. This may not be true position. This court has seen the affidavit of one **NICOLAS CHIGIRI** the investigating officer in the criminal court where he has deposed that **JOSIAH GICHANGI NJAGI** was charged in court vide Kerugoya Chief Magistrate’s criminal case NO. 366/14. This would mean that the said **Josisah Gichangi Njagi** was in fact arraigned in court prior to the ex parte applicant. I therefore agree with the 1<sup>st</sup> Respondent that the allegations of discriminations and prejudice do not hold any water.

It is on the basis of the above that while I have granted leave to the ex parte applicant to bring in a substantive motion for the prerogative orders of certiorari and prohibition. I decline to issue an order of stay of proceedings in the criminal court. This is because I find that the question of natural justice at times has to give way to necessity otherwise the machinery of justice and fair administration thereof will break down and this court is not prepared to go that route.

I therefore direct that the substantive motion be filed by ex parte applicant within 21 days from the date of this ruling. The criminal case at the subordinate court shall proceed as scheduled and the costs of this application shall follow the substantive application.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 2<sup>ND</sup> DAY OF OCTOBER, 2014**

**In the presence of.**

The Ex parte Applicant

Mr Ngari for Mukua Advocate for Ex parte Applicant

Mr Sitati for state for 1<sup>st</sup> Respondent

Martin Court Clerk