



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Miscellaneous Application 637 of 2007

JOSEPHINE ISELE KULUO .....  
APPLICANT

AND

THE CHIEF MAGISTRATE'S COURT KIBERA, NAIROBI ..... 1<sup>ST</sup>  
RESPONDENT

ATTORNEY GENERAL ..... 2<sup>ND</sup>  
RESPONDENT

JUDGMENT

Applicant's case

1. Josephine Isele Kuluo, the *ex-parte* applicant ("the applicant"), is an advocate of the High Court and she has moved this court by the Notice of Motion dated 22<sup>nd</sup> June 2007 seeking the following orders:-

(a) An order of certiorari removing to this Honourable Court for the purpose of the same being quashed the charge sheet and all proceedings relating to Criminal Case No. 1002 of 2005 at Kibera Law Courts Nairobi, Republic –vs- Josephine Isele Kuluo.

(b) An order of prohibition do issue prohibiting the respondents from pursuing, hearing and or continuing any further Criminal or other proceedings against Josephine Isele Kuluo in respect of matters similar to, arising and or relating to the charges set out in Criminal Case No. 1002 of 2005 Kibera Law Courts Nairobi.

(c) That costs be provided for.

2. The *ex-parte* applicant was charged with the offence of stealing by agent contrary to **section 283(c)** of the **Penal Code** in that on diverse dates between 15<sup>th</sup> November 2003 and 15<sup>th</sup> December 2003 at Ishakas Kraal House in Kithiani, Nairobi she stole 3,600,000/= received by her for and on behalf of Dr. Patrick Maina Kahindo, the interested party in these proceedings.

3. She avers that her client Dr Kahindo lodged a complaint with the **Advocates Disciplinary Committee** to wit: **DC Cause 142 of 2006** where she was struck out from the roll of advocates. During the course of the disciplinary proceedings, the applicant and Dr Kahindo recorded a consent dated 7<sup>th</sup> June 2007 in which she admitted receipt of the sums of money and undertook to liquidate the amount by monthly instalments.

4. It is the applicant's case that the criminal proceedings were improperly commenced to secure payment

of a civil claim and are therefore oppressive and an abuse of the court process and it is proper that the orders of certiorari and prohibition be issued. The applicant's counsel, Ms Mwila, relied on the following cases; *R v Attorney General ex -parte Jared Benson Kangwana Nairobi HC Misc. 446 of 1995 (Unreported)*, *R v Attorney General and Another ex-parte Hussein Mudobe Nairobi HC Misc. 898 of 2003 (Unreported)* and *R v Kenya Revenue Authority ex-parte Aberdare Freight Nairobi HC Misc. 946 of 2004 (Unreported)*.

### **Respondent and interested parties Case**

5. Both the interested party and the respondent have opposed the application through written submissions. They emphasised that under **section 193A** of the *Criminal Procedure Code* that notwithstanding any other written law, the fact that a matter in issue in any criminal proceeding is also directly or substantially in issue in any pending civil proceeding shall not be a ground for any stay, prohibition or delay of criminal proceedings. They therefore contended that the criminal proceedings should take the natural course.

6. The respondent argues that the applicant has also failed to demonstrate that Chief Magistrate's Court lacks jurisdiction to hear the case or has acted in excess of jurisdiction or that it has in fact breached the rules of natural justice. Ms Kahoro submitted that in the circumstances prerogative orders should not be issued. Counsel relied on *R v Chief Magistrates Court ex-parte Helmuth Rame HC Misc Civil App. No. 152 of 2006 (Unreported)*, *David Njogu v Director, Criminal Investigations Department Nairobi HC Misc. Civil App. No. 658 of 2004 (Unreported)*, *Bryan Yongo v Attorney General Nairobi HCCC No. 61 of 2006 (Unreported)* in support of the respondent's case.

### **Determination and disposition**

7. In considering this matter, I think two competing principles come to mind. On the one hand is the duty of the state to investigate, prosecute crime and for the court to conduct a trial based on facts presented by the state. On the other, is recognition that the state has coercive power which must not be used or abused for ulterior motives and when this is disclosed, the High Court has jurisdiction to put a halt to the proceedings.

8. In this case, I am satisfied that on the basis of the material before me that the complainant and interested party, Dr Kanindo and the applicant reached a consent, which was recognised and recorded by the Advocates Disciplinary Committee. It also shows that the applicant had made some payment towards discharging her indebtedness. I think that the criminal proceedings in the circumstances were intended to put pressure on the applicant to resolve the debt which had been admitted and payment terms agreed upon.

9. I find that this is a proper case for grant of orders of certiorari and prohibition sought in the motion. I therefore make the following orders;

***a. An order of certiorari be and is hereby issued removing to this Court for the purpose of the same being quashed the charge sheet and all proceedings relating to Criminal Case No. 1002 of 2005 at Kibera Law Courts Nairobi, Republic v Josephine Isele Kuluo.***

***b. An order of prohibition be and is hereby issued prohibiting the respondents from pursuing, hearing and or continuing any further Criminal or other proceedings against Josephine Isele Kuluo in respect of matters similar to, arising and or relating to the charges set out in Criminal Case No. 1002 of 2005 Kibera Law Courts Nairobi.***

***c. There shall be no order as to costs.***

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> day of October 2012**

**D.S. MAJANJA**

**JUDGE**

Ms Mwila instructed by Omboga and Company Advocates for the ex-parte applicant.

Mr T. Kahoro, State Counsel, instructed by the Directorate of Public Prosecutions for the respondent