

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO.71OF 2011**

[Original Misc. Criminal Application No. 5 of 2011,  
RM's Court Dar es Salaam at Kinondoni (Kiwonde, RM)]

**ALFRED LUCAS ..... 1<sup>ST</sup> APPLICANT**  
**SAED KUBENEA ..... 2<sup>ND</sup> APPLICANT**

***VERSUS***

**YUSUF MANJI ..... RESPONDENT**

*Date of last Order:*                    08/10/2012

*Date of Ruling:*                        21/11/2012

**R U L I N G**

**Fauz Twaib, J:**

The dispute that gave rise to the present proceedings began as a civil case filed by Yusuf Manji (the Respondent) at the Kisutu Resident Magistrate's Court, Dar es Salaam, as Civil Case No. 94 of 2011 against the Applicants Alfred Lucas and Saed Kubenea and three others. That suit was based on the tort of defamation.

Together with the Plaint, the Respondent also filed an application for injunctive orders against the Applicants. On the same day that the suit was filed (29<sup>th</sup> July 2011) the RM's Court heard an *ex parte* application and issued interim injunctive orders against all the Defendants. After being served with a copy of the Plaint, the chamber summons and affidavit, the Applicants filed a joint written statement of defence which also contained a counter-claim. They also filed a joint counter affidavit against the application for injunctive orders. In paragraph 1 of the counter affidavit, the 1<sup>st</sup> Applicant stated, among other things, that he

was a principal officer of the 4<sup>th</sup> Respondent/Defendant in that case, Printech Company Ltd.

The Respondent has taken issue with this statement. He claims to have enquired from the Chairman of Printech Ltd., who denied, in writing, to have authorized the 1<sup>st</sup> Applicant to act on the company's behalf or even having knowledge of the existence of the suit. The Respondent thus believed that the 1<sup>st</sup> Applicant's statement was false and, having been made in a sworn statement filed for purposes of Court proceedings, amounted to the offences of false swearing and perjury. He thus filed Miscellaneous Criminal Application No. 94 of 2011 at the Kinondoni RM's Court and obtained leave, *ex parte*, to commence private criminal prosecution against the Applicants.

After obtaining leave, the Respondent filed Criminal Case No. 1165 of 2011 at the District Court of Kinondoni at Kinondoni. Not happy with this turn of events, the Applicants filed the present application. They are praying for orders revising the decision of the RM's Court granting leave to file criminal proceedings and an order declaring that the Kinondoni District Court had no jurisdiction to hear and determine the application to conduct the said prosecution.

The affidavit in support of this application contains many allegations of fact which, in my respectful view, are not relevant. As far as I can deduce from it, the Applicants have fronted six main reasons for the application:

1. That the application was heard and determined *ex parte*, thereby denying the Applicants an opportunity to be heard.
2. That the alleged perjury in Civil Case No. 94 of 2011 has not been established, since the application for injunction has not been heard by the RM's Court, the counter affidavit has not been found by the Court to contain the alleged falsehood, nor have the preliminary objections been determined.

3. That the Respondent has involved neither the Director of Public Prosecutions (DPP) nor the Police before filing the application for leave to proceed with private prosecution.
4. That since the alleged falsehood is said to have been committed in respect of proceedings in the Kinondoni RM's Court, the Kinondoni District Court has no jurisdiction to entertain it.
5. That in granting the application for private prosecution, the Court did not satisfy itself on all the requirements of the law and, therefore, there is abuse of Court process.
6. That the Respondent has been actuated by malice and should not have been granted leave to conduct private prosecution.

Learned counsel for the Applicants, Dr. Nshalla, made no submissions in support of the first ground. I take it that he has decided to abandon it. However, even if he did submit on this ground, it would not have succeeded. Applications for leave to conduct private prosecution are usually formal and may be made *ex parte*. There is no requirement in law to notify the other party or to involve him before leave is granted.

Dr. Nshala submitted strongly on the second point, which contains three sub-points: That the alleged perjury has not been established by the RM's Court in the civil case; that since the application has not been heard by that Court, there is no finding that the counter affidavit contains any falsehood; and that the RM's Court has not yet decided on the Applicant's preliminary objections. For these reasons, it is Dr. Nshala's view that the criminal case has been prematurely instituted.

Counsel Nshala cited the case of *Richard Kimani & M. Maina v Nathan Kahata*, High Court of Kenya Criminal Case No. 11 of 1983 (however, counsel did not avail the Court with a copy of this unreported decision). Counsel asserts that it was held in that case that the right of private prosecution is a constitutional safeguard. Counsel further asserted that

the Kenyan Court borrowed the words of Lord Diplock in *Gouriet v. Union of Post Office Workers* [1977]3 All ER 70 and held that private prosecution is:

“... a useful constitutional safeguard against capricious, corrupt or biased failure of Police forces and the office of the Director of Director of Public Prosecutions to prosecute offenders.”

The Kenya High Court then set out certain conditions, the existence of which the Court must satisfy itself before granting leave, namely: Whether any complaint has been made to the Director of Public Prosecutions, how is the complainant involved (i.e, the complainant's *locus standi*), whether he has suffered any injury or danger, and whether or not he is motivated by malice or political considerations.

It has been argued by counsel for the Applicants that none of the above steps have been followed in this case, and that the Court was moved to issue leave based on false allegations of fact.

The third ground can be very briefly disposed of. The Applicants argue that the criminal case, if any, should have been filed in the same Court and not in the District Court. This contention can be disposed of without much ado. With due respect to learned counsel, I am not persuaded by it. Suppose the alleged falsehood took place in the High Court. Would the aggrieved party file the criminal case in the High Court? I think not. In my view, what is important is for the Court where the criminal case is filed to have the requisite territorial and subject matter jurisdiction. I have no doubt that the Kinondoni District Court has such jurisdiction in this case.

Counsel further submitted that the order granting leave is a nullity which can only be cured by revision, and not an appeal. I agree, but only subject to establishing is nullity. But the issue is whether the proceedings were actually a nullity due to some procedural irregularity, miscarriage of justice and/or abuse of court process.

It seems to me that all the allegations raised by the Applicants in support of this contention go to the merits of the case the Respondent seeks to prosecute against the Applicants. Those matters cannot be decided at this stage, but after the hearing of the criminal case. Applicant's counsel also invoked the provisions of Article 107A (1) and 2 (a)-(d) and 107B of the Constitution. They require the Courts to do justice without being tied up with undue technicalities. I cannot, with respect, understand the context within which the Applicant has cited the Constitution. There are statutory provisions to cover the situation.

Counsel Rweyongeza for the Respondent has countered by first pointing out that counsel for the Applicants has given a wrong title to his submissions (by citing Civil Case No. 94 as the proceedings being sought to be revised). This is true. But Mr. Rweyongeza did not, rightly, insist on the same being expunged or struck out, a prayer one would expect from someone who seeks the easy way out. The error is insignificant and counsel Rweyongeza appears to understand that. It is clear that the Applicants' submissions were for the present application and the Respondent has not been prejudiced by it. Had such a prayer been made, it would not have deserved being entertained.

On the argument that there is no finding of falsehood on the Applicant's counter affidavit, Mr. Rweyongeza countered that the law does not require that there must first be such a finding. He submitted that the truth or falsehood of the statement can only be established after a trial has been conducted, which is what his client is now seeking.

Respondent's counsel also argued that his client had a right to private prosecution in terms of section 99 of the Criminal Procedure Act, Cap 20 (R.E. 2002). He also used the Kenyan case of *Richard Kimani (supra)*, which to this Court is only persuasive, to show that private prosecution is a constitutional safeguard, and that the Respondent has a right to do so.

I agree with Mr. Rweyongeza on this point. *Richard Kimani* is not binding on this Court. However, it is persuasive. With due respect, even though the case requires certain steps to be taken, and the Court to be satisfied that such steps have actually been taken before granting leave, I do not think that there are such requirements in our law. All the other cases cited by the Applicants' counsel are civil cases. The *sub judice* rule in section 8 of the Civil Procedure Code, Cap 33 (R.E. 2002) does not apply to criminal proceedings such the present.

Furthermore, as I have stated earlier, our procedures for leave are *ex parte*, merely formal, and would not require any elaborate trial as to the applicant's motives, etc. Questions as to whether the facts upon which the application is made are true are not at issue at the time. The Court merely has to look at the affidavit at its face value.

I thus cannot not fault the District Court in the manner it handled the application for leave. Indeed, in Uganda, the position is that even where no leave is sought or granted, that alone would not make the proceedings a nullity. The merits or otherwise of the complaint would depend on the evidence to be adduced at the hearing: See *Kyagonga v Uganda* [1973] 1 EA 486 (HCU). If, at the end of the case, the prosecution is found to be actuated by malice, the accused can be awarded costs (See *Rufus Riddlesbarger v Brian John Robson* [1959] 1 EA 841] and could also have recourse to an action for damages for malicious prosecution.

Having said that, however, I think there is merit in the Applicant's contention that it would not be proper for the criminal proceedings to proceed while the civil case is still pending. In such circumstances, the criminal prosecution must await the outcome of the civil proceedings, at least until the application for which the counter affidavit was intended is determined.

Since the alleged perjury is in relation to proceedings that are still pending, it is possible that the civil Court may not reach the conclusion

that the impugned statement was false. Whatever the findings of the civil Court however, until such time as the issue has been decided upon, the criminal proceedings should not be proceeded with. This would avert any conflicting decisions that may come from the two cases on the same point.

In view of the foregoing, therefore, I order that the criminal proceedings now pending in Kinondoni District Court against the Applicants be stayed until such time that the civil application from which it arises is disposed of. This order has not been specifically prayed for by the Applicants. It is thus made under the prayer for "any other reliefs and orders" deemed just and equitable, as contained in prayer (4) in the chamber summons thus made pursuant to the Court's supervisory powers over District Courts, in terms of section 44 (1) of the *Magistrates' Courts Act*, Cap 11 (R.E. 2002).

DATED and DELIVERED at Dar es Salaam this 21<sup>st</sup> day of November 2012.

**F. Twaib**  
**JUDGE**