



**Ogwankwa v Nyaruri & 4 others (Miscellaneous Application
96 of 2023) [2024] KEHC 13522 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 96 OF 2023
TA ODERA, J
OCTOBER 31, 2024**

BETWEEN

CYRUS ANYONA OGWANKWA PLAINTIFF

AND

MAUTI NYARURI 1ST DEFENDANT

BENJAMIN BITERA NYARURI 2ND DEFENDANT

KENYATA MOIRURUKI 3RD DEFENDANT

DENNIS ALLOYS 4TH DEFENDANT

DISHON ONSERIO 5TH DEFENDANT

RULING

Introduction

1. The Applicant has approached this court with this instant Application seeking an order of this court compelling the Respondents to produce his brother one Didmus Omweri Onkundi who he alleges to have gone missing in the year 2010. He claims that the 1st Respondent called his brother in 2010 and since then he has never been able to see him. He also avers that he reported the matter to the DCI who advised him to file this Application in this court.
2. He equally claims that during the hearing of a case; ELC CASE NO. 75 of 2017 which he had filed against the respondent, the respondents had testified that the 1st Respondent bought a parcel of land that was the subject of the said suit from the said Didmus Omweri Onkundi who later moved to Kericho. He thus contended that the Respondents having given such testimony in court, they are fully aware as where his brother is and thus should be compelled to produce him by this court.



3. In response to the Application, the Respondents filed a notice of preliminary objection and grounds of opposition contending that the suit was bad in law since the Applicant did not have any locus to file the suit. The respondents equally claimed that the suit was res judicata given that there were several suits filed by the Applicant against the Respondents. The Respondents also contended that the Applicant did not file before any evidence to prove that he had been advised by the police to file this Application.
4. During the Interpartes hearing of the Application I, with the consent of all parties, directed the Application to be canvassed by way of written submission. Both parties to this Application filed their submissions for my consideration.

Issues of Determination

5. On perusal of the Application, the response thereto and the submissions of the parties the sole issue for determination is Whether the Applicant has raised reasonable grounds to sustain an application for habeas corpus for production of Didmus Omweri Onkundi.

Analysis and Determination of the Issues

6. It is trite law that court has powers to issue the writ of habeas corpus, compelling the production of a person illegally detained. The writ of *habeas corpus* is a special and supervisory jurisdiction which empowers the High Court to oversee, safeguard and uphold the liberty of a citizen in the event of an illegal incarceration. The writ of *habeas corpus* is enshrined under articles 25(d) and 51(d) of the [Constitution](#) as a fundamental right from which cannot be derogated. Murithi J in Mombasa H.C. Petition No. 7 of 2014 [Masoud Salim Hemed v D.P.P](#) set out the requirement that one must meet before he can be granted an order of habeas corpus. He observed thus:

“The general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. As stated in the case of MA. Estrelita D. Martinez v. Director General & Ors., supra, “the petitioner must establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the respondents.” In this case the petitioners were able to establish, and this was admitted by the respondents, the arrest of the subject by the police and the question is on whether the police had custody of the Subject at the time of the habeas proceedings”

Section 389 of [Criminal Procedure Code](#) provides that; -

- (1) The High Court may whenever it thinks fit direct—
 - (a) that any person within the limits of Kenya be brought up before the court to be dealt with according to law;
 - (b) that any person illegally or improperly detained in public or private custody within those limits be set at liberty;
 - (c) that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;
 - (d) that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;



- (e) that any prisoner within those limits be removed from one custody to another for the purpose of trial; and
- (f) that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.

7. It is gainsaid then that in the instant application, the Applicant is required to demonstrate that the subject was in the custody of the Respondents. However, from the facts of this case, it is outright that the Applicant is not stating that his brother is illegally being detained by the respondents. He is only alleging that the Respondents are the persons who know his whereabouts given that they had averred in the Environment and Land Court in Kisii ELC Case No. 75 of 2017 that his brother had sold to the 1st Respondent a parcel of land that was the subject of the said suit before he moved to Kericho. The Applicant cannot in certain terms aver that in deed his brother is being detained unlawfully by the Respondents in Kericho. He is in fact shifting the burden of proof to the Respondents contrary to the provisions of section 107 of the Law of *Evidence Act* by contending that since the Respondents had talked of his brother being in Kericho, it goes without saying that they are the ones who know where his brother is and thus should produce him. As a matter of fact, the Applicant did tender such proceedings of the Environment and Lands Court for consideration before this court.
8. It is clear that an order of habeas corpus can only issue where there is proof that a person in an unlawful custody whether privacy or of a State agency. From the forgoing therefore since it has not been demonstrated in this application that the subject is being held by the Respondents, and the Respondent cannot therefore be linked to his disappearance or to be unlawfully detaining him. The application herein thus does not raise any reasonable cause of action against the Respondent.
9. The application is frivolous, incompetent and a gross abuse of the process of this court. The preliminary objection is upheld and in the end, the application is struck out with costs to the respondents.

It is so ordered.

T.A ODERA

JUDGE

31.10.24

Delivered virtually in the present of:

Applicant

Respondents are absent

Court Assistant - Oigo

