



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CONSTITUTIONAL PETITION NO. 6 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3, 10, 12, 14(1)-(3), 16, 19, 20(1)-(4), 21, 22, 23, 24, 28, 29, 47, 159, 165(3), 238, 244, 245, 258 AND 259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF RIGHTS AND DENIAL OF RIGHT TO FAIR HEARING AND ALL OTHER ATTENDANT RIGHTS**

**BETWEEN**

**DELAILA NASIMIYU WAFULA .....PETITIONER**

**AND**

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

**THE DPP .....2<sup>ND</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**POLICE SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**LSK.....5<sup>TH</sup> RESPONDENT**

**AUCTIONEERS LICENSING COMMISSION.....6<sup>TH</sup> RESPONDENT**

**AND**

**ROSE NAKHUNGU OLWOCHI.....1<sup>ST</sup> INTERESTED PARTY**

**YVET OLWOCHI.....2<sup>ND</sup> INTERESTED PARTY**

**SAMSON ITONDE TUMBO.....3<sup>RD</sup> INTERESTED PARTY**

**ANWAR AHMED MOHAMMED.....4<sup>TH</sup> INTERESTED PARTY**

**R U L I N G**

By a Notice of Motion dated 31<sup>st</sup> December, 2019, the applicant seeks;

- a. That there be a stay of execution of the orders made on the 11<sup>th</sup> December, 2019 pending the hearing and determination of this application inter parties.
- b. That there be stay of execution of the orders made on the 11<sup>th</sup> day of December, 2019 in Bungoma Chief Magistrates Court Civil

Case No. 450 of 2018 pending the hearing and determination of this petition.

c. The forced consent order entered on the 18<sup>th</sup> December, 2019 be set aside pending the hearing and determination of this application inter parties.

d. Costs of the application be provided for.

The applicant avers that she filed Civil Suit No. 450 of 2018 in the subordinate court against the 1<sup>st</sup> and 2<sup>nd</sup> interested parties which was not properly handled by the court as she was not given an opportunity to be heard since the court did not have jurisdiction. She was not served with any notice on the bill of costs.

She depones that being dissatisfied with the way the case was handled, she filed the instant petition where the 1<sup>st</sup> -4<sup>th</sup> interested parties despite being served with the petition have not bothered to respond thereto.

She depones that recently, a notice to show cause was issued which she again was not served with. The affidavit of service in the file was not genuine since the mobile phone number purported to be hers is not hers.

That since she was not aware, the advocate misinformed court leading to a warrant of arrest being issued against her. That the 4<sup>th</sup> interested party has always used illegal means to deny her right to be heard in court.

That on the 17<sup>th</sup> December 2019, she was arrested and placed in police custody for more than 24 hours and forced to enter into a consent and thus prays that there be stay of any orders in Civil Suit No. 450 of 2018 pending the hearing and determination of this petition.

The 4<sup>th</sup> interested party filed his replying affidavit deponing that this court lacks jurisdiction to grant the orders sought in the application since it is not an appeal against orders issued in civil case no. 450 of 2018 where the applicant had filed a similar application dated 15<sup>th</sup> December, 2019 which is pending hearing and determination where the 1<sup>st</sup> and 2<sup>nd</sup> interested party are parties.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent filed a preliminary objection through the 4<sup>th</sup> interested party to the suit whereupon the court upheld the preliminary objection by striking out the applicant's suit with costs.

That upon striking out the suit, the 4<sup>th</sup> interested party prepared his bill of costs and served upon the applicant's counsel, assessment was done and the process of execution by attachment commenced.

He avers that after the auctioneer carried away the goods, an objection was filed for the return of goods which application is pending and the instant application cannot be used to canvass the issues for the release of the goods so carried.

That thereafter, he changed the mode of execution to warrant of arrest whereupon the applicant was arrested on 17<sup>th</sup> December, 2019 and a consent was recorded. Pursuant to the consent, the applicant paid to the 4<sup>th</sup> interested party the sum of Kshs 10,000/= in partial satisfaction of the consent order. The applicant thereafter defaulted.

That the orders of 11<sup>th</sup> December, 2019 have been overtaken by events and cannot be stayed as they have been executed rendering the instant application an academic exercise and further that there cannot be stay of execution on assessed costs and since the application does not touch on costs, the orders sought cannot be granted.

He depones that since the applicant has not appealed against the decision striking out her suit, this court cannot be moved in its original constitutional jurisdiction to set aside such orders. He depones that the applicant has not demonstrated any substantial loss she stands to suffer if the application is dismissed.

### **Determination**

The application was canvassed by way of written submissions. The parties complied and the issue commending itself for determination by this court is whether the applicant is entitled to the orders sought.

The law on conservatory orders is now well settled in this jurisdiction. For instance, in *Centre for Rights Education and Awareness (CREAW) & another Vs Speaker of the National Assembly & 2 others (2017) eKLR* the Court held:-

***A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.***

The applicant's main contention emanates from an order of 11<sup>th</sup> December, 2019 where the subordinate court issued a warrant of arrest against her in satisfaction of assessed costs. That she was not heard before the warrants were issued. That the execution of the said decree contravenes her rights.

It is a fact that there is Civil Suit No. 450 of 2018 where the applicant had sued the 1<sup>st</sup> and 2<sup>nd</sup> interested party represented by the 4<sup>th</sup> interested party, an advocate. The suit was struck out by the subordinate court for want of jurisdiction. The 4<sup>th</sup> interested party sought to recover his costs thus the petition and the instant application.

The criteria for deciding whether one has met the threshold for granting such order were enumerated in *Law Society of Kenya Vs Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR* where the court held;

*From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-*

- a) *First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.*
- b) *The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.*
- c) *Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.*
- d) *The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.*

Applying the above principles to the instant application, it is clear that there is pending litigation in the subordinate court on issues directly raised in the instant application. There are elaborate legal mechanisms for the applicant to take whenever she is dissatisfied by an order of a court.

This application is neither an appeal against the orders made in that court nor a challenge on the manner in which the proceedings were carried out by that court. There is no evidence that her constitutional rights have been violated or that there is an imminent threat on the same.

This court believes that the applicant's rights will be taken care of in the pending suit and the window of appeal or review is available to the applicant if she is dissatisfied with the orders of that court.

The court also notes that the applicant has partially complied with the orders of that court by making part payment in satisfaction of the consent order which has neither been challenged either in that court or by way of appeal.

In sum total, this court finds no merit in the application which is hereby dismissed. Costs shall abide the outcome of the petition.

**DATED AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.**

**S N RIECHI**

**JUDGE**