



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL APPLICATION NO. 235 OF 2019**

**IN THE MATTER OF THIKA PRINCIPAL MAGISTRATE'S CIVIL CASE No. 191 OF 2013**

**PHARASE MUCHIRA VS. MARY WANJIRU GACHU & THE HON. ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF CALLING FOR THE SUBORDINATE COURT**

**RECORD AND FOR THE PURPOSES OF GIVING DIRECTIONS**

**AND IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE**

**APPLICANT'S RIGHT TO FAIR TRIAL**

**IN THE MATTER OF UNFAIR AND UNLAWFUL COMMITTAL TO**

**CIVIL JAIL AND DENIAL OF REDRESS**

**IN THE MATTER OF ARTICLES 23 (1), 159 (2)(a),**

**165 3(5) ,(6) &7 OF THE CONSTITUTION**

**MARY WANJIRU GACHAU.....APPLICANT**

**VERSUS**

**THE MAGISTRATE'S COURT AT THIKA.....1ST RESPONDENT**

**HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**PHARACE MUCHIRA.....3RD RESPONDENT**

**RULING**

1. The circumstances in which the application dated 25<sup>th</sup> June, 2019 was made to this court under certificate of urgency are somewhat peculiar. As a perusal of the lower court file reveals, a suit, being **Thika CMCC No. 191 of 2013** had been filed by **Pharace Muchira** (the Respondent herein) against one **Mary Wanjiru Gachu** and the **Attorney General** seeking damages for unlawful arrest on account of an alleged malicious complaint/report of defilement against the Respondent made by the former to police at Gituamba, Thika.

2. It is admitted by both parties that there is a defense on record. However, an interlocutory judgment was entered against the Mary Wanjiru Gachu notwithstanding, pursuant to the Respondent's request dated 1<sup>st</sup> October 2013 and filed on 3<sup>rd</sup> October, 2013. The Respondent admits, and the file contains a corresponding endorsement though faint, dated 4//10/2013 by which judgment was entered against **Mary Wanjiru Gachu**.

3. Thereafter the matter proceeded between Respondent and the Attorney General, counsel for the Respondent severally referring the lower court to the interlocutory judgment against Mary Wanjiru Gachu. In the final judgment of the lower court delivered on 2<sup>nd</sup> August, 2017, by

**Ireri PM**, reference is made to the defence by Mary Wanjiru Gachu and her written witness statement, also on the record together with other documents filed by the said party.

4. The court found for the Respondent stating inter alia that: -

**“...[I]t was not in dispute that the plaintiff herein was arrested and detained at Gituamba Police Station from 22<sup>nd</sup> March, 2012 and ---- in custody up to 26<sup>th</sup> March, 2012... against the constitution. The report was made by the first defendant who was an agent of the state, therefore, I find that the plaintiff herein suffered and his constitutional right to be brought before the court on a reasonable period was violated and he is entitled to some compensation, I also find that the police detained the plaintiff in custody when medical evidence presented showed that there was no defilement. And the reason why the plaintiff was released without preferring any charges, to that extent I find the arrest and detention was malicious and unlawful, the police should have thoroughly investigated the case before arresting the plaintiff..., I therefore in the premises find in favour of the plaintiff and I proceed to award him Kshs. 400,000/= as general damages for malicious prosecution”.** (sic).

5. Based on this judgment, a warrant of arrest in execution was issued on 8/05/2019 against the judgment debtor therein. The Applicant herein who asserts that her name is **Mary Wanjiru Gachau** and not **Mary Wanjiru Gachu** states that she was on 18/06/2019 confronted by the court bailiff seeking to effect the warrant of arrest against her. When she appeared in court on 19/06/2019 accompanied by her counsel, the Applicant sought some seven days as her advocate put it “*to put her house in order*”, to which the Respondents’ advocate objected. In a brief ruling the court stated: -

**“No proposal has been made. JD (Judgment Debtor) be committed for 30 days. DH (Decree Holder) to pay for subsistence.”**

6. This order prompted the application to this court by way of miscellaneous cause. The application sought several orders key among them the release of the Applicant from civil jail and the calling up of the lower court file for purposes of giving directions as to further proceedings in the lower court suit. The motion invokes Articles 23 (1) and 165(6) & (7) of the Constitution and is supported by the affidavit of **Mary Wanjiru Gachau**.

7. In his replying affidavit the Respondent claims that the memorandum of appearance and defence filed in the lower court were not served upon his advocate; that interlocutory judgment could not have been entered if the defence had been filed; and that the presence of the “*memorandum of appearance and defence in the lower court file is a mystery*” to him and his advocate. He however proceeds to depose that the Applicant herein is the person sued in the lower court and who also filed the defence therein and that a typographical error omitted one letter in her middle name.

8. The court had directed the parties on 20/02/2020 to file written submissions in canvassing the application. None of the parties complied and on 17/06/2020 a ruling date was reserved. The Court will therefore determine the application on the basis of the respective affidavit material on record and the applicable law.

9. Ordinarily, this court’s jurisdiction concerning a civil matter in the lower court is invoked by way of an appeal. Nevertheless, the court having considered the application in the first instance ordered the release of the Applicant from civil jail, directing her to execute a personal bond of Kshs. 50,000/= and invoking its supervisory jurisdiction under Article 165(6) of the Constitution called for the lower court file.

10. The court has considered the affidavit material and the record of the lower court before it. Article 165 sub-article (6) of the Constitution provides that:

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”**

11. It is important to state from the outset that this court is not concerned with the merits of the final judgment of the lower but the process by which judgment was arrived at and the propriety of the subsequent execution process against the Applicant. The fact that the Applicant’s name was misspelt in the suit below is neither here nor there. She cannot convincingly deny that the intended defendant in the said suit is herself, else she would have vehemently protested on the first appearance in the lower Court on a warrant of arrest and before this Court. As it is, she was satisfied before this court to make what appeared to be fainthearted and indirect denials.

12. That said, Article 50(1) of the Constitution guarantees the right of every person to a fair hearing, while Article 29(a) provides that:

**“Every person has the right to freedom and security of the person, which includes the right not to be**

**(a) deprived of freedom arbitrarily or without just cause... “**

13. It appears from the record of the lower court that the proceedings therein grossly impinged upon the Applicant’s rights above. This court is persuaded that even though the format by which it was approached was unconventional, it had a duty to intervene by invoking its supervisory jurisdiction in light of the disclosed lapses in the court process undertaken following the filing of the defence and until the entry of the final judgment. Effectively, the Applicant who was eventually arrested in execution, was denied a chance to defend the suit despite a defence having been filed because an interlocutory judgment was entered against her.

14. Secondly, the Applicant was committed to civil jail based on the final judgment resulting from this flawed process. In **Dancun Nduracha v. Fuad Mohamoud Mahomed & 2 Others [2015] eKLR** the Court of Appeal affirmed this Courts’ supervisory jurisdiction by stating that:

**“The High Court has the jurisdiction to invoke supervisory jurisdiction to review decisions and proceedings of subordinate courts. Such supervisory jurisdiction can be invoked by the court of its own motion. (See Twaher Abdulkarim Mohamed V. IEBC & 2 Others [2014] eKLR. See also Law Society of Kenya V. Centre for Human Rights and Democracy & 13 others [2013] eKLR where this court differently constituted stated that it would uphold the supervisory jurisdiction of the High Court, in cases where there has been blatant abuse of the rules of natural justice”.**

15. The rules of natural justice include the basic right to a hearing- *audi alteram partem* -which is enshrined in article 50 of the Constitution. Additionally, section 3A of the Civil Procedure Act saves this courts inherent power **“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”**.

16. Reviewing the undisputed circumstances of this case, this is a proper instance for the court to intervene for the ends of justice and to prevent the abuse of the process of the court. In view of the orders that I propose to make, the less said the better. In the result, to vindicate the process of the court, this court makes the following orders: -

- (a) The order issued by the lower court on 19/06/2019 committing the Applicant to civil jail for 30 days is hereby set aside.
- (b) The personal bond executed by the Applicant on orders of this court on 27/06/2019 is hereby discharged.
- (c) The execution of the judgment dated 2<sup>nd</sup> August 2017 is hereby stayed.
- (d) The court directs that the motion dated 21<sup>st</sup> June 2019 filed in the lower court, seeking *inter alia* to set aside the judgment in the lower court suit be set down for hearing on priority basis.
- (e) For the purposes of (d) above, this court directs that a copy of this ruling be certified to the **CM’s Court at Thika** and transmitted alongside the lower court file to the said court.
- (f) The lower court suit be listed before Chief Magistrate Thika on 20<sup>th</sup> August 2021 for appropriate directions on the hearing of the motion dated 21/06/2019.
- (g) The Applicant is awarded the costs of the application dated 26/06/2019. These costs are to be paid by the 3<sup>rd</sup> Respondent, **Pharace Muchira**.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29<sup>TH</sup> DAY OF JULY 2021**

**C. MEOLI**

**JUDGE**

**In the Presence of:**

**Mr Maina h/b for Ms. Mwangi for Applicant.**

**Ms. Nyakora for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.**

**Kevin: Court Assistant**