



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION 13 OF 2015

**IN THE MATTER OF ARTICLES 1,2,3(1),10,19,20,21,22,27(1), (2) & (3), 28,35,41(1), 47(1) & (2),
48,50 (1) (2)(A) &(O) &258**

AND

**IN THE MATTER OF RULE 4,10,11,13 AND 20 OF THE CONSTITUTION OF KENYA
(SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27(1), (20 & 3), 28,35, 41(1), 47 (1), AND 50(1),2(A) AND (O)
OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTION 76 OF THE COOPERATIVE SOCIETIES ACT, CAP 490
LAWS OF KENYA**

AND

**IN THE MATTER OF MUKURWEINI PRINCIPAL MAGISTRATE'S CRIMINAL CASE NO.
493 OF 2014**

BETWEEN

MARY WANGARI GACIHI

RUMUKIA FARMERS' COOPERATIVE SOCIETY LIMITED...APPLICANTS/PETITIONERS

VERSUS

THE PRINCIPAL MAGISTRATE MUKURWEINI LAW COURTS

THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

This petition was preceded first by the Notice of Motion dated 21st September 2015 brought under

Articles 22, 23 162(2) (a) and 258 of the Constitution under certificate of urgency on 22nd September 2015 of Charles Wahome Gikonyo Advocate.

The Notice of Motion sought orders;

1. That pending the hearing and final determination of the petition, conservatory orders of stay be issued staying the orders dated 5th August 2015 and 14th September 2015 and all subsequent orders including warrants of arrests until further orders of this honourable court.
2. That the costs of this application be provided for.

The grounds for Notice of Motion and the urgency were that;

- i. That the first respondent had issued order to supply documents in violation of the applicant's rights and in violation of article 35 of the Constitution
- ii. That the first respondent has acted without jurisdiction
- iii. That the applicants were at risk of being arrested any time
- iv. That the committee members of the second applicant were not heard and that violated their right to be heard and fair administrative action
- v. That the applicants were not parties to the criminal case and adverse orders had been issued against them.
- vi. That the dispute between a Cooperative Society and a member or its officials can only be heard by the Cooperative Tribunal under section 76 of the Cooperative Societies Act CAP 490 Laws of Kenya.

This was supported by the affidavit of Mary Wangari Gachihi.

On 23rd September 2015, the matter was placed before Justice Ngaah granted ex parte the conservatory orders of stay staying the orders dated 5th August and 14th September 2015 and all subsequent orders including warrants of arrest until further orders of the court.

The respondents did not oppose the motion and the order was confirmed on the 29th September 2015.

The Petition was also supported by the affidavit of Mary Wangari Gachihi.

The background to this petition is that one Samuel Thande Njogu (herein after the accused person) was charged with two counts before the Mukurweini SPM's court in criminal case no. 493 of 2014. Count one was incitement to violence contrary to section 96 of the Penal Code and count two was failing to notify the regulating officer of an intent to hold a public meeting contrary to section 5(1)(2) of the Regulation of Public Meeting and Processions 10 of 1997 as read with section 11 of cap 56 of the Laws of Kenya.

Of relevance are the particulars to the first count where it was alleged that "on the 10th day of November 2014 at 11:00 AM at Kagunyu coffee factory in the Mukurweini sub- County within Nyeri County, without lawful ,excuse uttered words e.g. *(Nyinyi wakulima wa Kagunyu kahawa na pesa zenu imeibiwa na hawa polisi wamekuja pia ni wezi)* which words implied that it might be undesirable to cause damages at Kagunyu coffee factory an act which was calculated to lead to destruction of Kagunyu factory the property of Rumukia Coffee Society. "

When the matter came up for hearing on the 10th May 2015 before the Hon Munguti PM, the accused person made an application for summons for the Secretary of Rumukia Farmers Co-op Society Ltd to

appear so that he could make an application to be supplied with a raft of documents namely;

- 1. Minutes of the AGM of 11th December 2014, 23rd March 2015, Special AGM of 11th September 2012, management meeting of 23rd September 2013, Factory meeting of 19th October 2014 at Kagunyu, DCIO meeting held at Muyu Chief's camp on 8th October 2014,*
- 2. Society PCR for 2013/2014*
- 3. Audit report by Co op Ministry 2013-2014*
- 4. Task force 2012-2013*
- 5. Audited Accounts for Financial Year 2013 and 2014*
- 6. Payment late analysis for final payments dated early (Feb or March 2015)*
- 7. Coffee transport permit for Kagunyu and Gatura coffee factories dated 13th November 2014*
- 8. Way bridge tickets for the coffee*
- 9. Society Case HCC 22/2014 Nyeri and 20/2014 Nyeri*
- 10. Police OB of 13th November 2014 touching on this matter, investigation diary, DCIO report from Othaya DCIO*
- 11. Any other document the prosecution will rely on the case.*

The Court allowed his application for the summons with the full list of documents attached to it.

On the 17th June 2015, the court was told that the summons was served and one Margaret Wangari had failed to appear. A warrant of arrest was issued against her.

On 23rd June Mary Wangari appeared and informed the court that she was the Secretary of the 2nd applicant and that though the documents sought were available, the society had engaged an advocate.

The court proceeded to issue an order for her to supply copies of the documents to the court pending the appearance of the advocate. The matter was fixed for 7th of July 2015.

On that date counsel for the society Mr. Wahome Gikonyo appeared.

He submitted that the Mary Wangari objected to the summons because she was neither a witness nor a complainant; that the case had not started, that the accused had no right to have 3rd parties summoned to supply him with documents and this was an abuse of the court process as the documents he sought were irrelevant to the charges, and that the summons were a violation of Mary's constitutional rights.

The accused in response cited Articles 48 on access to justice, 50 on fair trial, 2(3) on the sovereignty of the Constitution, and 35 of the Constitution on the right to access to information, saying that he needed the documents to prepare for his defence.

The court prosecutor submitted that the documents the accused was asking for were not part of the evidence that the prosecution intended to rely on in prosecuting their case. Further that the prosecution had already supplied all the evidence they intended to rely on to the accused person. The prosecution supported the objections raised by Mr. Wahome for the applicants.

Mr. Wahome submitted that the court had no jurisdiction to issue orders under Article 35

In a ruling made on the 5th August 2015, the court invoked the provisions of Articles 20(3)(b) and 22(4) of the Constitution and found that the accused person had a right under article 35 to be supplied with information to prepare for his defence.

The objections by Mary Wangari to the summons were dismissed and ordered to supply the list of 15 documents within 21 days.

On 14th September 2015 a further order was issued to the OCS Mukurweini Police Station to assist the accused person to obtain the said documents.

The matter was then fixed for 21st September 2015 for mention to confirm compliance.

The petitioners contended that the first respondent's actions granting these orders against them was in blatant violation of the provisions of the Constitution in that

- i. The court had no jurisdiction to grant the orders under article 35 of the Constitution
- ii. The court condemned the second petitioner's committee members unheard
- iii. The lower court assumed the jurisdiction of the High Court
- iv. The court denied the petitioners their rights under the Constitution
- v. Only the High Court or the Cooperative Tribunal could deal with the accused's request

The petitioners sought the following orders;

- i. A declaration that the act of the first respondent in granting an order for supply documents under article 35 of the Constitution was without jurisdiction and in violation of the petitioners rights under articles 29, 31, and 47 of the Constitution.
- ii. An order quashing the order of the first respondent dated 5th August 2015 and 14th September 2015 and all the subsequent orders
- iii. Any other or better order this court may deem mete and just to grant.

The petition was served on and received by the office of the Attorney General and Dept. of Justice on the 23rd September 2015. One C. Masaka, Litigation Counsel came on record for the 1st and 2nd respondents on the 3rd December 2015 vide a Notice of appointment dated 30th November 2015. No responses were filed to the petition.

Despite service with mention notices the office of the Attorney General and Dept. of Justice AG never appeared in court, and neither did they file any submissions.

The only issue for determination is whether the magistrate had jurisdiction to grant the orders made under Article 35 of the Constitution.

It is noteworthy that the accused person's application was grounded on the rights of an accused to access evidence that may be used against him as guaranteed under Article 50(2) (j) "*to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence*".

However, the prosecutor clearly stated that they would not be relying on any of the documents the accused was asking for. With regard to the charges the accused was facing, none of the documents he was

seeking were evidence/ intended evidence against him. In any event the Constitution places the burden of supplying all the evidence intended to be used against an accused person on the prosecution. Hence, the summons to Mary Wangari could not issue under the provisions of article 50 (2)(j) of the Constitution.

It is possible the court could have considered the application under section 144 (1) of the Criminal Procedure Code CAP 75 Laws of Kenya .

(1) If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.

However, there is nothing on the record to show that the accused person established that the documents were ‘material evidence’ and that the same had not been availed to him voluntarily.

On the issue of article 35 of the Constitution, Hon. Justice Mativo addressed it in the ruling dated 17th February 2017 on the application made by the accused person to be made a party to this petition. He had pointed out that the magistrate’s court had no jurisdiction to grant the orders in question.

Article 23 of the Constitution is the one that provides for the authority of courts to uphold and enforce the Bill of Rights; The High court is conferred with jurisdiction as seen in article 23(1) which states;

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The subordinate court is provided for under sub article (2)

Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Parliament expressed itself in the Magistrate’s Court Act, 2015, which came into force on the 2nd of January 2016, at section 8 in the following terms;

(1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate’s court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.

Clearly the jurisdiction of the Magistrate’s court is limited to articles 25 (a) and (b) which states as follows;

25. Fundamental Rights and freedoms that may not be limited;

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;

It goes without saying that the magistrate did not have the jurisdiction to give the orders he did under Article 35 of the Constitution.

In any event, by the time of his orders in 2015, the Magistrate's Courts Act, 2015, had not come into force, and even if it was in force, it had not conferred jurisdiction on him.

I find that the words of Nyarangi JA in **Lillian 'S' [1989] KLR 1** resound loudly here; that

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Without jurisdiction, all the orders the magistrate made to enforce the accused person's rights under article 35 of the Constitution are null and void.

Is it possible this is the reason for the failure by the office of the Attorney General and the Dept. Of Justice to file any responses? We will never know.

Be that as it may, I find that the accused's rights to fair trial had not been violated as the prosecution had provided the evidence they were going to rely on in the Criminal proceedings. His right to challenge any evidence against him remains, and should the need arise to obtain any documentary via article 35, he has access to the High Court which is clothed with that jurisdiction.

In the circumstances, the Petition is allowed and I issue the following orders:

1. A declaration that the act of the first respondent in granting an order for supply documents under article 35 of the Constitution was made without jurisdiction, and therefore null and void.
2. The order of the first respondent dated 5th August 2015 and 14th September 2015 and all the subsequent orders is, and are hereby quashed.
3. The Criminal case against the said Samuel Thandi Njogu to proceed to trial, if it had stalled by didn't of these proceedings.

It is so ordered

Dated, Delivered and signed at Nyeri this 20th Day of September 2017

Teresia Matheka

Judge

In the presence of;

Edward Mwangi Muchoki – Treasurer of the Rumukia Farmers Cooperative Society Limited who states: Our lawyer Mr. Wahome said we can have the ruling in his absence.

N/A for the C. Masaka Litigation Counsel, office of the Attorney General and Dept. of Justice for the respondents.