



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 515 OF 2015

BETWEEN

HILDA NYARUAI THUKU.....PETITIONER

AND

CHIEF MAGISTRATE NAIROBI.....1ST RESPONDENT

COUNTY CRIMINAL INVESTIGATIVE OFFICER, NAIROBI.....2ND RESPONDENT

THE DCIO LANGATA POLICE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JOSIAH MUSILI.....5TH RESPONDENT

JAMES WAWERU MACHARIA.....6TH RESPONDENT

RULING

1. For determination, is a Notice of Motion brought under rules 3(2), (3), (4), (5) and (8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Applicant, who is the 5th Respondent in the Petition, seeks the following orders;

(a) that the Petition dated 19 November, 2015 be dismissed with costs,

(b) That the Petitioner pay the 5th Respondent's costs of this Application.

2. The Application was supported by the affidavit sworn by the Applicant on 8 April, 2016, and the grounds stated on the face of the application. The grounds ran thus:

(a) that the petition filed herein by the petitioner is mischievous with an attempt to influence the outcome of an ongoing criminal matter in which the 6th respondent is accused of stealing a motor vehicle, which forms the subject of the entire petition.

(b) that this honourable court had issued an order on 8 January 2016 dismissing the petitioner's Chamber Summons seeking conservatory orders to obtain the motor vehicle which is disputed in

the petition.

(c) That the petitioner herein has not challenged the said order which was given by this honourable court.

(d) That there being no challenge to this order, the main substratum of this petition has been settled with nothing more for the petitioner to pursue before this court.

3. It is necessary to state a brief background set to this matter.

4. The applicant and the petitioner are involved in criminal proceedings before the Kibera Law Courts being **Criminal Case No. 4610/2015** in which the 6th Respondent is accused of stealing a motor vehicle contrary to section 268(1) as read with section 278(a) of the Penal Code.

5. The Petitioner moved this court claiming a breach of her fundamental rights and freedoms under articles 40 and 47 claiming an infringement on her right to own and enjoy property, and in that regard, sought conservatory orders under certificate of urgency, beseeching this court to grant orders restraining the 1st through the 4th Respondents from retaining the motor vehicle in their custody.

6. The 5th respondent however opposed the application for conservatory orders, citing among other reasons, that the said motor vehicle was the matter of interest in the ongoing criminal case, in which the 6th respondent is an accused.

7. The Applicant, through his counsel Mr Kyalo submitted that the court had an inherent jurisdiction to dismiss cases where appropriate and that in the instant case the Petition ought to be dismissed as the substratum of the Petition had been overtaken by events.

8. He further submitted that the motor vehicle that the Petitioner sought to have reclaimed is material evidence in Criminal case No. 4610/2015 and that the Petitioner should not interfere with the proceedings in the criminal case.

9. He urged that this court strike out the Petition in its entirety to enable the smooth flow of the proceedings in Criminal case No. 4610/2015.

10. The petitioner asserted that the fact that the Petitioner did not challenge the court order dismissing the application for conservatory orders is an indication that there is nothing further to pursue in the Petition.

11. Counsel Mr. Thuita, submitted on behalf of the Petitioner, and opposed the Application on the grounds that the fact that an application for conservatory orders had been dismissed did not mean that the Petition had no merit.

12. He buttressed this argument with the decision in **Constantine Mwikamba vs. Institute Chartered Practitioners and Accountants High Court Const. Petition No. 225 of 2014**, wherein it was stated that the standard of evidence needed in the Application for conservatory orders is different from that required in the main petition.

13. He further submitted that the substratum of the case was still intact and all the petitioner sought were a vindication of her proprietary rights over the motor vehicle.

14. Mr Thuita contended that the discretion to strike out the Petition is a power that the court should always use sparingly. He urged the court to dismiss the application.

15. The square issue for determination is whether this court should dismiss the instant petition summarily without going to its merits.

16. The Applicant has submitted that the orders made by this court dismissing the Petitioner's application for conservatory orders rendered the main Petition nugatory as the substratum of the Petition effectively ceased

17. The rules guiding the issuance of conservatory orders in the interim are relatively clear. At that interlocutory stage of the proceedings an applicant only need establish a prima facie case. The court is then not bound to make any firm definitive and conclusive findings of fact or of law. Such determinations and findings can only be made after hearing the petition substantively.

18. The substratum of the Petition revolves around the rival proprietary rights of the parties. A determination will ultimately have to be made and it need not only be made before trial court. The ultimate determination, the contest being of a civil nature, will have to be made by a civil court. This court may be in a position to determine that issue. I do not see how the existence of the petition may compromise the criminal proceedings.

19. The application in my view is lacking in merit. It ought to be dismissed and is hereby dismissed with costs to the Petitioner.

Dated, signed and delivered at Nairobi this 19th day August, 2016

J.L.ONGUTO

JUDGE