



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CRIMINAL APPL. 17 OF 2014

JULIA NJERI WACHIRAAPPLICANT

Versus

DIRECTOR OF PUBLIC PROSECUTION.....1st RESPONDENT

COMMISSIONER OF POLICE2nd RESPONDENT

THE OCS NYERI POLICE STATION3rd RESPONDENT

RULING

BACKGROUND

1. The applicant on 18th June 2014 filed an application under certificate of urgency under section 389 (1)(a)(b) of the Criminal Procedure Code, Article 22(1)(2) 49 (1a-h)(2) and 51(2) of the Constitution of Kenya 2010 in which she sought an order of habeas corpus in respect of one JORAM WACHIRA MWANIKI who was alleged to have been unlawfully held by the 3rd Respondent.
2. The application was certified urgent and fixed for interpartes hearing. In respond thereto the 3rd Respondent filed an affidavit through Chief Inspector Raphael Gaa in which it was deponed that the subject had not been arrested but had been escorted to Raphaelite – Redhill place Centre for treatment, rehabilitation and counseling of addictive illness at the request of one SARA NJERI (the interested party).
3. The affidavit was filed in response to the court order of 23rd June 2014 wherein it was ordered that the 3rd respondent produce the subject in court on 4th July 2014. Miss Kitoto for the State on the said date submitted that since the subject was never arrested the OCS could not produce the same in court. The court at that stage allowed SARA NJERI the interested party to address the court upon which she stated that her brother had earlier in 2009 been taken to the said institution through the assistance of the police. The matter was therefore fixed for mention on 8th July 2014 for further orders.
4. On 7th July 2014 Mr. Gori for the applicant informed the court that the family members had failed to meet as ordered by the court and that the applicant had been denied access to the victim at the centre where he was not being attended to. Since the applicant had denied that the subject was sick the court ordered that the doctor attending to the subject prepare and submit medical report on the same and the applicant was allowed to see the subject with a doctor of her own choice to prepare a medical report and submit the same on 16th July 2014. Further the court allowed the interested party to be enjoined in the proceedings.
5. On 13th July 2014 Mr. Gori for the applicant informed the court that his client had been denied access to the subject to enable her doctor examine the same and therefore sought an extension of three (3) days. Mr. Wahome for the interested party brought the mother of the subject to court and

further informed the court that Dr. Okonji had stated that nothing had changed in respect of the subject since his medical report of 18th July 2014. The matter was therefore fixed for further mention on 23rd July 2014 for purposes of receiving the two medical reports.

6. On 23rd July 2014 Mr. Gori appeared before the court and informed the court that his client did not wish to proceed with the application and sought to withdraw the same. Mr. Wahome for the interested party opposed application for withdrawal on the ground that it was being made in bad faith since the applicant after being granted an order to go to the centre with a doctor of her choice stole the subject and moved to the High court in Nairobi family division and filed suit No. 133 of 2014 seeking orders in respect of the same. He therefore submitted that the applicant was in contempt of court.
7. Mr. Gori in reply submitted that he was not aware of proceedings in another court and that his instructions were limited to having the subject produced.
8. Based upon the said information the court found that the applicant herein and the petitioner in petition No. 133 of 2014 Nairobi had abused the court process and therefore in the interest of justice ordered the later suit stayed pending further orders of this court. The applicant was further ordered to return the subject to the Raphaelities – Red hill place for treatment under the care of Dr. Okonji and to appear before court on 30th July 2014 to show cause why she should not be cited for contempt of court.
9. On 28th July 2014 the applicant under certificate of urgency through his new advocate Mr. Ngugi filed an application seeking to stay the execution of the order of 23rd July 2014 and setting aside or review of the said orders on the ground that the said orders were made on the basis of misleading and untruthful submissions made from the bar by the advocate of the interested party without any evidence and thereby burdening the applicant to come before court to show cause why she should not be cited for contempt.
10. It was submitted by Mr. Ngugi that the orders were obtained irregularly and therefore ought to be set aside. It was further submitted that once the state filed a response that it was not holding the subject the proceedings became spent. In support of the submissions herein the applicant relied upon the following cases

a) MARIAM MOHAMED & ANOTHER V THE COMMISSIONER OF POLICE & ANOTHER MISC. CRIMINAL APPLICATION NO. 732 OF 2007 NAIROBI in support of the submission that the habeas corpus application was spent.

b) BAKARI ALI KASIRANI V STANLEY MUEMA WANGUYE HCCC NO. 599/1999

c) KENYA PIPELINE CO. LTD V TRANSNATIONAL BANK LTD & OTHERS HCCC NO. 569/2005

d) CHUMO ARAP SONGOK V DAVID KABIEGO ROTICH CIVIL APPEAL NO. 141 OF 2004

e) LEONARD MUTUA MUTERU V BENSON KATELA OLE KANTAI & OTHERS (2014)eKLR all in support of the powers of the court to set aside orders.

11. It was further submitted that the court order issued herein to return the subject to the centre was irregular and abrogated the subject right under Article 57(a). It was submitted that the applicants rights under Article 45 were violated. It was submitted that the order staying the proceedings in Nairobi were not in the best interest of the subject since the issue raised therein were of a different nature and that the applicant had not abused the court process. In support thereof the following cases were submitted.

a) SIMIYU V STANDARD CHARTERED BANK (K) LTD NAIROBI HIGH COURT CIVIL CASE NO. 899/94 reported in (1994)LLR 1152(HCK), on abuse of the court process

b) OSERO & CO. ADVOCATES VS LABHSON LTD MIS. APPL. NO. 160/2005 NAIROBI.

c) NGINYO INVESTMENT LTD V MOBILE PAY LTD NAIROBI HIGH COURT CIVIL SUIT NO. 289/2010 on the procedure and proof of in contempt proceedings.

12. Mr. Gori by permission of the court addressed the court and confirmed that he had informed the court that the applicant had been turned away from the medical centre since she did not carry a court order which order he extended but the applicant did not come for it. He confirmed that the applicant had stated that there were allegation in Dr. Okonji's medical report which were not true and therefore she required another medical report. He further confirmed that the parties agreed that the court proceed with the matter even after the state had filed an affidavit in the best interest of the subject.
13. Mr. Wahome in opposition to the application submitted that the application was based upon wrong principle since Articles 27(1), 45, 50 and 57 do not give the court the power to grant order of review or stay. He submitted that the matter before the court had not been spent since the court had not made any final order in respect of the same. At the instance of the applicant the court made an order for further medical report to enable the same decide on the orders to be made. He submitted that the new application would have been a response to the notice to show cause and not a basis for review.
14. Mr. Wahome further submitted that the application had not met the conditions for review which are error on the face of record, discovery of new and important evidence or for any sufficient cause. He submitted that the order was not made on the basis of misinformation but on the basis that court of justice does not act in vain since it had made an order for production of medical reports it was in order for the same to ask the applicant to show cause as to why she had gone before another court with the same medical report she had denied.
15. It was submitted that the action by the applicant amounted to an abuse of the court process. It was submitted that the contempt proceedings was not commenced by the interested party and therefore the right procedure was not applicable.
16. From the submission herein and the history as set out the court has identified the following issues for determination.

a) Has the applicant made out a case for review of the orders issued herein on 23rd July 2014?

b) What is the right procedure to be followed by a party if faced with notice to show cause.

c) Did the applicant abused the court process for which she should be held liable in contempt.

1. I must point out that explanation as to where the subject was the application for habeus corpus should have been spend and that the applicant was at liberty to discontinue the same. However it must be noted that at the said time the subject was in a medical facility and the applicant had denied that the same was unwell whereas the interested party had stated and supported by the medical report by Dr. Okonji that the subject was unwell it was on this basis and taking into account the provision of Article 159(1)(b) and (d) that the court made the orders in respect of the two medical reports herein.
2. I therefore take the view that the court having made the orders in respect of the production of the medical reports herein all the parties before the court the applicant interest were under an obligation to honour the said order and or to offer an explanation as to why the said order could not be honoured. In this I find support in the case of HADKINSON V HADKINSON 2ALLER 1952 pg 56A where Ropper L J state:

“It is plain or unquantified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even in cases where the person affected by an order believes it to be irregular or even void”.

3. I would therefore agree with the submissions by Mr. Wahome that the applicant was under obligation to tell the court why she could not produce a medical report as ordered by the court

before moving to withdraw the application herein. Further this court having issued an order for notice to show cause the best procedure would have been for the applicant to appear before the court on 30th July 2014 and to place the materials herein before the court as to why she was not in contempt of court.

4. It must be noted that obedience of court order is fundamental to the administration of justice and rule of law and as was stated by Ndalo J in TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS (2013)eKLR

“28 the reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law”

5. By filing a petition No. 133 of 2014 while this court was proceeding with matter in respect of the subject and using the medical report which she had denied to be valid and correct and without informing the court of change in position as submitted by the applicants advocate I find that the process of the court was carried out without honesty and good faith and the applicants action in filing the later suit in the family Division at Nairobi amounted to forum shopping.
6. Having said so can the court review the orders herein before the applicant show cause?

It should be noted that there is the rights and the interests of the subject who is a victim of circumstances and the applicant having admitted that the same is sick in her petition No. 133 of 2014 and is therefore in need of care and that the issues in respect of his custody can be best handled in the said petition I am inclined to review my orders granted herein as follows:

a. The order directing the applicant to appear before this court to show cause is hereby set aside.

b. To enable the Family Division at Nairobi decide on all the issues including whether the suit should be transferred to the civil registry at Nyeri for trial and determination I hereby set aside my orders staying the said proceedings.

c. I further order that the file be transferred to the Family division at Nairobi and be placed in Petition No. 133 of 2014 for record purposes.

d. Each party shall meet their own cost.

Dated, signed and delivered at Nyeri this 26th day of September 2014.

J. WAKIAGA

JUDGE

Read in open court by Justice J. Abuodha on behalf of Justice J. Wakiaga.

J. ABUODHA

JUDGE