



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 529 OF 2010 (O S)

UFANISI CAPITAL AND CREDIT LIMITED.....PLAINTIFF

VERSUS

1. STEPHEN KIPKENDA KIPLAGAT

2. PAUL LILAN AND

3. PHILEMON KOECH

T/A KIPKENDA, LILAN & KOECH ADVOCATES.DEFENDANTS

RULING

The 1st defendant has filed a Notice of intention to raise a Constitutional issue on the plaintiff's Notice of Motion dated the 22/8/11. The notice is brought under Articles 25, 29, 50 and 165 and Rule 23 of the Constitution (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of individuals through Court Practice and Procedure Rules 2006).

The 1st defendant /applicant raises the following Constitutional issues which he seeks to have the court determined in limine pursuant to Rule 23 namely that;

- i. Is it Constitutional, pursuant to right to a fair trial enshrined under Article 25 of the Constitution of Kenya 2010 to seek committal to Civil Jail of the person of the 1st defendant on the basis of an interlocutory order before the main Originating Summons is heard and finally determined.
- ii. Is it constitutional for this court to commit the 1st defendant to civil jail for the inability to comply with an order when that inability is not deliberate, willful or negligent but is otherwise pursuant to a lawful agreement whose legality is not contested.
- iii. Are the intended orders of committal of the 1st defendant inconsistent with Article 29 of the constitution which guarantees freedom from cruel, inhuman and/or degrading treatment?
- iv. Are the provisions of sections 1A, 1B, 3A, 40, 63(a) and 89 of the Civil Procedure Act inconsistent with the provisions of Article 25 read together with Article 50 of the Kenya Constitution in the context of the orders sought in the motion dated 22/08/2011?
- v. Is committal to civil jail for failure to abide by a court order with viable legal reasons(s) a violation of the 1st defendant's constitutional right as well as Articles 11 of the International Covenant on Civil and Political Rights for which Kenya is a signatory ratified on 1st May 1992?

That 1st Respondents seeks interpretation of the said Articles by the court pursuant to the provisions of Article, 165 (3) (b) and (d) and (4) of the Kenya Constitution 2010 in which case should the answer be in the affirmative, then the 1st defendant/respondent seeks dismissal in limine of the Notice of Motion dated 22/8/11 with costs .

The 1st defendant in his written submission gave the factual background as follows; that the defendant acted for the plaintiff in a sale transaction of a property L.R No. 209/2582 dated 27.01.2010.

Contrary to the said agreement, the 1st defendant was also duty bound to pay commission to a 3rd party by the name Dasahe Limited vide an agreement dated 26/03/2010 and in particular clause (2) of the said agreement. This agreement was between the plaintiff and the 3rd party. That the 1st defendant did pay the said sum to Dasahe limited of Kshs.31, 500,000 a fact which is not disputed by the plaintiff and Dasahe has admitted before this court that it did receive the said payment. That at the time the present proceedings were instituted that 1st defendant did not hold any money on account of the plaintiff and could not therefore be in a position to abide by the court order of 08.04.2011. Refusal to honour the court order is for reasons(s) that are lawful and/or legal. That these facts were brought to the attention of the Judge (Hon. Dulu J.) who by an interlocutory ruling delivered and dated 08/04/2011 ordered the defendant to deposit the disputed amount in court. That the court of Appeal vide a ruling dated 29.07.2011 refused to stay that order through it conceded that the intended Appeal is not frivolous or rather is arguable. That the 1st defendant has since lodged the substantive appeal against that ruling which is Civil Appeal Number 91 of 2011 raising in total ten (10) grounds of Appeal. That this court vide a ruling dated 11.11.2011 refused to allow the third party to be enjoined in to these proceedings and in the same ruling the court declined to rule on whether or not the defendant has a right of audience although the issue was canvassed at length before it. The 1st defendant was aggrieved and has preferred an appeal against this ruling and have since filed and served a Notice of Appeal and sought for proceedings. That the substantive originating summons is yet to be heard. Indeed directions have not been taken.

Based on this background the 1st defendant argues that the 1st defendant has shown cause why the orders sought against him cannot be issued as he has shown that he paid out the money to the 3rd party pursuant to a lawful agreement entered into between the plaintiff and the 3rd party in the presence of the 1st defendant. That the 3rd party has admitted receipt of the money and sued for the balance in a suit pending in court and that therefore the 1st defendant has no money to deposit in court.

The 1st defendant argues that the issue of right of the 1st defendant to be heard is *res judicata* by virtue of section 7 (explanation 4) of the Civil Procedure Act. That this court has the inherent jurisdiction to safe guard interest of both parties before it. That the 1st defendant has not willfully or deliberately disobeyed the court order but has been unable to comply with reasons advanced. That the 1st defendant has shown cause why such drastic order should not be issued until the issues in controversy are finally determined by either this court or the court of appeal.

The 1st defendant poses the question whether it is constitutional for the court to make the orders sought against the 1st defendant. To answer to this issue he submits that since the Originating Summons has not been heard on merit it would be against the cardinal principle of Article 25 of the Constitution of Kenya to commit a person to prison on an order issued at an interlocutory stage. That it is against the principles of the right to a fair trial under Article 25 and Article 50 of the Constitution to commit a person to prison for inability to comply with the court order which inability is not deliberate or willful but backed by good reasoning which are legal in nature and before he has been heard fully in the dispute. That the right to a fair trial cannot be limited by any Act of Parliament and especially of the Civil Procedure Act. That the provisions of the Civil Procedure Act invoked to seek committal to prison are inconsistent with the constitution and therefore null and void to that extend.

That Articles 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 prohibits deprivation of basic freedom by way of enforcement of a civil debt through imprisonment. That the matter before this court the money in issue is yet to become a civil debt (see **HCC No 19 of 2010 in the matter of Bankruptcy Case No. 10 of 2010 by virtue of article (2) (5) and (6) of the Constitution of Kenya 2010**). That the Notice of Motion is improperly before the court and to take him to prison files on the face of the Constitution and he seek a dismissal of the Motion with costs. Whilst submitting orally in court Learned Counsel for the applicant relied on the provisions of the constitution cited in their objection and on the case of “**Re the matter of Zipporah Wambui (2010)**”

eKLR on the alleged interference with the respondents rights before they gave their side of the story.

Mr. Macharia for the 2nd and 3rd respondent submitted that they are raising the issue of the constitutionality of the application to commit the defendant to civil jail. That the issue is the interpretation to be given to Article 24(1) (c) of the Constitution. That the rights of liberty is conferred on all citizens by Article 29 of the constitution that these rights can only be limited by being committed to jail for a criminal offence and to civil jail as described in the Civil Procedure Act to enforce the performance of a decree and thirdly that the right can be limited for contempt of court. That Article 24 of the constitution introduces the principles of proportionality and that there are several guidelines that every decision making body must bear in mind when it is to determine the right to limit one's liberty. Counsel in his submission elaborated on the said guidelines as provided under Article 24 of the Constitution. Counsel reiterated Mr. Njuguna's submissions on the International law which has been adopted by Kenya in its relation to violation of individual rights. He urge the court to find that the application *ab initio* is unconstitutional.

Mr. Havi for the plaintiff responded as follows; that the High Court made an order that the sum of Kshs.31,500,000/- be deposited in court within 30 days. The respondents appealed against the said order and the court of Appeal did not grant the said orders. Later the respondent came to court and stated that they should not pay the money but that a 3rd party should be included in the proceedings so as to pay. A ruling on this matter was made on the 10/11/11. That the respondent has now come to court asking to stay and hold that the requisite to conform to the compliance of the order of 8/4/11 is unconstitutional. That the respondents request cannot be granted as they are asking this court to undermine 2 decisions of this Court and the Court of Appeal. That this is not permissible in law or by the Constitution. That the application dated 22/8/11 has not been heard and it is not known if it will succeed or fail yet the respondents have come to court to say that whatever the outcome it will be unconstitutional. That the respondents are subjecting the court to hypothetical arguments that is not the court's business. That the constitution is clear. Counsel went ahead to distinguish this case and that of **Zipporah Wambui (2010) eKLR**. He argued that the circumstances were different and that Justice Koome's decision on arrest and imprisonment is not binding to this court, since the avenue they have sought to use to enforce their order of 8/4/11 is provided from the Civil Procedure Act. Counsel argued that a pursuit of a remedy under a statute cannot be said to be unconstitutional. That the Civil Procedure Act 2010 came way after the promulgation of the constitution and therefore the rule cannot be said to be unconstitutional.

Counsel relied on the case of **KBS & 2 others Vs. Attorney General** to advance his argument that constitutional challenges can only be raised between the citizens and the state and as a state organ and that they cannot be taken to defeat enforcement of remedies under private law. Counsel stated that this was the same argument in the case of **Alphone Mwangemi Munga & 10 others Vs. Africa Safari Club Ltd (2008) eKLR** and the case of **Richard Nduati Kariuki Vs. Leonard Nduati Kariuki and another (2006) eKLR**. Counsel argued that the originating summons has not been determined but the court has stated in 2 decisions that the money must be paid. That court orders must be obeyed. That lack of paying the money cannot be said to be a constitutional issue. He urged the court to dismiss the notice and to proceed to hear the matter.

In reply Mr. Njuguna argued that this court is not functus officio as the matter has not been heard, that the court of appeal did not direct payment of any money nor did it stay execution. That this court is still seized of the matter and they are not challenging the order of 8/4/11 but they are challenging the provisions of the Civil Procedure Rules which have been invoked to procure imprisonment before or trial is done. That all the authorities relied on by the applicant related to constitutional rights and they are not binding to this court. That they are asking this court to look at Article 2 and find that to invoke any law that gives the power to seek civil jail before one is heard as invalid. That the issue of constitutionality was not canvassed at the Court of Appeal as this is the court with the said jurisdiction and if the provisions of any statute are inconsistent with the constitution then this court can make such orders.

Mr. Macharia in response stated that his submission on Article 24 are targeted not at the right to enforce but the means to do so. That any party can come to court to challenge the provisions of the Civil Procedure Rules even if it was enacted after the constitution. That Section 38 of the Civil Procedure Act

gives the hierarchy of the things to be done before any one arrives to the option to arrest.

I have considered the submissions made and the law and the authorities relied on by the parties. On the authorities I note as follows, the cases cited by the plaintiff deal with constitutional issues and the cases cited by the applicant's deal with issues of contempt and procedure of contempt proceedings. I will first deal with the law.

The plaintiff's Notice of Motion upon which the applicant has raised a constitution issue is dated 22/8/11. It is brought under section 1A, 1B, 3, 3A, 38, 40 63 (a) and 89 of the Civil Procedure Act cap 21 Order 22 Rule 26 and Order 51 of the Civil Procedure rules 2011. It seeks the following orders.

“That warrant of arrest be issued against Stephen Kipkenda, Kiplagat Paul Lilan and Philemon Koech to be brought to court to show cause why they should not be committed to prison for refusal to comply with the court order made on the 8th of April 2011 directing them to deposit the sum of Kshs.31, 350,000/- in court within 30 days from the date of the order”.

This application was filed by the plaintiff after the court issued orders on the 8/4/11 after Justice Dulu heard the Originating Summons dated 8/11/10 which sought amongst other on order that the defendant be directed to pay the said sum of Kshs.31,500,000/-. The applicant seeks to have this court determine issues raised in its notice. Under Rule 23 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rule 2006 the High court is empowered to deal with any constitutional issue that has been raised on a matter before it to treat such issue as a preliminary point and to hear and determine the same. The applicant has raised issues as stated in his notice dated 29/11/11. The applicant seeks to have this court determine the issues in light of the provisions of Article 25, 29, 50 and 165 of the Constitution of Kenya 2010. Article 25 of the constitution deals with the fundamental rights and freedoms that shall not be limited. Amongst the said rights is the right to a fair trial. Article 29 deals with the freedom and security of persons. It states as follows

“Every person has the right to freedom and security of the person which includes the right to be

- a. ***Deprived of freedom arbitrarily without a just cause.***
- b. ***Detained without trial except owing state of emergency.***

These above 2 sub Articles are the relevant ones for this matter.

Article 50 provides for fair hearing and details the rights to be accorded to an individual to a fair hearing. Article 165 provides for the establishment of the High Court under article 165 sub article (d) (1). Article 165 (1) (d) (i) provides that the High Court shall hear any question respecting the interpretation of the Constitution including the determination of;

The question whether any law is inconsistent with or in contravention of this Constitution.

The Civil Procedure Act is an Act of Parliament that makes provisions for procedure in civil suits. Rules are provided under the said Act that guide the Civil Courts on application brought under the said rules. In the Notice of Motion the plaintiff has moved the court is under section 1A, 1B, 3, 3A, 38, 40,63 (a) and 89 of the Civil Procedure Act and Order 22 Rule 26 of the Civil Procedure Rules and order 51. To determine the issues raised, I have looked at the Articles cited and the provisions of the Civil Procedure Act Rules. The constitution in the Articles cited does protect the right to a fair trial and liberty of an individual. Can it therefore be said that the application to seek the warrant of arrest and committal to civil jail of the applicant for failure to comply with a court order issued on the 8/4/11 interferes with the applicant's right to a fair trial and that the intended orders are inconsistent with Article 29 which guarantees freedom from cruel human and degrading treatment.

As already stated the Civil Procedure Act provides for the procedures to be followed in Civil Courts. The application that was filed was before the High Court. It is a civil matter. An order was issued on

the 8/4/11 that has not been compiled with. The plaintiff has subsequently under the relevant provisions of the Civil Procedure Rules moved to court seeking orders for warrant for committal to civil jail. The applicants were served. The application is yet to be heard. Having been served, I find that the applicant has been accorded a chance to respond within time and hence the provisions of Article 25 and 50 have been complied with. The provisions cited in the application by the plaintiff are provisions that any party cites in moving the court's jurisdiction in Civil Suit. The matter is yet to be heard and determined. No order has been issued. It therefore cannot be argued that the provisions cited by the plaintiff under the Civil Procedure Act and rules are inconsistent with the provisions of Article 25 and 50 of the constitution. In my view the court shall hear the application and determine it on its merit. The applicant will be given a chance to be heard. The provisions cited by the plaintiff in the application from the Civil Procedure Act do not in any way curtail the applicant's right. A party has a right even at an interlocutory stage to move a civil court and seek an order for committal to jail arising from an act of contempt when an order is disobeyed. I am not saying that the applicant have not obeyed the order but the Civil Procedure Act provides for procedure on how to deal with one who has failed to obey a Court order. In enacting these provisions of the law in the Civil Procedure Act and Rules Parliament was well aware of the Article 25, 29 and 50 of the Constitution. To hold that these provisions of section 1A, 1B 3A 40, 63 (c) and 39 of the Civil Procedure Act are inconsistent with the provisions of the Article 25 and 50 would render the rules of practice useless and would turn the entire Civil process chaotic.

I note that Article 11 of the International Covenant on Civil and Political Rights for which Kenya is a signatory and ratified on the 15th May 1972 are important however I do not agree with the applicants submissions that when a court gives an order for committal to Civil Jail in the appropriate circumstances there will be a violation of the 1st defendant constitutional right as provided the said Article. The 1st defendant shall be given a chance at the hearing to show cause why the orders should not be granted. If procedure has not been followed then the applicant is at liberty to raise objection on the same and the court shall determine the issue raised. I find no merit in the constitutional issues raised and dismiss the preliminary objection raised. Let the parties proceed with the application scheduled for hearing.

Orders accordingly.

Dated, signed and delivered this 6th day of August 2013.

R. E. OUGO

JUDGE

In the presence of:-

.....**PLAINTIFF**

.....**1ST DEFENDANT**

.....**2ND AND 3RD DEFENDANTS**

.....**COURT CLERK**