



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

PETITION NO.96 OF 2010
BETWEEN

PARMINDER SINGH MANKU.....1ST
PETITIONER/APPLICANT

HARJEET SINGH MANKU.....2ND
PETITIONER/APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

THE COMMISSIONER OF POLICE.....2ND
RESPONDENT

R U L I N G

1. What is before me is a Notice of Motion dated 9th December 2010 premised on the provisions of **Article 23(3)(b)** of the **Constitution** and **Rules 6, 10 and 12** of the **Constitution** of Kenya (*Practice and Procedure Rules*), Legal Notice No.6/2006. The inherent power of the Court is also invoked. The Applicants seek Orders that directions be given in light of the constitutional issues raised; that there be a stay of the proceedings in Milimani H.C. Civil Case No.656/2010; that there be a stay of execution of the warrant of arrest issued against the Applicants in H.C. Civil Case No.656 of 2010 and that the said warrants be lifted.

2. I have read the elaborate grounds in support of the Motion as well as the Supporting Affidavit of Parminder Singh Manku and the arguments by the Applicants can be summarised as follows;

3. That the two were initially Directors of Kewal Contractors Limited (*hereinafter referred to as “the Company”*) but at some point, the 2nd Applicant ceased to be a Director and was replaced by one, Tarnjit Singh Manku. Prior to the departure of the 2nd Applicant, the Company was granted a hire-purchase facility by Southern Credit Banking Corporation Ltd which later changed its name to Equatorial Commercial Bank Ltd. (*herein referred to as “the Bank”*). The Bank then took the log-books for seven (7) motor-vehicles belonging to the Company and held a right of lien over them.

Further, that the Applicants created a charge over L.R. No.209/8343/155 and L.R. No.15052 in favour of the Bank as further security for repayment of the sums of money advanced to the Company.

4. The Applicants further state that when H.C.C.C. No.656/2010 was filed, no service of Summons was effected on them and the 1st Applicant was surprised when his advocate, one Mr. Magare informed him that warrants of arrest had been issued against him for non-payment of Kshs.49,332,771/- allegedly due from the Company to the Bank.

5. It is as a result of the threat of arrest that he rushed to this court and on 17th December 2010, Gacheche, J. issued Orders staying the proceedings in H.C.C.C. No.656/2010 and with that Order, the execution of the warrants of arrest was also stayed.

6. The Applicants further alleged that there was no jurisdiction to issue the warrants of arrest as the debt was owed by the Company and not the Applicants; that their rights to freedom of association, to the protection of the Law, access to Justice, to family life, fair trial and freedom of movement were all breached hence the Prayers set out above.

7. The response by the Respondents is that the Petition and the Application are both misguided because the real issue is the contest regarding the non-payment of monies due to the company and the Respondents role was limited to effecting the warrants of arrest lawfully issued. Further, that if the Applicants were aggrieved by the issuance of the warrants, then their remedy was in an Application for review, setting aside or appeal and not a Petition under the Constitution.

8. It is also the case for the Respondents that the issues raised are of a contractual nature and should be dealt with in a Civil Suit and not in the manner that the Applicants have done.

9. The Interested Party, (*the Bank*) in a Replying Affidavit sworn on 22nd July 2011 has urged the point that whereas it was true that the Applicants and the Bank entered into a hire purchase agreement and motor-vehicles registration numbers KAQ 459 G, KAN 394 H, KAS 947 Z and KAU 909 P were the ones taken on hire-purchase on certain terms, the Applicants also signed Deeds of Guarantee and bound themselves to repay, on demand, any monies due to the Bank.

10. Further, that the Company failed to abide by the terms of the hire purchase agreement and it also fell into debt with other parties leading to Winding Up Petition No.12/2010 by Karisma Company Ltd. Attempts at repossessing the hired motor-vehicles were unsuccessful as the Applicants deliberately acted in concert to avoid their liability. The Bank then had no choice but to institute H.C.C.C. No.656/2010 and although the Company and Applicants admitted indebtedness and executed documents restructuring their repayment of the debt, they still effect any repayment and so the Bank decided to secure its interests, it filed an Application within H.C.C.C. No.656/2010 and sought orders of arrest of the Applicants to show cause why they should not furnish security for payment of the sums claimed in the Plaint. The Orders were granted by Mugo, J. under **Order XXXVIII Rules 1, 2, 3, 4 and 12 of the Civil Procedure Rules**, because the Bank had satisfied her that the Applicants were intending to dispose of their properties and leave the Court's jurisdiction and avoid any decree being executed against them. The Respondents have also argued that instead of attending Court to show cause why they should not be arrested, the Applicants filed the present Petition, obtained orders of stay of the warrants *ex-parte* and yet none of their constitutional rights had been violated. Further, that arrest is not *per se* a violation of the Constitution and therefore the Notice of Motion dated 9th December 2010 should be dismissed.

11. From the above summary of the positions taken by the parties, only one issue needs to be addressed; whether the warrants of arrest were issued without jurisdiction and whether the issuance thereof violated the Constitution.

12. Firstly, the Court that issued the warrants was the High Court in its original civil jurisdiction under **Section 60(1) of the Repealed Constitution** which is equivalent to **Article 165(3)(a) of the Constitution, 2010**. It is not my understanding that the same Court sitting in its jurisdiction under **Section 84 of the Repealed Constitution** (similar to **Article 165(3) (d)**) can purport to determine the legality or constitutionality of the actions of a Court of similar and concurrent jurisdiction. Divisions of the High Court are administratively created and cannot purport to create jurisdiction that is not conferred by the Constitution. I am ably guided in that view by the decision of the Court of Appeal in Peter

Ng'ang'a Muiruri vs Credit Bank Ltd & Anor, C.A. No.203/2006 where it was stated as follows;

“There is no provision in the Constitution which establishes what Nyamu, J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.

With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional court. Instead it talks about an Application being made to the High Court.

In view of what we have stated above, it is quite clear that Nyamu, J.’s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other Courts. The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional court as opposed to creating a division of the High Court.

Any single Judge of the High Court in this county has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a Court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of The Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd [1989]KLR I “Jurisdiction is everything. Without it, a Court has no power to make one more step”.

13. I am wholly in agreement with the above proposition and I should add that the practice, lately popularized by Litigants and their Advocates, of filing Petitions before the High Court seeking Orders that the self-same High Court in its Civil and Criminal Jurisdiction has violated their constitutional rights, must stop. I am aware that my learned brother, Majanja, J. has taken the same view in Fleur Investment Ltd. Vs Permanent Secretary, Ministry of Roads & Anor, H.C. Petition No.173/2011 and in (Rtd) Major Shadrack Mutia Muiu vs. Prof. Kivutha Kibwana, H.C. Petition No.281/2006 and that should be a sufficient reason not to allow the Application.

14. Secondly, even if I were to assume Jurisdiction, it is clear to me that there is no substance in the Application before me. I say so because when the Bank appeared before Mugo, J. on 1st October 2010, the learned Judge did not actually issue warrants of arrest against the Applicants for purposes of incarcerating them but for purposes of them attending court and showing cause ***“why they should not furnish security for their appearance in the sum of Kshs.51,743,502.08/-“*** The Application leading to those Orders was heard initially *ex-parte* and parties were that the Applicants would appear before the learned Judge on 7th October 2010 but they never appeared and instead rushed to this Court. The Judge invoked **Order XXXVIII Rule 1** of the **Civil Procedure Rules** provides as follows;

”1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of Section 12 of the Act, the Court is satisfied by Affidavit or otherwise-

(a) that the defendant with intent to delay the Plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him-

(i) has absconded or left the local limits of the jurisdiction of the Court; or

(ii) *is about to abscond or leave the local limits of the jurisdiction of the Court; or*

(iii) *has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof; or*

(b) *that the Defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,*

the court may issue a warrant to arrest the Defendant and bring him before the Court to show cause why he should not furnish security for his appearance;

Provided that the Defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the Plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court."

15. If the Applicants were dissatisfied with the above Order, their remedy was an appearance to make argue their case at the *inter-parties* stage or seek a review of the Order or a setting aside thereof or even an Appeal. Any arguments that their right to the protection of the Law, access to Justice and fair trial cannot be fairly raised in the circumstances. Arguments of violation of their freedom of association and movement or right to family life would also be merely fanciful and based on no substance at all. Lord Diplock correctly stated in the case of Chokolingo vs. The Attorney General of Trinidad and Tobago [1981] 1 WLR 106, that;

"It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of Appeal. As it is a living, so must the Constitution be an effective, instrument."

16. I wholly agree and I would have been happy to think that although the Applicants have other remedies, a Constitutional relief may still be available. I am unable to do so in this case when it is obvious that the Applicants are merely invoking the **Constitution** to avoid their contractual obligations. They have admitted indebtedness and must face up to that reality and not hide under the protective cloth of the **Constitution**. Nowhere in the Application before me have they stated that they owe nothing and have fully met the expectations of their guarantees. The **Constitution** must also protect the Bank as it must protect the Applicants.

17. Lastly, it is clear to me that the Applicants are merely abusing the Court process and are not deserving of any Orders as regards the warrants of arrest and their attempt at hiding under the guise of violation of Constitutional rights cannot succeed.

18. The Motion dated 9th December 2010 being an abuse of Court process is dismissed with costs to the Respondents.

19. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF APRIL, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA – JUDGE

Irene – court clerk

Mr. Nyaribo for Petitioner

No Appearance for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE
20/4/2012

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