



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 4 OF 2010

JAMES KINGORI GIKONYO.....EX-PART APPLICANT

VERSUS

**PRINCIPAL MAGISTRATE NAKURU
LAW COURTS.....**

.....RESPONDENT

JUDGMENT

James Kingori Gikonyo, the Ex parte applicant, seeks the following orders against the Principal Magistrate's Court Nakuru:-

1. That the warrants issued against the applicant by the Principal Magistrate at Nakuru Law Courts in Criminal Case No. 7609 of 2009, in Republic V James Kingori Gikonyo be quashed.

The application was supported by a statutory statement dated 4/1/2000 and verifying affidavit sworn by the applicant on the same date. Mr. Githui, counsel for the applicant also filed skeleton arguments on 16/6/2010. The State Law office, Nakuru was served but there was no appearance at the hearing nor was any reply been filed by them.

The court notes that there is an error in the prayer sought in the Notice of Motion in that the applicant is not the person charged in the lower court but one Henry Kibue Mwaniki. The Criminal Case should read No.7609/2009 **“REP. V HENRY KIBUE MWANIKI.”**

The applicant stood surety for an accused person by name Henry Kibue Mwaniki in PM CRC No. 7609/08 on 22/12/08 where the accused was charged with the offence of obtaining money by false pretences. The charge sheet was exhibit (JKG1). The accused was released on bond of Kshs.500,000/- with the applicant as a surety, after the same was approved. When the matter came up for hearing on 22/2/09, the accused did not appear in court and the court issued summons (JKG3) against the applicant to produce the accused person in court or forfeit the sum of Kshs.500,000/-. On learning of the summons, the applicant started to look for the accused. The applicant traced the accused and he appeared in court on 22/5/09 for the hearing and his bond was cancelled. The applicant contends that despite the fact that the applicant had caused the applicant to appear in court after the warrant of arrest had been issued, (JKG3) a warrant of arrest was issued against him. The accused remained in custody as the case proceeded to hearing and on 4/12/09 the Senior Resident Magistrate released accused on fresh bond terms and another surety (Ex.JGK4). It is the applicant's contention that the Principal Magistrate's order that he should be arrested is made in excess of his jurisdiction because the purpose of bond was to ensure attendance of the court by the accused person and that it is the duty of the surety to procure the accused attendance. Once the accused is produced in court, the surety is deemed to have performed his duty.

I have had occasion to read the submissions made before the trial magistrate on 24/6/09 after the accused had absconded and the ruling of the said court. The court recalled the conduct of the accused who absented himself from the court on various occasions which prompted several adjournments. The lower court record shows that on 17/6/09, when the accused was absent, the court issued a warrant of arrest for the accused and a summons for the surety (the applicant). On 19/6/09 the investigating officer informed the court that the surety had been served with the summons but he never attended the court. It is after that the court issued a warrant of arrest for the surety. Meanwhile, the accused was arrested and detained in remand after the court observed that the accused, with impunity, had failed to attend court on various dates. It is worth noting that although it is the duty of the surety to ensure that the accused attends the court when he is required to, it seems the applicant never procured attendance of accused on any date and did not attend court on any date to explain the absence of the accused. On the date the accused was detained, the applicant claims that it is him who took accused to court. However, there is no evidence on record that the applicant was in court. If the applicant had been in court, he would have been allowed to explain the accused's absence and that he had produced him. Infact on the date the accused attended court on 24/6/09 before arrest, the advocate Mr. Machage told the court that it is him who took accused to court. There was no mention of the surety. It is against that background that the summons and later warrant of arrest were issued.

This court is in agreement with the applicant's submission that if accused fails to appear in court the duty of the surety is to procure the accused's attendance or pay recognizance pursuant to **Section 131** of the **Criminal Procedure Code**, after being required to show cause why he cannot produce the accused or pay the recognizance. If the surety does not show sufficient cause, then his property may be attached if he cannot pay. In the instant case, the surety failed or neglected to honour the summons. The question is how would the court procure the surety's court attendance except by a warrant of arrest? The release of accused on fresh bond came much later. But even if the court were to withdraw the warrant of arrest, it could only have done so later. The question is was the warrant of arrest issued in excess of jurisdiction or was that action high handed? I have already considered what happened in the lower court. Despite summons having been issued against the applicant, the applicant neglected or ignored it and never attended court. The only way to get him to the court was by way of warrant of arrest and I find that the magistrate did not act in excess of jurisdiction. If the applicant was available he would have offered an explanation to the court and the court would have dealt with the matter then. The applicant cannot keep away from that court and purport to run to this court for protection. He who comes to equity must come with clean hands. The applicant's hands are not clean. His conduct in the lower court in failing to assist the court in accordance with bond terms and later his failure to obey the court summons would not entitle him to the exercise of this court's discretion. The applicant cannot disobey one court's order and expect to get protection from the other. This court would be sending a wrong message to the public. The court must be treated with the dignity that it deserves. It must be remembered that Judicial Review orders are discretionary and sometimes the court will not grant them even if deserved. The **SUPREME COURT PRACTICE RULES 1997 VOL. 53/1-14/14** states as follows:-

“Even if a case falls into one of the categories where Judicial Review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case.”

The applicant's conduct is not deserving of this court's exercise of its discretion to grant Judicial Review orders. Judicial Review deals not with the merits of a decision but reviews the decision making process. If the applicant is aggrieved by the issuance of the warrant of arrest he should have to show cause why it was wrongly issued or he can appeal.

In sum, I find that the applicant has not demonstrated that the magistrate acted in excess of jurisdiction or abused his power. There is no evidence of vindictiveness or bad faith. The applicant should go back to the lower court to respond to the warrant of arrest or appeal. The application is therefore dismissed with the applicant bearing the costs.

DATED and DELIVERED this 18th day of March 2011.

**R.P.V. WENDOH
JUDGE**

PRESENT:

Mr. Githui for the ex-parte applicant.

N/A for the respondent.

Kennedy – Court Clerk.