



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

PETITION NO. 17 OF 2011

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40, 48, 50 AND/OR AS READ TOGETHER WITH ARTICLES 19, 20, 21, 22, 23 & 24 OF THE CONSTITUTION OF KENYA

**DR. VICTOR KIOKO MUNYAKA.....
PETITIONER**

-VERSUS-

- 1. THE HON. THE ATTORNEY-GENERAL**
- 2. THE MINISTER FOR INTERNAL SECURITY
& PROVINCIAL ADMINISTRATION**

RESPONDENTS

- 3. THE COMMISSIONER OF POLICE**
- 4. RISING STAR COMMODITIES**

RULING

When this matter was mentioned on **9th May, 2011** this Court directed that it be brought up alongside several other files, to enable the Court to get the full picture and be able to appreciate the background to the applicant's complaint. The other files are as follows:

- (i) Mombasa HCCC No. 66 of 2007 – Rising Star Commodities Limited v. Dr. Victor Kioko Munyaka;**
- (ii) Mombasa H.C.Misc.Civil Application No.40 of 2011: In the Matter of an Application for Leave of Court to institute contempt proceedings for disobeying Court Orders.**

The three causes of action are connected, as is quite clear from the Ruling in the contempt of Court application; the relevant part of that Ruling, given on **17th February, 2011** reads as follows:

“The applicant is seeking leave to commence proceedings in a matter of contempt of Court, against officers of the Police. The reason is that this Court's orders of 25th June, 2010 requiring the arrest of

the subject have repeatedly not been complied with.

“Today, the Assistant Commissioner of Police in charge of Operations, Mr. Wilfred Mbigi has asked the Court to allow him three weeks to co-ordinate with the Attorney-General on the matter. Learned counsel Mr. Muteti, of the Attorney-General’s Chambers, has asked for some time to be able to take instructions.

“This Court takes judicial notice of the fact that this is a long-standing matter, in which the subject has failed to comply with orders of the Court.

“I have to state on record that such a position is untenable, and no single individual is going to succeed in evading the process of law and justice, or in evading the writ of the Court, so long as [such a person] remains within jurisdiction.

“I have to restate the existing Court orders, and require that they be strictly complied with, on the basis of urgency.”

The principal file, in the sense of originating all the causes of action, is *HCCC No. 66 of 2007*. In that file, *Mr. Justice Serгон*, on *9th May, 2008* made an order, against the petitioner herein, in the following terms:

“THAT a warrant of arrest be and is hereby issued to be executed by the Provincial Police Officer, Coast Province, to apprehend the defendant/respondent [Dr. Victor Kioko Munyaka] and bring him before the Court on 19th May, 2008 to show cause why he should not provide security of Kshs.3,155,124/=.”

Dr. Munyaka later came before this Court, through his Advocates, with two applications: Chamber Summons of *25th May, 2009*, and Notice of Motion of *22nd June, 2009*. In the first application the applicant [*Dr. Victor Kioko Munyaka*] prayed –

- (i) *that there be a stay of execution of the warrant of arrest;*
- (ii) *that there be a temporary stay of execution of the decree issued on 18th December, 2008 for Kshs.4,012,330/50 and all other consequential orders;*
- (iii) *that the Court be pleased to set aside the Judgment delivered on 18th December, 2008.*

In the second application *Dr. Munyaka’s* prayers were:

(a)*that there be a stay of execution of the decree issued on 18th December, 2008 for Kshs.4,012,330/50 and all other consequential orders and/or further proceedings;*

(b)*that the Court be pleased to review, vary and/or set aside its ruling issued on 4th June, 2009.*

At the hearing of the two applications, it emerged that, against *Dr. Victor Kioko Munyaka*, a warrant of arrest had been issued on *5th May, 2007*: but the subject, by making a plurality of applications, and by resorting to the services of different Advocates, obtained Court orders favouring him through material non-disclosures; for instance, he had not disclosed that a warrant of arrest was issued against him also on *14th June, 2007*. It was urged, at the hearing of the two applications, that the subject was not coming before the Court with clean hands, and so should be denied access to the discretion of the Court.

This Court, on the basis of the two applications, made its findings and orders, on *10th December, 2009* in the following terms:

“It is clear that what is substantially under challenge is the summary judgment [in favour of the plaintiff, in HCCC No. 66 of 2007]..., which judgment was regularly entered by the learned Judge, after the relevant motion was served upon the defendant’s [Dr. Victor Kioko Munyaka’s] Advocate. There is much obscurantism in the account coming from the defendant’s side, regarding his failure to be represented in Court when the application for summary judgment was being heard. The defendant’s mode of representation, in addressing the consequences of the summary judgment, is confusing, as there appears to be no well-designated Advocate who makes it his or her professional business to address the relevant litigious questions. The scenario emerging, just as Sergon, J noted when he

vacated earlier orders, is, in my perception, one of inscrutability, which could only emanate from a substantial amount of non-disclosure on the part of the defendant.

“I have found no basis to set aside the summary judgment which had been quite properly entered on 18th December, 2008. It follows that I am taking the position that all the consequences of the said judgment, as determined by the Court, must follow and, must be given effect.”

Both applications by ***Dr. Victor Kioko Munyaka*** were dismissed; he remained subject to the earlier orders duly made by the Court.

What the subject has now brought, as “*Constitutional Petition*” No. 17 of 2011, it is quite plain, is a new cause to neuter the judicial state of affairs described above. The firm of ***M/s. Momanyi & Associates***, acting through counsel, ***Mr. Mosoti***, filed a Petition on ***16th March, 2011***, and, within the umbrella of that petition, filed simultaneously an application by Chamber Summons.

The applicant’s prayers are set out as follows:

- (i) “THAT a conservatory order do issue by way of injunction or prohibition, restraining the 2nd, 3rd and 4th respondents whether by themselves, their officers, servants, agents and/or others howsoever, [from] arresting or continuing to detain the petitioner pending the hearing and determination of this petition”;***
- (ii) “THAT the petitioner/applicant be at liberty to apply for such other orders and/or directions as this Court may deem fit and just to grant.”***

In the applicant’s grounds, he sets out to challenge the Court’s orders in HCCC No.66 of 2007, and states that he “***has so far tried to have that Judgment reversed without success***”; he challenges the decree drawn on the basis of that Judgment; he contends that the 4th respondent had obtained a warrant of arrest against him “***without ascertaining at all if the petitioner has any other attachable property which can be used to satisfy the decree.***”

This is a clear recognition that there is a valid decree of the Court, to be satisfied; ***Dr. Munyaka***’s complaint is only in respect ***of the specific property to be the subject of attachment***: and if he were to come before the Court, a basis would emerge for rendering satisfaction to the Judgment creditor. The inference emerging at this point is that there does not exist a basis for resorting to the guarantees of the Constitution to contest the Court’s decree entered in accordance with obligations created by the Constitution itself (the Constitution of Kenya, 2010, Article 159(2)(a),(b),(c)).

Indeed, ***Dr. Munyaka*** fortifies that inference by stating as a ground of his application that “***the petitioner is an elected Member of [Parliament]***” and “***is not a man of straw without property.***”

Appearing before this Court on ***9th May, 2011*** learned counsel, ***Mr. Mosoti*** for the applicant, acknowledged that orders have been made under HCCC No. 66 of 2007; in his words:

“The Court made the orders for compliance. We are not appealing against those orders.”

Learned counsel, ***Mr. Muteti***, on behalf of the Attorney-General, submitted that in view of the prayers which were being made by the applicant under Petition No. 17 of 2011, the Police authorities were placed in a position wherein they lacked the competence to arrest the applicant – and hence the matter under the said petition should be disposed of. Counsel submitted that the tenor and effect of Petition No. 17 of 2011 was an obstacle to the Police competence in complying with the Orders made under Mombasa H.C. Misc. Civil Application No. 40 of 2011.

For the plaintiff in Mombasa HCCC No. 66 of 2007, learned counsel, ***Mr. Omulele*** made remarks on the linkage in the three causes in question, and on the fact that the main question is ***compliance with the decree*** issued in HCCC No. 66 of 2007. Counsel urged that the subject’s petition lacked a proper

foundation, unless **Dr. Munyaka** had an account to bring before the Court, regarding his “**compliance**” with the decree.

Mr. Omulele submitted that the Police officers had, instead of arresting the subject and bringing him before the Court, accorded him protection and empowered him to resist arrest. Counsel submitted that the subject’s failure to comply with the Court’s orders should not be clothed as a constitutional petition; and this point was set against the history of the claim: “**For some four years the petitioner has played games with the Court. He has even gone up to the Court of Appeal, on some of the issues; he has been locked out; he has never once obeyed the orders of the Court; he now comes to petition, asking that all other matters be stayed, so that he can be heard.**”

It was indeed necessary to consider the three files together; and this Ruling is, significantly, one of directions on how these files should be handled.

Although **Dr. Victor Kioko Munyaka** has filed a “constitutional petition” and an application under it, he has not denied that his sole object is to create a new forum that, *ex facie*, has the colour of legitimacy and urgency, for contesting a valid decree of the Court which, certainly, he has attempted to evade for several years. What the applicant brings as a constitutional petition, therefore, is but a subterfuge, intended to defeat the constitutional process as it is conducted through regular litigation before the High Court.

The applicant’s application by Chamber Summons dated **15th March, 2011**, consequently, **is** an abuse of the process of the Court, and a vain invocation of the provisions of the Constitution. The said application is hereby struck out, with costs to the other parties.

The Decree and the orders made in **HCCC No. 66 of 2007** remain in force, and shall be appropriately enforced.

The Orders and directions on record, under the plaintiff’s *ex parte* Chamber Summons of **4th February, 2011** shall remain in force, subject to such necessary variations as may from time to time be made by the Judge.

This matter shall be listed before a Judge for mention, directions and appropriate orders, regarding compliance with the Decree and orders recorded under Mombasa HCCC No.66 of 2007.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 29th day of September, 2011.

**H.M. OKWENGU
JUDGE**