



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

PETITION NO. 68 OF 2011

DUNCAN OGEKA MACHAKA..... PETITIONER

=VERSUS=

RACHEAL MORAA TURUNGI T/A
MORA INVESTMENT & GENERAL MERCHANTS.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The applicant/petitioner has brought a Notice of Motion application dated 28th September, 2011 which he seeks the following orders:-

- a) That the application be certified urgent and be heard on priority basis.
- b) That pending the hearing and determination of the application inter-partes the court be pleased to stay proceedings in **Kibera CM CRC NO. 2988 of 2011**.
- c) That pending the hearing and determination of the petition No. 68 of 2010, the Honourable Court be pleased to stay proceedings in **Kibera CM CRC NO. 2988 of 2011** until the petition is heard and determined.

The application is premised on Articles 19, 20, 21, 22, 23, 24, 27, 49 and 165 of the **Constitution of Kenya 2010**. The application was certified urgent in terms of paragraph (a) and set down for inter-partes hearing on 13/10/2011. The first and second respondents however did not attend court. Upon perusal of the affidavits of service on record and upon counsel's own admission, it emerged that the first respondent had not been served, while the second respondent (the Attorney General) had only been served the day before the hearing. The 2nd respondent had accepted service under protest. On that account, the court ordered that service be effected afresh and new dates for inter-partes hearing of the application be set.

Mr. Abobo for the applicant/petitioner urged the court to hear part of the application ex-parte for prayer to stay proceedings in **Kibera CM CRC NO. 2988 of 2011**, in view of the fact that a hearing of the same was set for Monday 17th October, 2011. He expressed fear that without a stay order, the criminal proceedings before the Kibera Court would amount to an infringement of the constitutional rights of the applicant/petitioner and that the High Court has jurisdiction to supervise the subordinate court.

I therefore address this limb of the application in this Ruling. The petitioner avers that he was arrested on 8th August, 2011 and was taken to court on 11th August, 2011 beyond the constitutionally mandatory period. He further avers that the criminal proceedings pending before the Kibera Court are being used to settle a contractual matter which rightly belongs to civil proceedings.

Without the benefit of a reply by the respondents caused primarily by lack of service, I am constrained to make a finding on any or all of the averments in the petition. From my perusal of the petition, I find that the proceedings before the Kibera Court are based on a Criminal charge.

It is a well established principle that an ex-parte injunction should ensue where an applicant will suffer irreparable injury that cannot be compensated in damages. In the present application, I am not persuaded that the petitioner will suffer irreparable injury if the criminal proceedings against him are not stopped. In deed he will have the opportunity to be heard during the trial. Further, I find that the criminal proceedings will in no way prejudice the hearing and determination of the petition.

I therefore dismiss the application for a stay order against proceedings in **Kibera CM CRC NO. 2988 of 2011** and order that the petition be served on the parties and be heard expeditiously. It is ordered.

Ruling dated, signed and delivered at Kisii this 14th day of October, 2011.

R. LAGAT KORIR
JUDGE

In the presence of:

Mr. Abobo for the applicant

Mr. Mongare court clerk

R. LAGAT KORIR
JUDGE