



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 770 OF 2007**

**JAMES GITUNGO NJIHIA .....PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF PRISONS & ANR.....DEFENDANT**

**RULING**

The applicant herein filed a notice of motion dated 8.07.11 under section 1A, of the Civil Procedure Act and Order 1 rules 1, 20, order 29 rules 1, 2 of Civil Procedure Rules with the prayer:

i) that judgement and liability be entered herein against the defendant on the basis of the judgement delivered on 5.7.11 in Nairobi HCCC 769/07.

The other prayer, about taxation in this matter being the same as in HCCC 769/07, is left to the parties to work out.

It was stated in the grounds that the claim by Stephen Nderu Njuguna against the AG in CC 769/07 was all on fours with the claims of James Gitungo Njihia and Dickson Mungai Kungu in CC 770, 771 of 2007 respectively. All three were released on the orders of Lesiit J in HC MISC CR Appl. No. 559/06. So all the 3 plaintiffs brought similar actions against the AG on the basis that they had been unlawfully detained for periods over and above those stipulated by law. HCCC 769/07 was heard with the result that the defendant was liable both on liability and damages as found in the judgement dated 5/7/11. Thus for the expeditious determination of the 2 other cases, it is prudent to apply the same findings on liability and damages as was the case in HCCC 769/07.

The supporting affidavit of the applicant repeated more or less what was stated in the grounds so did Dickson Mungai Kungu in HCCC 771/07, where a similar application had been filed.

The defendant (AG) filed grounds of opposition mainly that the application was bad in law and that there had been no order that HCCC 769/07 be treated as a test case for these 2 other cases. And that the respondent was keen to cross-examine the applicant (Dickson Mungai Kungu).

Given to submit in respect of both HCCC 770/07 and 771/07, Mr. Kamau for the applicants went over the history of the plaintiffs in the 3 cases which started with their conviction in a criminal case in the lower court, appeals, computation of sentences and how in the end sentences were erroneously computed by the prisons, giving rise to the present suits. There were similarities all the way and accordingly this court should apply the outcome in HCCC 769/07 to HCCC 770, 771 of 2007, exercising its discretion to do

justice and also to save on time and money.

And that the defendant's opposition on grounds of law and that there was no order to use HCCC 769/07 as a test case for the other 2, did not hold.

On his part the defendant argued that granting the orders sought by the 2 applicants could breach the principles of the right to due process, fair hearing, cross-examination and calling witnesses. That indeed a cause ought be decided on issues on record (see **Aga Wanjiru Mwanki Vs Jane Wanjiru Mwaniki** [1997] eKLR). And the court ought to assess the demeanour of a claimant to determine what he deserves or does not deserve.

In determining the 2 applications in HCCC 770, 771 of 2007, this court reverted to the judgement delivered on 5.7.11 and found that it had observed, *inter alia*, that:

**“The court was urged to apply the same awards to HCCC 769, 770, 771 all of 2007. The court does not know what these 3 cases are about or who the parties are. May they take their own course.”**

It is clear that that the decision of 5.7.11 was in HCCC 769/07. What the court therefore did not know was as regards HCCC 770, 771 of 2007, which are the subject of this application. It now emerges that the 2 plaintiff/applicants in them suffered the same fate as the plaintiff in HCCC 769/07. The court not having been asked to use the latter as a test case and the defendant insisting on his right to be heard and to benefit from the principles/rights he has put up in opposition to the prayers herein, it is directed that HCCC 770, 771 of 2007

**“ ..... take their own course.”**

The applications are thus dismissed with costs.

Delivered on 3.11.11.

**J. W. MWERA  
JUDGE**