



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**PETITION CASE NO. 487 OF 2011**

**MAURICE ALDOUS OPAR.....**  
**PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup>**  
**PETITIONER**  
**THE CHIEF MAGISTRATE KIBERA LAW COURTS .....2<sup>ND</sup>**  
**PETITIONER**  
**THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup>**  
**PETITIONER**

**R U L I N G**

The applicant, **MAURICE ALDOUS OPAR**, was on trial before the Resident Magistrate's Court, Kibera, in Criminal Case No. 343 of 2006. He is alleged to have obtained by false pretences.

The trial had reached the stage wherein the applicant had put forward his defence. Thereafter, the trial court set the date when it would deliver its judgment.

However, as the applicant believes that he had been deprived of an opportunity to call further evidence, he has moved this court for orders to arrest the judgment. He believes that if the trial court were to be permitted to deliver its judgment before the applicant had an opportunity of putting forward his further defense, he would be prejudiced in a manner that would be incapable of reversal.

For that reason, the applicant has filed a Petition before this court seeking, *inter alia*, an order compelling the trial court to allow the applicant to advance his defence

When the matter came up for hearing, the 3rd respondent raised a Preliminary Objection. It is his contention that the Petition was incompetent and fatally defective, for failing to comply with the

mandatory provisions of the requisite rules. The rules in issue are the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High court Practice and Procedure Rules, 2006.**

Mr. Omari, learned state counsel submitted that the Petition ought to have invoked **Rules 24, 25 and 26**. Instead, the Petitioner had invoked **Rule 12**, which the 3<sup>rd</sup> respondent believes to be applicable only when an alleged violation of fundamental rights occurs outside ongoing judicial proceedings.

As far as the 3<sup>rd</sup> respondent was concerned the applicant ought to have first raised the issue before the trial court. The said trial court would then have framed issues for determination by the High Court.

In answer to the Preliminary Objection, Mr. Anzala, the learned advocate for the Petitioner, submitted that this court ought to determine issues on merit.

He conceded that pursuant to **Rule 25**, a dispute ought to be raised before the trial court. However, he says that the case before me was peculiar.

The said peculiarity is said to stem from the failure by the advocate for the petitioner, to raise the issue before the trial court.

When the applicant realized that his advocate had not done the needful, he instructed another advocate. In those circumstances, the applicant says that his new lawyers could not have raised the issue before the trial court, as the trial court had already scheduled a date for judgment.

The applicant invites this court not to visit upon him the failure by his former advocates.

He says that this court should take into account the fact that he had brought the petition herein without any undue delay.

It is the applicant's contention that **rule 25** is procedural, and that the procedure does not go to the root of the petition. He therefore urged me to be guided by **Article 159 (2) of the Constitution**.

Having given due consideration to the issue, it is clear to me that the applicant has readily conceded his failure to comply with the provisions of **Rules 24,25 and 26 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.**

That concession is well advised because **Rule 25** stipulates as follows;

*“ where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.”*

By dint of the provisions of **Rule 26**, the presiding officer would be obliged to forward the reference to the High Court unless the allegation was frivolous or vexatious.

The procedure provided gives to the presiding judicial officer the opportunity to carry out the first assessment regarding the question whether or not the alleged contravention was substantive.

Secondly, the procedure makes it clear that it is only such question as is framed by the presiding judicial officer that will be determined by the High Court.

When a party does not go through the stipulated procedure, there arises a danger that the High Court will become inundated by applications, some of which would be construed as frivolous or vexatious. Secondly, when parties move directly to the High Court, they would not be limited as to the scope of the questions which they may raise before that court.

There are therefore good reasons why the rules were formulated the way they are.

To my mind, the fact that the advocates who were then acting for the applicant did not make an application to the trial court, does not stop the current advocates from doing so. The learned trial magistrate is still seized of the matter, and until judgment was delivered, he should be able to comply with **Rule 25**.

But would this court be running foul of **Article 159 (2) (d) of the Constitution of Kenya, 2010**, if it insisted that the applicant must comply with the rules of procedure, as set out in Rule 25?

To my mind, it is not open to any person to simply ignore rules of procedure, where the same are provided; and then urge the courts to administer justice without undue regard to technicalities. If there was no regard to rules and procedure, the judicial process may well risk descending into anarchy.

However, I do appreciate the fact that where technicalities of a procedural nature were the only obstacles to the realization of justice, the Constitution imposes an obligation upon me to disregard the said technicalities if that would enable me to do justice to the case before me. That is particularly important when a strict adherence to the rules of procedure would lead to the case being concluded in an unjust manner.

In the matter before me, the applicant still has an opportunity to comply with the procedure stipulated. There is nothing, in my considered view, to bar him from moving the judicial officer who is presiding over his trial, to formulate issues for determination by the High Court.

And if the trial court were to reject the application to formulate a Constitutional reference, the applicant may yet move the High Court directly thereafter.

In the event, I uphold the Preliminary Objection. I therefore strike out the Petition, with costs.

However, I do direct that for the next 7 days there shall continue to be a stay of the proceedings in the criminal case, so as to give to the applicant an opportunity to move the said court, if he be so minded.

In other words, the learned trial magistrate shall, for the next 7 days withhold the delivery of his judgment.

**Dated, Signed and Delivered at Nairobi, this 3rd day of November, 2011**

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**FRED A. OCHIENG**  
**JUDGE**