



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL CASE 2603 OF 1995

**METHI & SWANI FARMERS CO-OPERATIVE SOCIETY LTD...APPLICANT**

**V E R S U S**

**THE CO-OPERATIVE BANK OF KENYA LIMITED..... 1<sup>ST</sup> RESPONDENT  
MAKINDI BANKS LIMITED..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

This is a Notice of Motion dated 23<sup>rd</sup> October, 2003 filed by M/s Kamau Kuria & Kiraitu advocates for the applicant **METHI & SWAMI FARMERS COOPERATIVE SOCIETY LIMITED**. The respondent are named as **COOPERATIVE BANK OF KENYA LIMITED (1<sup>st</sup> respondent)** and **MAKINDI BANKS LIMITED (2<sup>nd</sup> respondent)**.

The application was filed on 24<sup>th</sup> October, 2003 under rule 10(A) of the Constitution of Kenya (**Protection of Fundamental Rights and Freedoms of the Individual**) Practice and Procedure rules, 2001 as well as section 70, 71, 77 and 84 of the Constitution and section 3A of the Civil Procedure Act (Cap. 21).

It seeks for several orders as follows-

- 1. A declaration that the orders issued herein on 26<sup>th</sup> January, 1996 by the Honourable Justice Bosire (as he then was) contravened the applicant's rights to access to justice.**
- 2. A declaration that the order issued herein on 25<sup>th</sup> October, 1996 by the Principal Deputy Registrar Njai was unconstitutional to the extent that it deprived the applicant the right to access to justice and the protection of the law.**
- 3. A declaration that the orders made subsequent and consequent to the orders issued given herein on 26<sup>th</sup> January, 1996 are null and void to the extent that they denied the applicant herein access to justice on account of financial constraints.**
- 5. A declaration that a deprivation of the means to Livelihood through biased and unfair laws is tantamount to the contravention of the right to life.**
- 6. A declaration that due process of the law must be followed to its final conclusion before a party can be deprived of its right to livelihood which is the right to life.**
- 7. A declaration that under the rules in *HINDS -VS- R 91976) All ER 373 and MAHARAJ -VS- A/G (1978) 2 ALL ER.670* that protection of fundamental rights and freedoms of the individual under Chapter V of the Constitution includes protection from infringement of the same through its judicial arm.**
- 8. A declaration that the provisions under Order XXV rule 5 of the Civil Procedure Rules deprive a party from protection of the law and is a contravention of section 77 of the Constitution and therefore is null and void.**
- 9. A declaration that access to justice includes giving a party to any proceedings a chance to litigate their claim to a legal conclusion.**
- 10. A declaration that a miscarriage of justice was Occasioned through the order issued on 23<sup>rd</sup> October, 1996 and as a result the applicant's constitutional rights under section 70 were contravened.**

*11. A declaration that the poverty of a party in Litigation is not a just cause to deny him access to justice.*

*12. A declaration that the right to life as enshrined under section 71 of the Constitution includes the right not to be deprived of a means of livelihood.*

*13. A declaration that financial ability of parties to a suit is not the litmus test to a determining the validity of the claims and that conduct during proceedings.*

*14. A declaration that the dismissal of the suit against the 2<sup>nd</sup> defendant on 7<sup>th</sup> March, 1997 was a nullity.*

*15. An order that the order issued herein on 7<sup>th</sup> March, 1997 dismissing the claim against the second defendant be set aside.*

There are three grounds on the face of the application as follows-

*(a) The orders made on 26<sup>th</sup> January, 1996 were Unconstitutional to the extent that they denied the applicant herein the right to access to justice.*

*(b) The orders made on 26<sup>th</sup> January, 1996 were Unconstitutional to the extent that they denied the applicant herein the right to life.*

*(c) The orders made herein on 26<sup>th</sup> January, 1996 and all other consequential orders were unconstitutional to the extent that they denied the applicant herein the right to the protection of law.*

There was a supporting affidavit filed with the applicationsworn by **BERNARD KOGIE WATHOBIO** described as the Chairman of the Management Committee of the Applicant. The said affidavit has 4 paragraphs and gives the surrounding facts and court rulings that gave rise to the application. It was deposed, inter alia, that the applicant had secured a loan from Cooperative Bank Ltd. of Kshs.2.7 million which rose to Kshs.54 million without the bank accounting for the rise in the amount, and that the court made several orders culminating in an order of 5<sup>th</sup> December, 1996 which should be reviewed.

The application was opposed. Counsel for the parties Mr. Gacheru for the applicant and Mr. Biye for the 1<sup>st</sup> respondent addressed me at the hearing.

Having considered the application, submissions and the law, this application will not succeed.

The first reason is that this application, though it is headed as a Constitutional application, is in effect seeking either review or challenging of orders that have been issued by this court. When a decision is made by court it can only be challenged through appeal to a higher court, or it may be reviewed by the same court, subject to the limitations for review under the Civil Procedure Act and Rules. This court cannot sit on appeal against a ruling or order of another Judge. In addition, this application is not an application for review under order 44 of the Civil Procedure Rules.

Therefore, in my view, the application is incompetent and has to be dismissed on that account. , because the orders sought can only be granted in an appeal or in an application for review.

The second reason for its dismissal is that even if the application could be given the benefit of the doubt and treated as a constitutional application, it would still not succeed. In the case of **MATIBA –VS- ATTORNEY GENERAL HC** Misc. Application No. 66 of 1990 the court stated-

***“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and manner of the infringement.”***

The above case is good law. I fully agree with the reasoning. No all breaches of a person’s legal rights amounts to violation of fundamental rights under the Constitution, or can justify the bringing to court of a constitutional reference. That is why the particulars of the sections of

the Constitution and complaints have to be stated.

In our present case the applicant has failed to give particulars that would bring any of his complaints within the ambit of any of the provisions of sections 70 to 83 of the Constitution. On that ground also the application has to fail. The application cannot therefore be sustained.

For the above reasons, I find no merits in the application. I dismiss the same, with costs to the respondents from the applicant.

Dated and delivered at Nairobi this 15<sup>th</sup> March, 2010.

**George Dulu**  
**Judge.**