

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

Constitutional Application 514 of 2009

MBIYU KAMAU APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

NAIROBI CHIEF MAGISTRATE COURT..... 2ND RESPONDENT

RULING

Mbiyu Kamau has filed an originating Notice of Motion against the Attorney General under Ss 60, 65 (2) and 123, (8) of the Constitution and Rules 2 and 3 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual High Court Practice and Procedure Rules 2006).

The Applicant seeks orders and declarations against the Attorney General and the Chief Magistrate’s Court Nairobi, alleging abuse of power and abuse of court process by the Respondents.

Ms. Obuo, Senior State Counsel, appearing for the Respondent filed a notice of Preliminary objection contending that the Originating Notice of Motion failed to comply with the mandatory provision of Rules promulgated under Legal Notice 6/2006 and specifically Rules 25 and 26 and urged the court to strike it out. She relied on this court’s decision in **CHEPKONGA V R** where this court observed that Rules must be observed.

Mr. Mureithi, counsel for the Applicant opposed the Preliminary Objection contending that what they have filed is an originating Notice of Motion under Rules 2 and 3. That Rules 25 and 26 are not applicable. That the Applicant is not alleging breach of fundamental rights but abuse of power and process. That he raised a similar objection in **MISC. CR.C APP. 877/07 LABAN MAKIYA OMANGI AND OTHERS V REP** and that J. Ojwang held that an application alleging abuse of process was properly brought through a motion to the High Court as they did not seek enforcement of fundamental rights. I appreciate the decision of J. Ojwang is only persuasive in nature.

Rule 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 provide as follows:-

“25 where a party to proceeding 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.

26. If the presiding officer is satisfied that there is an event in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application whereupon the court shall frame the question to be determined by the High Court in Form F set out in the schedule to these Rules.”

As clearly indicated in Rule 25, the Rules only applies to applications brought under S 84 of the Constitution which the enforcement of fundamental rights and freedoms i.e. Ss 70 to 83, infact from the arrangement of the Rules, Rules 25 and 26 fall under part III, the Enforcement Section. To the contrary the application before the court is brought under part I of the Rules, the Supervisory jurisdiction. The Applicant has brought the originating notice of motion pursuant to sections 60, 65 (2) and 123 (8) of the Constitution. Rule 3 provides that apart from applications brought under S 67 and 84, the other applications will be by way of Originating Notice of Motion. Rule 3 provides that the format of the applications to be in terms of Form A of the schedule to the Rules while Rule 6 provides that the same will be made before the High Court. In my view the Respondent’s objection to the procedure is misplaced. The Applicant has approached the court in the proper manner and the application is competent. The objection lacks any basis and is hereby dismissed.

Dated and delivered at Nairobi this 12th day of March 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Obuo for Respondent

Muturi: Court clerk