



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS APPLICATION 419 OF 2009**

**MEDIA ANALYSIS & RESEARCH SERVICES LIMITED.....  
APPLICANT**

**Versus**

**KENYA COMMERCIAL BANK  
LIMITED.....RESPONDENT**

**RULING**

Media Analysis and Research Services Ltd. Has filed this petition against the Kenya Commercial Bank Ltd. (KCB) under Section 84 (1) of the Constitution alleging contravention of their Constitutional rights under Section 70 (c) & 77 (9) of the Constitution. The Applicant seeks several declarations inter alia that

A declaration order that the entry to the Petitioner's property and purported proclamation of that property situate at the Petitioner's premises LR 94/04 Nyari, amounts to infringement of the Petitioner's right to privacy and other property which is in breach of Section 70(c) of the Constitution; a declaration that the Petitioner was not accorded an impartial hearing during the objection proceedings in HCC 104/06 in that the presiding judge in his ruling considered and took into account extraneous matters in breach of S.77 (9) of the Constitution and a declaration that the ruling by the presiding judge is unconstitutional and untenable and for damages.

Filed along with the petition was a chamber summons dated 15<sup>th</sup> July 2009, supported by the affidavit of Mwalimu Mati, the Chief Executive Officer of the Petitioner. In the Chamber Summons, the Applicant seeks conservatory orders to restrain the Respondents from removing the petitioner's goods from the premises to sell by public auction as threatened by a proclamation posted at the gate of the premises on 11<sup>th</sup> July 2009, by Dalali Auctioneers, that the Respondents be restrained from interfering with the Applicant's privacy to the premises and that pending the hearing and determination of the petition, the Respondents be restrained from interfering with the Petitioner's right to the premises and any other property whatsoever.

The grounds upon which the application is brought are that the judge who presided over the objection proceedings lodged by the Petitioner in HC 104/02 showed partiality and the Petitioner risks his rights under S.70 (c) and 77 (9) being infringed; that the proclamation of the Petitioner's goods by the auctioneer has infringed on the Applicants rights to privacy. The Applicant also contends that order 21

Rules 53, 56 & 57 are constitutional.

The Respondent opposed the application and one Chris Theuri filed a replying affidavit. Mr. Mutua who urged the Respondent's case submitted that the Respondents is enjoined as she cannot guarantee the Applicant's right to a fair hearing under S.77 (9) of the Constitution. That no constitutional issue is disclosed because it has been deponed that the objector and 2<sup>nd</sup> Respondent in HCC 104/04 are husband and wife and that finding can only be challenged on appeal.

As regards the right to property the Respondent contended that protection of property under S. 75 of the Constitution is not absolute as it can be taken away by execution of a court order. That it has not been denied that there is a decree against the 2<sup>nd</sup> Respondent in HCC 100/04 in favour of the Respondent herein.

That the Applicant has to demonstrate that they have a prima facie case with good chances of success and that if the order is not given, the Applicant will suffer irreparably. That the lease agreement clause V is the subject in HCC 104/04 and it shows that it is a private residential premises contrary to what the Applicant has informed court that it is a business premises. That the Petitioner has no legitimate complaint in this matter.

I have considered the affidavits, grounds and submissions in respect of the Chamber Summons. It is trite law and the courts have severally held that it is the state which guarantees individual rights and freedoms under the Constitution but not a private individual. In the case of **KENYA BUS SERVICES LTD. V AG HMISC 413/05**, Justice Nyamu held that fundamental rights and freedoms are contained in the Constitution and are only available against the state. He supported that contention with the case of **TEITIWNANG V ARIONG & OTHERS (1987) LRC CONST 517** where at page 599, Maxwell CJ said:-

**“Dealing now with the question can a private individual maintain an action for declaration against another private Individual or Individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by Private Law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or an individual under the fundamental rights provisions of the Constitution, no action for a declaration that has been a breach of duty under the provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provisions can be or be maintained in the case before me, and I so hold.”**

In the instant case the Respondent is a Bank, a body corporate. It is a private individual that cannot guarantee the Applicant's rights. No fundamental rights can be enforced against the Respondent by the Applicant.

Section 70 of the Constitution makes it clear that fundamental rights and freedoms are not absolute. Fundamental rights and freedoms are subject to reflect for rights and freedoms of others and public interest. In this case, the Applicants contention is that his rights are being infringed as relates to his property. It is upto him to demonstrate that he does not fall within the limitations under S 75 (6). There is a decree in place. He has to demonstrate that the execution does not fall within S.75 (6) (IV).

The Applicant is actually challenging the decision of the High Court in objection proceedings under Order 21 Civil Procedure Rules. Order 21 has an elaborate procedure on execution. It is upto the Applicant to demonstrate that these avenues provided under Order 21 civil Procedure Rules are exhausted or are unsuitable eg appeal, review, before he can move this court.

The High Court in its decision in 104/06 has found that the Applicant and the objector are husband and wife and that is why the said objection was unsuccessful. By the court being asked to find a different decision from that of that court is asking this court to sit on appeal of the High Court order. That would be outside this court's jurisdiction. An appeal can only lie to the Court of Appeal.

For all the above reasons, I find that the Applicant has not demonstrated that they have a prima facie case with good chances of success or that if the order is not granted the Applicant will suffer irreparably. In the result, no conservatory orders can issue at this stage and the Chamber Summons is dismissed with costs abiding the petition.

Dated and delivered this 27<sup>th</sup> day of July 2009.

R.P.V. WENDOH

JUDGE

**Present**

Mr. Alex Karanja for Petitioner/Applicant

Mr. Mutua for the Respondent

Muturi: Court Clerk