

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

Petition 388 of 2009

JAMES NGUGI NDUNGU..... PETITIONER

VERSUS

THE COMMISSIONER OF POLICE..... 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT THIKA..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This is a ruling on a Preliminary Objection raised by the Respondents pursuant to Rule 25 of Constitution of Kenya (Supervisory Jurisdiction and Protection of fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

The Petitioner has filed the petition dated 23/6/09 under S.84 (1) of the Constitution in which he alleges breach of his fundamental rights under Ss. 75 (1), 76 (1) and 77 (2) (c) of the Constitution. He seeks several orders and declarations inter alia, that the hearing of Thika Chief Magistrate Criminal Case No.5245/08 is unconstitutional null and void and should be terminated. He also seeks damages for the said violations. On the same date, the petitioner filed the Chamber Summons of the same date seeking conservatory orders, that pending hearing and determination of the petition, the proceedings in Thika Chief Magistrate's Court No. 5245/08 or any other case arising from the search and seizure of the petitioner's property on 25/11/08 be stayed and that pending the determination of the petition, the 1st Respondent by himself or his officers and especially the District Criminal Investigation officers, Thika Police Station be restrained and prohibited from commencing any further criminal proceedings arising from the search and seizure of his property from his house on 25/11/08. The Chamber Summons application came up for hearing and Mrs Obuo, counsel for the Respondent raised a preliminary objection to the effect that the petitioner failed to comply with Rule 25 of the Rules made S. 84 of the Constitution i.e legal Notice 6. of 2006. That these issues having risen in the subordinate court, the Applicant should have raised them before that court and the court would have proceeded under Rule 25 to frame question so that they could have been referred to by High Court. Mr. Nyongesa counsel for the petitioner is of the view that the petitioner had a right to file a petition directly to the High Court under Rule 11 of the same Rules. That he had the option to come directly to the High Court or ask the subordinate court to frame issues for determination by the court and that the objection is not questionable.

I do appreciate that the Rules made under Legal Notice 6/06 do provide the manner in which a party can approach the court to enforce his fundamental rights. Rule 11 provides that where contravention of any fundamental rights and freedoms of an individual under rule S. 70 to 83 (inclusive) of the Constitution is alleged or is apprehended, an application shall be made directly to the High Court. That provision is couched in mandatory terms. Under Rule 23, if a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat it as a preliminary point and hear and determine it. Under Rule 24, if a constitutional question arises before a subordinate court, the presiding officer of that court may refer the question to the High Court for determination if in his opinion, the matter is not frivolous or vexatious.

Rule 25 then provides that if a party alleges contravention of his rights in a matter before the

subordinate court, 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 alleged violation. That court will consider it and if the allegation is found to have substance, the subordinate court would proceed under Rule 26, frame the question for determination by the High Court in Form F set out in the schedule to the Rules and refer it to the High Court. That Rule enables the court seized of the matter to have a first look at the allegation, determine whether there is indeed an issue for determination by the High Court. It sifts through the matters to be referred to the High Court and eliminates what would be otherwise frivolous applications being made to the High Court and at the same time saves on the otherwise precious time of the court. The words used in these rules are 'shall'. Which indicates that they are mandatory. The petitioner has not explained to this court why he decided to skip this elaborate procedure provided for under the rules to come directly to the High Court. Rules are not meant to decorate the books but to guide the parties and help the court in speeding the determination of these matters. The Rules must be obeyed and adhered to. In the case of JAMES NJENGA KARUME V. SPEAKER OF NATIONAL ASSEMBLY Court of Appeal 192 of 1991; zThe Court of Appeal said that when the Constitution or a statute provides for a particular procedure to be followed in proceedings, that procedure must be adhered to. The Rules Committee had a reason why it came up with these Rules and parties must put them to use. Had the subordinate court been moved there would have been no court to hear the Chamber Summons on conservatory orders because once a reference is made to the High Court, the lower court proceedings are stayed. The upshot of this is that the petition and Chamber Summons dated 23/6/09 are made prematurely before this court, the objection is sustained and the petition and Chamber Summons are hereby struck out with no order as to costs.

Dated and delivered at Nairobi this 24th day of July 2009.

R.P.V WENDOH

JUDGE

Present

Mr. Nyongesa for the Applicant

Mr. Tanui for the Respondent

Muturi court clerk