



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Miscellaneous Petition 33 of 2009

BADRUDIN HUSSEIN HAJI ISSA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The petitioner herein was, on 30th April, 2009 granted conservatory or interim orders, whose effect was to stop the police from arresting or detaining the petitioner in their custody or cells

“pending the hearing and determination of the Chamber Summons Application dated 30th April, 2009 interpartes.....”

I will turn to this prayer shortly. The brief background to this dispute can be related as follows:

The petitioner has been issued with a temporary grant of letter of administration for the estate of his father. Prior to that appointment, the estate was being administered by other members of the family, namely the petitioner’s mother, sister and brother before it was revoked. Since

H.C.C.MISC.APPL. NO.33/2009

then, the family of the deceased has remained divided, with the petitioner on the one hand and the rest of the family united on the other hand. The rest of the family and a tenant have complained to the police about their harassment by the petitioner; that the petitioner has been breaking into certain premises comprised in the deceased person’s estate, reports of which have been made to the police.

The petitioner is now alleging that the OCS Narok Police Station is using these reports to intimidate him. As a result the petitioner has gone into hiding fearing arrest and detention. He has abandoned his family and business. These are, in summary what I am able to glean from the pleadings herein.

The first observation I wish to make is that this matter has by and large arisen from the administration of the estate of the deceased. The temporary grant to the petitioner was issued on 27th October, 2008 and is therefore due for confirmation. With the confirmation and the subsequent distribution of the estate, the family animosity will have been resolved. The family members ought to take this route to avoid wastage

and acrimony.

Secondly, it must be noted that while the individual's rights under the Constitution is guaranteed and this court enjoined to protect those rights,

H.C.C.MISC.APPL. NO.33/2009

the police have a duty to maintain law and order which in turn has a direct

correlation to those fundamental rights and freedom of the individual. The court in considering application of this kind must balance both interests.

The third point is to do with the procedure adopted in bringing this application. It is properly expressed to be brought under Rules 11 to 14 (inclusive) and 20 to 21 (inclusive) of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Under the latter provisions, the petitioner has been enjoying conservatory orders since April, 2009, whose effect, as I have stated, is that he had immunity against arrests – indeed of any nature.

But the petitioner, under the former provisions was expected to have brought a petition in form D of the schedule to the rules. What he has brought is chamber summons. Chamber summons can only be brought for conservatory orders pending the hearing of the Petition. There is no petition and the chamber summons is hanging.

Given the seriousness of human rights issues, it is of utmost importance that applications relating to protection of those rights are scrupulously drafted.

H.C.C.MISC.APPL. NO.33/2009

For these reasons, the application fails and is dismissed. Conservatory or interim orders issued on 30th April, 2009 are vacated.

DATED, SIGNED and DELIVERED at NAKURU this 30th day of October, 2009.

W. OUKO

JUDGE