



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Petition 616 of 2009**

**IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER SECTION 70, 71, 72, 77, 83 OF THE CONSTITUTION**

**BETWEEN**

**SAMUEL STEPHEN MATU..... PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT**

**SERAPHINA KINYANYA MVOI..... 2<sup>ND</sup> RESPONDENT**

**RULING**

On 4/6/09, the Magistrate's court in Childrens case No.3265 (NRB) ordered the Petitioner/Applicant to pay Kshs 50,000/- to his wife for maintenance of their children and in default he was to serve 30 days in jail. On 1/7/07 the court extended the jail term for a further 30 days. He is aggrieved by that extension of the prison term and filed the petition dated 21/10/09 seeking the setting aside, review or quashing of the orders of Mrs Mbugua made on 6/7/09 in the children case and that the court do declare it irregular and unlawful.

The Petitioner filed the chamber summons dated 21/10/09 contemporaneously with the petition in which he prays to be released on bail terms or be discharged pending hearing and determination of this application and that the court do suspend the imprisonment orders of 1/7/09 pending hearing of this petition. The Petitioner contends that he did not defend himself against the said extension as he was not given a hearing and his advocates were absent. That the said extension was made in breach of his Constitutional rights under sections 70, 71, 72, 77 and 83. Mr. Oyiembo counsel for the Petitioner said that the facts are not in dispute and what is in dispute is the extension of the jail term. Counsel relied on the case *LONGOLEMIK V REP (1982) KLR 395*, where the court, after sentencing the accused, 13 days later, called up the accused and ordered that he would be subject to police supervision after release and the Court of Appeal held that the order of supervision was illegal as the trial court was functus officio

when making it. The only question here is whether the magistrate's court had the jurisdiction to extend the prison sentence in default of the payment of the Kshs.50,000/=.

Mrs Mbugua, the Senior Resident Magistrate Children's Court filed a replying affidavit in opposition. She deponed that the 2<sup>nd</sup> Respondent had got judgment against the Petitioner for 15,000/= p.m. The Petitioner had defaulted in payment and the 2<sup>nd</sup> Respondent filed an application for notice to show cause why the Petitioner could not be arrested and committed to civil jail for failure to settle the decretal sum. After the hearing; the Petitioner was given time to pay and on 25/3/09 made an offer but on 28/4/08 he had not paid. He was committed to civil jail on 4/6/09 and the civil jail term was extended on 29/7/09, 31/8/09, 30/9/09 and 29/10/09 and that he has not shown any willingness to settle the decretal sum. That the sentence was lawful as the law allows imprisonment for 6 months. That the order was for payment or 30 days imprisonment until payment of the decretal sum in full meaning that the jail term would be extended till payment. That the orders were made in the best interests of the children and that the application is premature and an abuse of the court process. Ms Gichovi, counsel for 1<sup>st</sup> Respondent argued that the Civil Procedure Rules apply to execution of orders under the Childrens Act and that under Order 21 Rules 28 – 32 the court can commit a debtor to civil jail upto 6 months.

The 2<sup>nd</sup> Respondent is Seraphina Kinyanya the Applicant's estranged wife who deponed that the Petitioner has intentionally ignored to pay the decretal sum towards maintenance of the children of the marriage. Ms Sijeny, counsel for the 2<sup>nd</sup> Respondent submitted that under S 41 of the Childrens' Act, the court has powers to extend the order for imprisonment. That the Applicant can not claim that his rights have been infringed when he has infringed the childrens' rights guaranteed under S 66 to 69 of the Childrens Act.

An application brought under S 84 of the Constitution does not deal with the merits of the case because the merits of the case were determined by the subordinate court in Childrens case 3 of 2005. If any party is dissatisfied with that decision he must appeal to the High Court. It is not therefore necessary for the parties to address this court on whether or not the Petitioner is able to settle the decretal sums. The Applicant in his pleadings deponed to matters touching on the merits of the case but that is not the issue here. The issue is whether the lower court infringed on the petitioner's Constitutional rights when they extended the order.

It is trite that in constitutional applications under S 65 and 84 the Applicant should plead with particularity of the section allegedly contravened, the nature of the contravention and manner of the contravention.

In this case the Applicant has listed several sections of the Constitution which were allegedly infringed as against him. However, he has not made any specific pleadings as regards any of the sections. Section 70 generally lays down the various rights and freedoms of the individual and provide that they are not absolute but subject to rights of others and public interest. The Applicant did not make any specific pleading in respect of S 71 which offers right to life. He specify how the said right has been infringed. The Applicant also invoked Ss 72, 77 and 83 of the Constitution but did not specify how they were infringed. He can not leave the court to guess how his rights have been infringed. In fact the Respondent cannot know what to respond to in the circumstances. The courts have said over and over again that in such an application one must plead with precision as to what he complains of. In **ANARITA KARIMI NJERU V REP (NO. 1) K79 KLR 154 1979 EA TREVELYAN AND HANCOX 55** had this to say:

***“We would however again stress that if a person is seeking redress from the High Court on a matter which involves preference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”***

In *CYPRIAN KUBAI V STANLEY KANYINGI MWENDA NRB HC MISC 6/2/2002, KHAMONI J* said

***“ An Applicant moving the Court by virtue of section 60, 65 and 84 of the Constitution must be precise, and to the point not only in relation to the section, but also to the subsection, and where applicable the paragraph or subparagraph of the section out of 71 to 83, allegedly contravened plus relevant acts of that contravention so that the Respondent know the nature and extent of the case to respond to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.....”***

In *CYPRAIAN KUBAI* (supra) J. Khamoni went a notch higher by holding that one must specifically state the section, subsection and even the paragraph or sub paragraph that has allegedly been breached. The courts were of the same view in *KBS LTD V REP HMS 413/05 MATIBA V REP HMS 666/1990* and many others. The chamber summons under consideration flows from the petition. The Petitioner must demonstrate that he has a cause of action before interim or conservatory orders can be granted. Without proper pleadings disclosing a cause of action, interim orders cannot issue. The pleadings herein are vague and can not found a cause of action to warrant the grant of the interim orders.

Only the state secures and guarantees fundamental rights but an individual cannot do that. The Petitioner has named Seraphine Kinyanya as a Respondent. The orders sought herein cannot be obtained against the 2<sup>nd</sup> Respondent who is an individual as she cannot guarantee ones rights. The 2<sup>nd</sup> Respondent is not properly sued as a Respondent and She can only be enjoined as an Interested party. The 2<sup>nd</sup> Respondent is hereby struck off the petition as a Respondent.

For the above reasons I see no reason to consider the merits of the chamber summons before me since the petition discloses no cause of action. The chamber summons application is hereby dismissed with costs to the Respondent.

Since this petition is at early stage, this court will exercise its discretion and not strike it out but allow the Petitioner time, if need be to amend then it can proceed to full hearing. Order accordingly.

Read and delivered on 18<sup>th</sup> November 2009.

**R.P.V. WENDOH**

**JUDGE**

**Present**

Mr. Oyiembo for Petitioner/Applicant

Mr. Gichovi for 1<sup>st</sup> Respondent

Muturi court clerk