



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 589 of 2009

**IN THE MATTER OF PROVISIONS OF SECTIONS 70 TO 84(1) BOTH INCLUSIVE OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS**

GEORGE NDEGWA..... PETITIONER

VERSUS

ESTHER NDITI KALELI..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

RULING

The Petitioner George Ndegwa has filed the petition dated 7/10/09 under section S3, 60 (1) 65 (2) 84(1) and 123 (8) of the Constitution seeking several declarations against Esther Nduati Kaleli and the Hon. The Attorney General. Filed contemporaneously with the petition is the chamber summons of the same date in which he seeks conservatory orders seeking to restrain the agents of the 2nd Respondent and particularly the police at Ongata Rongai police station from arresting the petitioner or any of his agents pending hearing and determination of this application and that the Applicant be granted bail pending arrest. In his affidavit in support of the application, he depones that he is a Director of Green Plots properties Ltd, which deals in estate management. He acted as an agent of F. Gitonga Gathua in collecting rents and managing a residential property known as Plot 3591 Ongata Rongai, where the 1st Respondent resided. The 1st Respondent failed to pay her rent and the Applicant had instructions to distress (GM 3a). The 1st Respondent was issued with vacation notice and auctioneers were instructed to levy the distress but on going to the house, found that the 1st Respondent had vacated the house. That the 1st Respondent has turned and accused the Applicant and his employees of having broken into her house and stolen. That since then the police officers from Ongata Rongai have been pursuing him and harassing his staff thus paralyzing operations at his office and he cannot move about freely for fear of arrest. That since the Respondent have not countered these depositions by way of affidavit, they should be taken as the truth.

Mr. Onyiso counsel from the State Law office filed grounds of opposition in which he contended that the police are acting within their powers as an offence was allegedly committed by the Petitioner, that fundamental rights are not absolute but are subject to the rights of others and the public interest and no

right has been breached.

Since the Respondents have not filed any affidavit to controvert the Applicant's averments, the court will find that what the Applicant depones to, that the police are camping at his office wanting to arrest him for an alleged offence of breaking into the Interested Party's house is true.

Constitutional applications and orders made herein can only lie against the State which secure and guarantees personal rights and freedoms of individuals. The 1st Respondent is a private individual who cannot secure or guarantee the Applicant's right and was wrongly enjoined as a 1st Respondent and is hereby struck off the petition and chamber summons as a Respondent. The 1st Respondent could only have been enjoined as an Interested Party.

Under S 84 of the Constitution, the Court is not concerned with the merits of the case, but whether there is a breach or likely breach of applicants' rights. The Attorney General has inherent powers to investigate alleged crime. A complaint has been made to the police and this court cannot take away that right unless the Applicant shows that his rights have been, are being or likely to be violated. This court is not seized of the facts of the alleged crime. Whether or not the Applicant overstepped his bounds in performance of his duties and broke into the 1st Respondent's house has to be established by way of evidence. I cannot just hear from the Applicant even before investigations are done and take it as the gospel truth. The Applicant should allow for investigations to be conducted before the two versions of the dispute can be weighed against each other.

The alleged offence if any, is likely to be a bailable offence and if arrested the Applicant can be released on bail. In my view, this Application is premature and there is not good basis for grant of a conservatory order. The Applicant should allow for investigations otherwise this court will be interfering with the Attorney General's inherent powers to carry out investigations. For the above reason, I decline to grant any conservatory order and direct that the parties do prepare for the hearing of the petition: This application is disallowed with costs being in the cause.

Dated and delivered at Nairobi this 16th day of November 2009.

R.P.V. WENDOH

JUDGE

Presence:-

Mr. Kounah holding brief for Mr. Ongeru for Petitioner

1st Respondent

2nd Respondent

Muturi court clerk