



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Petition 346 of 2008**

**QUERARSSIM NIKOLOV NIKOLOV..... PETITIONER**

**V E R S U S**

**ATTORNEY GENERAL..... RESPONDENT**

**R U L I N G**

Before me is a Chamber Summons dated 11<sup>th</sup> June, 2008 filed by M/s Macharia Kenneth & Associates Advocates. The application was brought under Rules 20 and 21 of the Constitution of Kenya (Supervisory and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, and Section 123(3) of the Criminal Procedure Code. The substantive orders sought in the application are numbered 2 and 3 as follows-

2. *The petitioner be admitted to bail pending the hearing and determination of this application.*

3. *The petitioner be admitted to bail pending hearing and determination of Kibera Chief Magistrate's court Criminal Case Number 1209 of 2008.*

Several grounds are listed on the face of the application. The application is also supported by the affidavit of **GUERARSSIM NIKOLOV NIKOLOV**, the applicant/petitioner sworn on 11<sup>th</sup> June, 2008.

Though the application was filed ex-parte, I ordered that the same be served. At the hearing of the application, Mr. Macharia appeared for the applicant, while Mr. Mwangi appeared for the respondent.

Mr. Macharia submitted that the petitioner had been incarcerated at the Kilimani Police Station vide an order of the subordinate court in Kibera Criminal Case No. 1209 of 2008 on a request by the prosecution that there were further investigations. The subordinate court also ordered that there be a mention on 23/6/2008. Counsel argued that from the date when the petitioner was ordered to be detained at Kilimani Police Station, he had not been charged in court, and that was therefore a contravention of Section 72(5) of the Constitution. Counsel submitted that bail was a constitutional right unless someone was charged with an offence punishable by death. Counsel sought to rely on the case of **ODEUGU -VS- REPUBLIC HC. CR. Application No. 427 of 1998**. Counsel argued that under Section 65 (2) of the Constitution, the High Court had jurisdiction to supervise subordinate courts in any civil or criminal proceedings. Counsel also argued that under rule 6 of the rules under which this application was filed, the High Court could act on its own motion.

Counsel further submitted that the applicant was held at Kilimani Police Station, allegedly, for investigations regarding offences committed in Germany. Counsel argued that the Kenyan courts did not have jurisdiction for offences committed in Germany. Therefore, the applicant should not have been detained for more than 24 hours. Counsel sought to rely on the case of **ALBANUS MWASIA MUTUA -VS- REPUBLIC -Nairobi Criminal Appeal No. 120 of 2004**, among others.

Mr. Mwangi for the respondent opposed the application. Counsel contended that the application was not brought in the required form, as paragraph 6 of the supporting affidavit related to bail. The petition itself was also not supported by an affidavit as required. Counsel sought to rely on a number of court cases. Counsel also argued that the application was bad in law, as it was made pursuant to a court order, and the copy of proceedings annexed was not certified. There was also no indication that the applicant had attempted to apply for bail in the subordinate court. Counsel also argued that the failure to join the Chief Magistrate in this application denied the Attorney-General the Opportunity to obtain instruction from the Chief Magistrate. It was also not indicated whether the applicant had applied for police bond.

In response, Counsel for the Petitioner/applicant sought to distinguish the cases cited by the Counsel for the respondent. Counsel relied on the provisions of the Interpretation and General Provisions Act (Cap. 2) and submitted that mere non-compliance with form, unless intended to mislead, should not be a reason for dismissing an application. Counsel also argued that, Constitutional remedies could be granted even where there were other remedies available. Counsel also submitted that there was no requirement that the Chief Magistrate should have been made a party. Lastly, Counsel argued, the petitioner was not given a chance to apply for bail in the subordinate court.

I have considered the application, documents filed, and the submissions of Counsel who appeared before me. I have also perused the authorities cited to me.

At this stage, I am not required to go into the merits of the petition. What is before me for decision now is a Chamber Summons for conservatory orders. Having considered all the facts and circumstances before me, I find that the Chamber Summons before me is a bail application, which is brought before me as a Constitutional application. I appreciate that Constitutional remedies are awardable, even where

other remedies are available. However, we have to be careful as, if we allow everything to be brought to court as, if it is Constitutional, we will be clogged with flimsy Constitutional applications. Most importantly we must avoid allowing litigants to take shortcuts which will have the effect of blurring proceedings, and deny the court the opportunity to get all the relevant facts disclosed before making a decision.

In our present situation, because of the procedure adopted by the applicant, I do not have the original record of the subordinate court to verify facts and the decisions made by that court. In addition, the procedure adopted has denied the police a chance to explain why they asked for the petitioner to be detained at Kilimani Police Station. In all those circumstances, I am not able to consider relevant facts for the grant of the orders of bail sought. I am of the view that the applicant should have applied for bail, straight and clear. I will dismiss the Chamber Summons.

For the sake of clarity, I wish to state that the applicant is at liberty to apply for bail or bond at any time in a proper manner.

However, I dismiss the Chamber Summons dated 11<sup>th</sup> June, 2008 and decline to grant the orders sought.

Dated at Nairobi this 20<sup>th</sup> day of June, 2008.

**GEORGE DULU**

JUDGE.