



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. 160 of 2008

MAHESH MAHER APPLICANT/PETITIONER

AND

- 1. STANLEY KAMAU GATUNE1ST RESPONDENT**
- 2. ASHOK K. P. UMRANIA 2ND RESPONDENT**
- 3. MOHAMMED MADHANI 3RD RESPONDENT**
- 4. HABIBA HUSEIN 4TH RESPONDENT**
- 5. JOHN DAMES 5TH RESPONDENT**
- 6. SURESH BUDHIA 6TH RESPONDENT**
- 7. CHIEF MAGISTRATE NRB..... 7TH RESPONDENT**
- 8. CHIEF MAGISTRATE, KIBERA8TH RESPONDENT**

RULING

On 3rd April 2008 the petitioner Mahesh Maher filed the petition dated the same day pursuant to section 84 (1) alleging violation of his fundamental rights under Sections 70(a) 72(2) &76(1) and 77(1) of the Constitution. The Respondents are Stanley Kamau Gatune, Ashok Kumar Purshotam Umrana, Mohammed Madhani, Habiba Husein, John Dames, Suresh Budhia, the Chief Magistrate Nairobi and the Chief Magistrate Kibera. The petitioner seeks the following orders:

1. That the court do issue an order of Prohibition, prohibiting the said Magistrate from proceeding or further proceeding with trials in CMC 1784 of 2006, Nairobi and CMC 195 of 2007 Kibera. Both Republic V. Mahesh Maher and intended assault case.
2. That a permanent injunction to restrain the 1st to 6th respondents from entering, harassing or interfering with the petitioner by themselves or agents or otherwise howsoever molesting him by themselves or otherwise.

Costs of the Petition

Filed simultaneously with the petition in the Chamber summons dated 3/4/08 in which the petitioner seeks the following orders:

3. That the court be pleased to grant the petitioner conservatory orders by prohibiting any or any further proceedings pending in
 - a. Nairobi CMC 1784 /06 – R v. Mahesh Maher
 - b. Kibera CM CR 195/07 – R V. Mahesh Maher until the finalization of the petition;
4. The court be pleased to restrain by injunction the 1st, 2nd, 3rd and 4th Respondents by themselves, their servants or agents from molesting or harassing the petitioner in any manner until the petition is finalized;
5. That search without warrant be prohibited and police do return papers, files and other documents taken from the petitioner during unlawful search;

6. Costs be provided for.

The chamber summons is premised on the grounds found on the face of the application, an affidavit dated 27.3.08 and a further affidavit of the petitioner/applicant dated 14/5/08. The application was opposed and a replying affidavit was sworn by Washington Mworira the investigating officer in Criminal case No.1784/06 (Nairobi) and another sworn by Charles Njogu an Inspector of Police who was the investigating officer in Cr. Case No.195/07 at Kibera court on behalf of the 7th and 8th respondent. The 4th respondent filed grounds of opposition dated 28/4/08 and Mr. Oonge appeared for the 1st respondent. Mr. Wena counsel for the 2nd and 6th respondent did not file any papers but associated himself with the 1st and 5th respondent's submission. Ms. Gakobo appeared on behalf of the 7th and 8th Respondents.

Respondents.

Mr. Owuor counsel for the petitioner/applicant submitted that the Applicant formed a company called Mortgage Direct Ltd with 1000 nominal shares of which one Stanley Gatune the 1st respondent held one share worth 100/=. The process of transferring the share to the petitioner was in progress when Criminal Case 1784/06 was preferred against the applicant that he stole Kshs 4.5 million from the company. That the 1st respondent had falsified a document to the company registry notifying the company registry that he was one of the directors. The applicant was also charged in case 195/07 where the 1st Respondent alleged having been owed 1.7 million. The petitioner claims that his rights under Section 72 (3) (b) of the Constitution were violated in respect of Criminal Case 1784/06 when he was held in custody for 40 hrs before he was produced before a court of law. Guided by the case of **KURIA & OTHERS V AG** – (2002) 2 KLR 69 that the court should prohibit the Criminal prosecution because the criminal cases are considering matters divorced from the goals of the criminal justice process. That it is not clear why the cases are given to different courts and why 1st Respondent has not been charged. Mr. Owuor, urged that they have made a prima facie case and the court should grant the conservatory orders.

Mr. Oonge representing the 1st Respondent opposed the Chamber Summons on 2 grounds that;

- (1) That they were served with a further affidavit dated 14th May 2008 yet no leave of the court was sought to file it and it should be expunged from the record.
- (2) That the Petitioner is seeking a prayer of prohibition at prayer 3 and that should have come by way of Judicial Review after leave to bring Judicial Review proceedings is sought.
- (3) That the prayer 3 is directed at individual citizens not the Government yet they should have been enjoined as mere Interested Parties.

That the 1st Respondent made a report to police, it was investigated and charges preferred before a competent court of law.

That the applicant has failed to demonstrate why a stay should be granted and that in any case prayers 4 and 5 have not been canvassed and there is no allegation against the 5th Respondent and the application should be dismissed.

Mr. Wena, Counsel for 2nd and 6th Respondent associated himself with the 1st Respondent's submission and added that prayer 4 which relates to the 2nd and 6th Respondent has not been canvassed and the application must fail.

Ms Gakobo, Counsel for the 7th and 8th Respondent also opposed the Chamber Summons. She relied on the replying affidavit of Charles Njogu and Mwitwi Mworira that complaints were lodged by the 1st Respondent, they were investigated by police who preferred charges. They found a signature of the 1st Respondent to have been forged and the same was forwarded to the Government examiner who confirmed as such.

That the two cases are before competent Courts of law. That the petitioner is trying to ventilate the Criminal Case before this court when it can be done during the criminal proceedings. That even if there is a civil claim, S. 193 A of the Criminal Procedure Code envisages that both can proceed simultaneously.

As regards the breach of S. 72 (b) of the Constitution, Counsel submitted that such allegations had not been raised before the trial court.

Lastly that the Applicant has not demonstrated that the criminal proceedings were commenced for other purposes other than the justice system.

I have now considered the rival submissions, the application and authorities that have been relied upon. The first issue I wish to deal with is the further affidavit that was filed by the Applicant on 15th May 2008 and is dated 14th May 2008. The said affidavit has been challenged on grounds that it was filed without the leave of this court and should be expunged from the record. Mr. Owuor Counsel for the petitioner submitted that the further affidavit is properly on record the applicant having complied with Rules 17 of the Gicheru Rules, Legal Notice 6/2006. Rule 17 provides that a petitioner who wishes to file a further affidavit shall do so within seven days of service of the replying affidavit. At paragraph 11 of the further affidavit, the Applicant deposes that he is swearing it in support of the petition and Chamber Summons application.

Under Rule 17 of Legal Notice 6/06, the further affidavit should have been filed 7 days within the filing of the replying affidavit. The last replying affidavit filed by the Respondents was filed on 6th May 2008, by Interested Party Washington Mworira. 7 days lapsed on 13th May 2008. The further affidavit was filed on 15th May 2008 which was outside the period allowed by the Rules. The further affidavit is

irregularly on record and is hereby struck off. If the Petitioner wanted the further affidavit filed, he should have sought the leave of the court.

The applicant alleges that violation of Section 72 (b) of the Constitution is that he was held for 40 days before charges were preferred. He is before the subordinate court. Under Rule 25 of Legal Notice 6/2006, where one alleges a contravention to any of the Sections 70-83 of the Constitution, he shall apply informally to the presiding officer that a reference be made to the High Court to determine the nature of the alleged violation. The question of the applicant having been held for over 40 days having been in existence that should have been raised before the magistrate trying the case.

It was Mr. Oonge's submission that an order of prohibition is not available in applications under the Constitutional provisions but that the applicant should have filed a Judicial Review application and sought leave of this court before filing the same. The Applicant has moved the court under S. 84 (1) of the Constitution for alleged breach of his constitutional rights. Under S. 84 (2) of the Constitution, once one alleges breach of his fundamental rights, the court under S.84 (1), the court can grant any order or give any directions it considers appropriate for purposes of enforcing the provisions of S.70 to 83 of the constitution. That Section reads as follows:

“S. 84 (2) the High Court shall have original jurisdiction –

(a) to hear and determine an application made by a person in pursuance to subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such order, issue such writs and give such directives as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 (inclusive).”

Under the above section, the court has wide powers to grant any relief to the Applicant for purposes of securing the Applicant's rights and those reliefs can include Judicial Review orders of prohibition or certiorari or any other. The Petitioner need not file a Judicial Review application in order to get the orders. If the Applicant seeks any other orders that cannot be granted in a Judicial Review Application, this would be the right forum to seek the order for prohibition. This is because if the Applicant files a Judicial Review application, he would be confined to seeking the orders of certiorari, mandamus or prohibition. The Petitioner has properly moved this court for an order of prohibition.

It was the 1st Respondents submission that the 1st Respondent being a private citizen the orders sought cannot issue against him. I do agree with that submission that the 1st to 6th Respondents being private citizens cannot guarantee or secure the individual rights under the Constitution and so this application is wrongly brought against them. It is only the state which guarantees and secures the individuals fundamental rights and freedoms and the orders cannot issue as against private individuals. The courts have said this over and over again. See the cases of

1. KENYA BUS SERVICE LTD & OTHERS v. AG HMisc Application 413/05

2. HON MARTHA KARUA V RADIO AFRICA LTD t/a KISS FM HCC 288/04

3. NDUATI KARIUKI V THE HON LENARD NDUATI KARIUKI HMISC 7/06. The individuals can only be enjoined to these proceedings as interested parties. No orders can be obtained against the 1st to 6th Respondents at this interim stage or over the final orders in the petition.

The two investigating officers in criminal case 1784/06 IP Mwiti Mworio and IP Charles Njogu investigating 195/07swore affidavits in opposition to the prayers sought. Both of them depone that the charges against the applicant were preferred after complaints were made to the police and after investigations the police decided to charge the applicant with the various offences which are outlined in the charge sheets. The applicant alleges that there has been inordinate delay in hearing and determination of the two cases but the two officers referred the court to the proceedings in those cases as evidence that the delay if any, has not been occasioned by the prosecution. Since it is the applicant who alleges delay he should have exhibited the proceedings before the lower court for this court to appreciate what is the cause of the delay. He does not expect the Respondents or this court to look for the proceedings. Rule 14of Legal Notice 6/2006requires any party who requires to rely on any document to annex it to the supporting affidavit.

According to the investigating officers there were good grounds or cause them to charge the applicant with the offences that were preferred and that there is no evidence of bad faith which has been disclosed as against them or that the cases were preferred for ulterior purposes other than the criminal justice system. Having considered the affidavits sworn by the investigating officers and the annexures thereto, I find that the applicant has not demonstrated that he deserves the orders prayed. The applicant should await the hearing of the petition when all the prayers can be considered once and for all. After all criminal case No 1784/06 has been pending since 2006 for over one and half years and the applicant never moved this court for any interim orders nor did he challenge the constitutionality of the charges therein. If indeed he had good grounds to stop the prosecution of these cases he should have moved with alacrity to stop them. The court does not aid the indolent and the interim orders are not deserved and the court declines to grant the same. The chamber summons is hereby dismissed.

Prayers 4 and 5 were not canvassed at all. In any event prayer 4 seeks final orders and cannot be granted at this stage. Prayer 5 is also not sought in the petition and would not be granted.

Let the parties exchange skeleton arguments on the petition and have it heard to its conclusion. Costs of the chamber summons to the Respondents and interested party.

Dated this 10th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Owuor for Applicant/Petitioner

Mr. Oonge for 1st Respondent

Daniel: Court Clerk.