



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 361 of 2008

ALICE MUGECHI MWICIGI..... APPLICANT

V E R S U S

THE ATTORNEY-GENERAL.....1ST RESPONDENT

CHIEF MAGISTRATE NAIROBI LAW COURTS.....2ND RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 19th June, 2008 filed by M/s Kamau Kinga & Company advocates for the applicant. It was filed under Order 53, Rule 1 (2) (3) and (4) of the Civil Procedure Rules. However, in its heading, there is an alleged contravention of Fundamental Rights and Freedoms of the Individual under Sections 70 (a), 72(3) (b) and 77(1) of the Constitution. It seeks for the following orders, that-

(a) *Leave be granted to apply for orders for certiorari do issue to bring to this Honourable court and quash the proceedings of the Respondents in Criminal Case No. 8 of 2008 before the Chief Magistrate's Court at Nairobi.*

(b) *That this Honourable Court be pleased to*

prohibit from further proceeding with Criminal Case No. 8 of 2008.

(c) *This Honourable Court be pleased to declare*

that the charges brought against the petitioner in criminal case No. 8 of 2008 be dismissed and the Petitioner be acquitted forthwith for the violation of her fundamental rights and freedoms by the arresting officers.

(d) *This Honourable Court be pleased to grant the*

Petitioner interim orders for stay pending the determination of these proceedings.

(e) *This Honourable Court be pleased to make such*

other or further orders as it may deem just and fit to grant

(f) *Costs of the application be provided for.*

In the grounds supporting the application, it is averred that the respondents who are named as **THE ATTORNEY-GENERAL and the CHIEF MAGISTRATE NAIROBI LAW COURTS** have violated and/contravened the Petitioners fundamental rights and freedoms guaranteed under sections 70(a), and 72(3) (b) and 77(1) of the Constitution; that the Petitioner was arrested on 27th December, 2007 at 12.30 pm and was not brought to court until 8th day of January, 2008 when she was charged before the Chief Magistrate's court at Nairobi law Courts; and that the Petitioner was in custody for more than twelve days whereas she was supposed to be presented before a court of law within twenty four hours after arrest. A statement and verifying affidavit were filed as required by law.

I ordered that the application, which was filed as an ex-parte application be served. Consequently, it was served on the Attorney-General.

At the hearing of the application, Mr. Kinga for the applicant made submissions before me. He submitted that the applicant was held beyond the Constitutionally allowed period after arrest, even after discounting intervening public holidays. He submitted that the Court of Appeal had held in a number of cases, that they would uphold the rights of an accused person. He submitted that prayer (c) was an alternative prayer. He asked for the application to be allowed and leave be granted to file Judicial Review proceedings as well as stay of proceedings in the subordinate court until determination of the application.

Mr. Wahoro for the respondent emphasized that prayer (c) was not addressed specifically by applicant's counsel in his submissions. Counsel also submitted that declarations were not orders covered in Judicial Review proceedings. Therefore, though he did not object for the grant of prayers (a) and (b), the application was incompetent in its entirety because it sought for declaratory orders, and should therefore be dismissed.

I have considered the application, documents filed and submissions of Counsel who appeared before me.

This application is incompetent. It alleges contravention of fundamental rights under Sections 70, 72, and 77 of the Constitution. It is however brought in the wrong way and is therefore incurably defective.

The general procedure for bringing to this court applications for breach of fundamental rights and freedoms of the individual under Section 70 – to 83 (inclusive) of the Constitution are clearly spelt out under Rules 11, 12 and 13 of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006 – Legal Notice No. 6 of 2006. The said Rules provide as follows-

“11 Where contravention of any fundamental rights and freedoms of an individual under Sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.

12 An application under rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.

11. The petition under rule 12 shall be supported by an affidavit.”

Clearly, from the above provisions of the Rules, this application should have come by way of petition, if it arose from a general allegation of contravention or apprehended contravention of Sections 70 to 83 of the Constitution. A petition and a Chamber Summons are two different forms of applications. One cannot be substituted for another. On that account, I find that this application is incurably defective and has to be struck out.

That is not all. This application arises from alleged contravention of fundamental rights and freedoms of the individual contrary to the Constitution, with regard to criminal proceedings in the Chief Magistrates Court. Such constitutional matters as have been alleged arising from proceedings in the subordinate court, should have been brought to the High Court under rule 25 of the Rules under Legal Notice No. 6 of 2006, which provides-

“25. Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under Section 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.”

In our present case, there is no allegation that the constitutional issue being brought to the High Court was raised in the subordinate court proceedings in question. The applicant or his counsel should have raised the issues in the subordinate court, before coming to the court. On this account also, the application is incompetent.

Rules of court are not made for fun but to serve a purpose. They have to be complied with. The applicant has to choose the correct procedure to bring this matter to this court. Otherwise the application as currently filed is incompetent and incurably defective. I will strike it out.

Consequently, and for the above reasons, I strike out the Chamber Summons application herein. For the sake of record, I wish to state that the applicant is at liberty to bring to this court appropriate proceedings under the law on the subject matter, but following the correct legal procedure and process.

Dated and delivered at Nairobi this 23rd day of July, 2008.

In the presence of-

GEORGE DULU

JUDGE.

In the presence of –

Mr. Bwire holding brief for Mr. Kinga for the applicant.

Mr. Njuguna holding brief for Mr. Wahoro for respondents.