



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC APPLI 1492 OF 2005

IN THE MATTER OF THE CONSTITUTION OF KENYA AND THE CONSTITUTION OF KENYA (PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2001

IN THE MATTER OF NAIROBI HIGH COURT OF KENYA CIVIL CASE NO. 1094 OF 2005 – NAIROBI HOUSE LIMITED – VS- LENA CATHERINE KOINANGE, VERONICA NJERI, TRENTON (K) LIMITED AND JEWEL INVESTMENTS LIMITED

IN THE MATTER OF NAIROBI HIGH COURT OF KENYA CIVIL CASE NO. 1184 OF 2005, TRENTON (K) LIMITED AND JEWEL INVESTMENTS LIMITED – VS- NAIROBI HOUSE LIMITED

-AND-

IN THE MATTER OF THE INVESTIGATIONS BY THE CRIMINAL INVESTIGATION DEPARTMENT ON TITLES NUMBERS L. R. 209/7577 (I.R. 94498) AND L.R. NO. 6863/75 (L.R. 31722)

-BETWEEN-

LENA CATHERINE KOINANGE.....APPLICANT

-VERSUS-

ATTORNEY GENERAL1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

NAIROBI HOUSE LIMITED.....1ST INTERESTED PARTY

TRENTON (K) LIMITED.....2ND INTERESTED PARTY

JEWEL INVESTMENTS LIMITED.....3RD INTERESTED PARTY

DIAMOND TRUST BANK LTD.....4TH INTERESTED PARTY

RULING

By an Originating Summons dated 12th October 2005 and filed in court on 13th October 2005, the Applicant, Lennah Catherine Koinange sought orders against the Hon. the Attorney General and the Director of Criminal Investigations Department, under Section 84(1) and (2) of the Constitution of Kenya and Rules 9 and 11 (a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. They are as follows:-

1. An order of prohibition directed to the Respondents and the police stopping or prohibiting the arrest, detention, indictment and Criminal prosecution of the Applicant or the institution of any criminal proceedings by the Attorney General against the Applicant arising out of a complaint made to the Respondents and/or the police by Nairobi House Ltd and the directors of Nairobi House Ltd arising from the subject matter of the Civil proceedings in Nairobi High Court CC No. 1094/2005 and 1184/2005;
2. Damages for the contravention of the fundamental rights and freedoms of the Applicant and for the pain, loss and mental anguish suffered as a result of the violations of the said rights and freedoms;
3. The Honourable Court make such further orders, issue such writs and give such directions as the Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights and freedoms of the Applicant;
4. The costs of the Application be provided for.

On the same date of 13th October 2005, the Applicant filed a Chamber Summons under Certificate of Urgency in which the following orders were sought;

1. That this Application be certified urgent and be heard ex parte in the first instance;
2. That a day be appointed for the application to be heard inter partes;
3. That the Application and Originating Summons be served on all the parties in the High Court Civil Case No. 1094/2005 and 1184/2005 as interested parties;
4. That the arrest, detention, indictment and criminal prosecution of the Applicant or the institution of any Criminal proceedings by the Attorney General against the Applicant arising out of a complaint made to the Respondents and/or the police by Nairobi House Ltd and the Directors of Nairobi House Ltd and or arising out of the subject matter of the Civil proceedings in Nairobi HCC Nos 1094/2005 and 1184/2005 be stayed until the hearing and determination of the Originating Summons filed herein and dated 12th October 2005;
5. That the costs of this Application be provided for.

On 14th October 2005, Mr. Orengo, counsel for the Applicant appeared before my brother Justice Ibrahim

and upon hearing the Counsel ex parte, the judge granted prayers 1, 2, 3 and 4 of Chamber Summons dated 12th October 2005.

On 21st October 2005, Karandu Manduku and Ondabu Advocates, moved to court under Certificate of Urgency on behalf of the 1st Interested Party, Nairobi House Ltd. by way of Chamber Summons of the same date. The Chamber Summons sought the following orders;

- 1) That the Application be certified urgent and be heard immediately in view of its urgent nature;
- 2) That service of the Application be dispensed with and be heard ex parte in the first instance;
- 3) That Nairobi House Ltd. be and is hereby granted leave to be enjoined to these proceedings as an Interested Party;
- 4) That pending the hearing and final determination of this Application, the exparte orders given by this Honourable Court on 14th October 2005 be and are hereby set aside and/or discharged;
- 5) That the ex parte orders given by the Honourable Court on 14th October 2005 be and are hereby discharged;
- 6) That the Originating Summons dated 12th October 2005 and filed in court on 13th October 2005 be and is hereby struck out and subsequently this reference be and is hereby dismissed with costs to the Interested Party;
- 7) In the alternative, this reference be and hereby stayed pending the hearing and final determination of Nairobi HCC 1094 of 2005, Nairobi House Ltd. vs Lennah Catherine Koinange; Jewel Investments Ltd. and Trenton (K) Ltd. and Nairobi HCC 1184/2005 Trenton (K) Ltd. & Jewel Investments Ltd. v Nairobi House Ltd.;
- 8) The costs of this Application be awarded to the Interested Party/Applicant.

Mr. Nyaberi urged this Application before Justice Ibrahim who certified the Application urgent and allowed the Nairobi House Ltd to be enjoined to the proceedings as a party thus granting prayers 1 and 3 of the Chamber Summons dated 21st October 2006. The Chamber Summons was then fixed for inter partes hearing and it is what was urged before me by Mr. Nyachoti for the 1st Interested Party – Nairobi House Ltd.; Mr. Luseno who appeared for the 4th Interested Party, Diamond Trust Bank Ltd. who was joined to the proceedings later as an Interested Party supported the Chamber Summons by the 1st Interested Party, and Ms Nyamosi for the Respondents who argued in support of the Chamber Summons. On the other hand Mr. Orengo appeared for the Respondent/Applicant (Lennah C. Koinange) and Mr. Katwa for Jewel Investments who are the 3rd Interested Party and they opposed the Application. The Chamber Summons of 21st October 2006 is supported by an affidavit sworn by Peter Mbugua Francis Kimani, a director of the 1st Interested Party, a replying affidavit dated and filed in court on 1st November 2005 sworn by Daniel Kirorei, a Police Inspector from the Criminal Investigation department (hereinafter referred to as, C.I.D) the investigating Officer in **Criminal Case No. 121/746/05** in which Lennah Catherine Koinange was charged, and a further affidavit of Peter Mbugua, F. Kimani, filed in court on 13th January 2006. The 4th Interested Party filed grounds in support of the 1st Interested Party's Application.

The salient grounds upon which the Application is premised are:

- 1) that the ex parte orders of 14th October 2005 were obtained by the Respondent/Applicant concealing material facts;
- 2) That the reference is frivolous and an abuse of the court process;

3) That no reasonable cause of action is disclosed;

4) That no interim orders were sought by the Respondent/Applicant in the Application of 12th October 2006.

Briefly, the Interested Party's case is that the 1st Interested Party, Nairobi House Ltd, is the registered owner of LR 6863/75 (IR 31722 situate in Lavington. The title was exhibited to Peter Mbugua. Replying Affidavit dated 15th November 2005. That title was issued on 18th January 1977.

The 1st Interested Party learnt of the existence of another title LR 209/7577 registered in the names of Lennah Catherine Koinange dated 1st September 1991 and that the said LR 209/75/77 is on the same physical location as LR No. 6863/75. The 1st Interested Party therefore lodged a complaint with the C.I.D. to ascertain whether title 209/7577 was authentic. A search conducted at the Lands Registry revealed that LR 209/7577 is IR 94498 and that IR 94498 belongs to Anne Nyawacha Mwok-handa who owns LR 12715/3148. Mr. Nyachoti submitted that there can be no one IR number in respect of two L.R. numbers. The 1st Interested Party complained on the basis that L.R. 209/7577 could be a forgery and likely to deprive the 1st Interested Party of their land. It was further submitted that LR 209/7577 was purportedly transferred by the Applicant to the 2nd and 3rd Interested Parties, Trenton (K) Ltd. and Jewel Investment Ltd. on 3rd November 2004 but a search at Lands Registry indicates that the Day Book 301 which appears on the title for transfer of LR 209/7577 was in respect of IR 44373 which is a totally different property.

In his submissions, Mr. Nyachoti went on to demonstrate why the Applicant was justified in lodging a complaint with the C.I.D. about the title held by the Applicant. The Affidavit sworn by Daniel Kirorei on behalf of the Respondents sets out what the investigations he carried out on LR 209/7577 where he annexed the statements recorded by various officers. They are as follows:

1. Caleb Tawayi Muhuyi and Geoffrey Swanya Birundu both Registrars of Titles said that IR 94498 was issued to LR12715/3148 which belongs to Anne Mwok-handa but not LR No. 209/7577;
2. Judith Marilyn Okungu, Commissioner of Lands cancelled the allotment letter issued to the Applicant Lennah C. Koinange and asked her to return the original letter. She said there was a forgery in respect of LR 209/7577;
4. Gaitan Mukofu, a Deputy Commissioner of Lands denied knowledge of or processing the title in respect of LR 209/7577;
5. George Gichuru Gichuhi, a Registrar of titles, said that the Day Book No. 301 was issued on 3rd November 2004 but not 17th November 2004 as indicated in the transfer of LR 209/7577 to 2nd and 3rd Interested Parties. He concluded that it was a forgery;
6. Elizabeth Nyambura Gicheha a collector of Stamp Duty on being shown IR 94498, denied receiving any stamp duty in respect thereof;
7. Lennah Koinange's statement to police, she alleged that her advocates Messrs Rachier obtained the title on her behalf;
8. Ambrose Rachier Advocate, denied that his firm ever processed the grant or presented the transfer for registration but that the client did it personally;
9. E.M. Murage Director of Survey, upon being requested by Rachier Advocate and Director of C.I.D. to confirm the deed plan 91752 in respect of LR No. 209/7577 and LR No. 6873/75, he confirmed that LR 6863/75 and the Deed plan 9175, survey plan F/R 130/24 were approved and authenticated on 13th March 1975 and they supercede any other LR Nos or deed plans. He also gave a history of LR No.

10. Communication between the Commissioner of Lands and other Officers in the Lands Office over LR No. 209/7577 all point to the conclusion that the title was obtained in dubious or questionable circumstances;

11. Ruth Waruguru, Assistant City Director Planning in her affidavit, denied that the signature on form PP A2 presented for approval was hers. She denied that there were any records of LR No. 209/7577 at City Hall and that Form PP A 2 was in respect of LR 6845/127 which is situate along Ngong Road;

According to Counsel, all this evidence gathered by the C.I.D required that the Applicant explain how she obtained the title LR 209/7577 and that the preference of charges against the Applicant was well founded.

Mr. Nyachoti argued that the purpose of the interim orders was to stop investigating the Applicant or pervert her from being charged. He observed that before this reference was filed by the Applicant, the Interested Party – Nairobi House Ltd. had filed HCC 1094/05 against the Applicant, 2nd and 3rd Interested Parties. In HCC 1184/05, 2nd and 3rd Interested Parties sued the 1st Interested Party and it was one of the prayers that the title issued to 1st Interested Party, Nairobi House Ltd be investigated.

In the same case, the 1st Interested Party filed a Chamber Summons Application seeking consolidation of HCC 1094/05 and HCC 1184/05 and asked for the title issued to the Applicant, LR 209.7577 to be investigated. Mr. Nyachoti submitted that both parties had wanted the titles investigated and yet when the Applicant came to court, she did not exhibit these particular pleadings and that had these pleadings been placed before the judge, and had the judge known that either party wanted the investigation of the other's title, he could not have granted interim stay.

Mr. Nyachoti argued that the matters raised by the Applicant in her affidavit can only help her in the criminal case but that no constitutional issue is raised.

He urged that under Rule 9 of the Chunga Rules, 2001, the Applicant should have raised the issue of the Interested Party using the criminal justice system to enhance their civil case before the Lower courts but not file a constitutional reference.

It is the 1st Interested Party's contention that in the Chamber Summons dated 12th October 2005, there was no prayer for interim order of stay, and it was irregular for the court to grant the said order.

Counsel submitted that under S. 26 (8) of the Constitution, the Attorney General is not subject to the control or direction of anybody or authority and the order barring the Attorney General from arresting and commencing criminal proceedings against the Applicant is unconstitutional.

Counsel relied on the following authorities;

1. M.V. LILLIAN 'S' V CALTEX OIL 1989 KLR 1 in which the court held that failure to make a full and frank disclosure of facts known to the Applicant may result in discharge of interim orders.

BEEF BUILDING SYSTEMS LTD. V NAIROBI CITY COUNCIL HCC 1357/01 where an order of injunction had been granted ex parte and the court set aside the order for being unjust and inequitable.

It was submitted that all the allegations made by the Applicant of harassment, torture, should be raised in the criminal case and that so far, the Applicant has not demonstrated that any right has been infringed by the CID officers during the investigations.

Mr. Luseno Counsel for the 4th Interested Party supported the application and adopted submissions of the 1st Interested Party. He also submitted that the constitutional reference filed by the Applicant contravenes the Chunga Rules, 2001. He said that because the Application was brought under Rule 9 & 11 (a), it

related to proceedings before the subordinate court. It should have been raised in the subordinate proceedings, and the magistrate should have framed a constitutional question which would be referred to the High Court for determination. It is Counsel's view that nothing was demonstrated to this court as to why the said orders should be granted as there was no specific prayer for interim relief and there has therefore been abuse of the court process.

Mr. Luseno urged that this court should recognize structures reserved under the constitution for determination of matters before different courts. He submitted that the Attorney General has power to investigate and if the Applicant is aggrieved, she should also have complained to the Attorney General to investigate the Interested Party's title. Counsel further said that the Criminal Procedure Code and Constitution offers rights and protection to the Applicant as she is presumed innocent till proved guilty, she has right to her defence, and ought to call and cross examine witnesses.

Mr. Luseno observed that the Applicant only seeks to stay the Criminal proceedings but not other cases that are pending in the civil courts and the constitutional reference is not about the safeguard any rights. Further to the above, Counsel urged that despite the fact that the Commissioner of Lands wrote to the Applicant asking her to return the Letter of allotment, she did not oblige and she cannot be the beneficiary of a court's order when she has not complied with the law under which the Commissioner was acting. Mr. Luseno urged that this Reference was filed as a shield against a legal and lawful criminal justice system under the Criminal Procedure Code and that this Reference seeks to achieve a goal not intended under the Chunga Rules, 2001 which amounts to abuse of the court process.

Like the Interested Party's submissions, it was submitted that so far, the Applicant has not alleged any violation of any constitutional rights in the Originating Summons. Mr. Luseno urged that in any case, fundamental rights are subject to recognized limitations which include institution of criminal proceedings and the police detention for purposes of interrogation and that even though detention can be inconveniencing, it is not unconstitutional and such allegation can be dealt with a criminal court.

Counsel relied on the following cases.

1. **MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD AND ANOTHER HCC 310/01**, where J. Ringera declined to let a party use legal means to validate an illegality.
2. **UWE MAXNEIR & VIOLET AKINYI ODERO V THE ATTORNEY GENERAL CA 131/05**. The appellants sought to stay Criminal proceedings against them by way of Judicial Review and the court found that there was no allegation of illegality of the decision by the Attorney General. The court said that Judicial Review should not be used to usurp functions of the trial court
3. **HMISC 343/00 AMENYA WAFULA V REP** where the court held that fundamental rights are not absolute but have limitations.
4. **HCA 169/91 ABDUL SHAKUR V ABDULA MAJID SHEEKI** where the court held that the court can only grant that which has been pleaded and sought in the Application and it was a fundamental mistake for the court to grant stay.

Mr. Orenge Counsel for the Applicant submitted that they moved the court under S. 84 (1) of the Constitution and that under that Section, one only needs to allege contravention of his rights and apply to this court for redress having satisfied the following;

1. Allege a violation or threatened violation of S.84 of the Constitution;
2. There must be specific reference to the Sections of the Constitution that are allegedly contravened;
3. Material must be placed before the court showing the manner in which the rights have been contravened which is in the form of an accusation.

Counsel contends that they have complied with the requirements since, the Originating Summons has made allegations of an intended prosecution that will compromise the protection against self incrimination, harassment, personal liberty and presumption of innocence which are accorded by the Constitution i.e. S.70 (a) and the manner of the prosecution. Counsel urged that the issue before court is not ownership of land. Counsel relied on the following cases;

(1) **LAWRENCE NDUTU & 156 OTHER V KENYA BOEWEYIA LTD. HCC 279/03**, where a Notice of Motion was filed alleging violation of fundamental rights and a Preliminary Objection was raised but the court ruled that once an allegation of violation or threatened violation of fundamental rights was made, the court had to determine the matter in accordance with S.84 of the Constitution.

(2) **ANARITA KARIMI NJERU V THE REP (1979) KLR 154**

where the court held that one had to specify the complaint, the provisions infringed and the manner in which they are infringed.

(3) **THE ATTORNEY GENERAL V BUTAMBALA (1992) LRC 496** a Tanzanian case, where at page 500, the court held as in the above two cases.

Mr. Orenge argued that though Counsel had spent a lot of time addressing the court, the issues in the Originating Summons have not been considered and that as held in the case of **RASHID ODHIAMBO ALOGGOH V HACO INDUSTRIES LTD CA 110/01**, once allegations of violations of fundamental rights are made, the Applicant has to be given an opportunity to prove them and in this case, it will be upto the Applicant to adduce evidence relating to oppression or abuse of court process. Counsel submitted that in the case of **JARED KANGWANA V ATTORNEY GENERAL NAIROBI HCMISC 446/1995** the judge observed that he was not dealing with the guilt of the Applicant but evidence of abuse of court process and that in this case, the issue is not ownership of land but whether there has been violation of Applicants rights. Counsel also referred to the Australian case of **WILLIAM & OTHERS V SPAUTZ (1993) 2 LRC 659** in which it was held that a stay will be granted in a criminal prosecution to prevent abuse of process or an unfair trial even if the moving party has a prima facie case. Mr. Orenge's contention is that the Criminal proceedings are intended to enable the Interested Parties easily prove the Civil case against the Applicant. Counsel also relied on the case of **GITHUNGURI V REP (1986) KLR 1** for the proposition that one can still come to the High Court for protection of his rights and avoid risking the inconvenience of a trial and imprisonment.

On the question of striking out of the Originating Summons, Counsel submitted that it is a draconian measure to strike out a party's and the Courts have generally discouraged that mode of determining cases, see the case of **DT DOBIE & CO V MUCHINA (1982) KLR 1**. Counsel also referred to the case of **SPENCER V ATTORNEY GENERAL (1999) 3 LRC 1** where the court held that if the pleadings are prolonged like in this case, then the court should decline to strike out and that the Applicant should consider all the pleadings to demonstrate that there is no cause of action. Counsel urged that Like the **KANGWANA CASE**, the court should have been addressed on the section and even the sub-section under which the allegation is made.

On the question of Non disclosure of material facts, Counsel was of the view that the Applicant placed before the judge sufficient material facts to enable him find that there was an arguable case. He said that all documents relating to the land i.e. titles, grants, survey plans were exhibited before the court. That the pleadings in the other cases were not filed because the Advocates were different. Counsel said that no relevant material facts were concealed from the court. Counsel relied on the case of **THE ANDRIA NOW RENAMED VASSO (1984) 1 QB 477** – for that contention. He also added that facts which are stated in such a way as to mislead or deceive the court may be discharged – Refer the case of **R V GENERAL COMMISSIONER EX PARTE PRINCESS EDMUND DE POLIGNAC (9A) 1KB 486**. The case of **BRINKS MATT LTD V ELCOMBE & OTHERS (1983) 3 ALL ER 188 pg 192** sets out the principles which the court should take into account in considering whether there has been a full and frank disclosure of material facts. I will consider them later in this judgment. Mr. Orenge further submitted that the court is being asked to determine to who the disputed land belongs and yet that is not

the duty of this court.

Mr. Katwa adopted Mr. Orengo's submissions and only added that the Application before the court is not made by the Attorney General who has powers to prosecute under S.26 of the Constitution and that the filing of the same by the Interested Party contravenes S.26 of the Constitution and that the Interested Party is overruling themselves as a complainant. He added that under S.84 (2) of the constitution, Justice Ibrahim had unlimited jurisdiction to ensure that rights of the individuals are secured.

The Application filed by the 1st Interested Party on 21st October 2005 attacks both the orders sought in the Chamber Summons filed by the Applicant on 13th October 2005 and granted on 14th October 2005, and seeks to have the order set aside as well as have the whole Originating Summons filed in court on 13th October 2005 struck out for being an abuse of the court process and disclosing no cause of action. This was not a Preliminary Objection but a substantive application which was argued at length. Had the court known that it would take so long to hear the arguments, the preferred mode of procedure would have been to proceed with the hearing of the Originating Summons and determine it once and for all instead of a possible repetition of the same arguments at the hearing of the Originating Summons, if the order of striking out is not granted. The nature of the Application has therefore called for arguments that go to the merits of the Originating Summons to establish whether or not there is any substance in the Originating Summons and whether it is an abuse of the court process.

I have now considered the submissions by all counsel, affidavits on record and authorities cited. The fact that some authorities are not specifically mentioned does not mean they were not considered. There is no doubt that the core of the dispute before this court is ownership of land situate in Lavington area of Nairobi which both the Applicant and 1st Interested Party claim to be the owners. The Interested Party holds a title in respect L.R 209/6863/75 whereas the Applicant holds a title in respect of LR 209/7577 which are said to occupy the same physical location. The parties have sued each other in the Civil court over the same issue. In HCC 1094/05, the 1st Interested Party Nairobi House Ltd, sued the Applicant and three others claiming inter alia, to be declared the owner of the land in question. In **HCC 1184/05 TRENTON K LTD** and **JEWEL INVESTMENTS LTD** (2nd and 3rd Interested Parties) sued the 1st Interested Party seeking to be declared the sole owners of the said property and also sought eviction of the 1st Interested Party. The claim before this court is however not ownership of the said land as this is not the proper forum to deal with that issue. The jurisdiction of this court is limited to enquiring into the allegations of violation of fundamental rights as alleged by the Applicant and what remedies, if any the court can grant. But the issue of ownership is so intertwined with the constitutional reference that the two cannot be totally divorced from each other. Reference has to be made to the question of ownership of the disputed land which birthed all these other issues.

It is impossible to deal with this Application without considering how it came to be that the C.I.D officers decided to investigate the Applicant and prefer criminal charges. The fact of the existence of two titles for the same plot is questionable and in itself calls for investigation. In this case however the 1st Interested Party reported to the Director of C.I.D to investigate and the affidavit of Inspector Kirorei sets out what he found during the investigations. I have already set out in the submissions of the Interested Parties, what was unearthed and wish to highlight but a few, as follows;

- (1) Though the title held by the Applicant indicates the title to be 209/7577 and IR 94498, it was found that the IR belongs to another person Ann Nyawanda Mwok-handa whose plot is situate in Syokimau area whereas the Applicant's plot is situate in Lavington area;
- (2) In her statement to the C.I.D, the Commissioner of Lands indicated that she had earlier cancelled the Applicant's letter of allotment to the disputed plot as it was private land that could not have been allotted;
- (3) The officers at Lands office denied processing the title in respect of LR 209/7577 and found there had been forgery on the title;

- (4) The collector of stamp duty denied collecting any duty in respect of the transfer to the 2nd and 3rd parties by the Applicant;
- (5) The Applicants counsel Mr. Rachier denied processing the grant and title for the Applicant;
- (6) The Assistant City Director Planning, Ruth Waruguru denied there being records in respect of LR 209/7577 at City Hall;
- (7) Mr. Murage, Director of Surveys also gave the history of the Land LR 209/7577 and 6863/75 and confirmed LR 6863/75 deed plan 9175 to be authentic and superceding any other.

With all the above and the other communication from the Lands Office that were exhibited, I do agree with the Interested Parties' submission that there was reason for the Applicant to give an explanation as to how she came to be in possession of the questioned title and even possession of the land in question.

Under S. 26 of the Constitution, the Attorney General has unfettered discretion to undertake investigations and prosecute.

S.26 (3), (4), and (8) reads as follows;

“The Attorney General shall have power in any case in which he considers it desirable so to do-

- a) to institute and undertake Criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;**
- b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and**
- c) to discontinue at any stage before judgment is determined any such criminal proceedings instituted or undertaken by himself or another person or authority;**

(3) The Attorney General may require the Commissioner of Police to investigate any matter, which, in the Attorney General’s opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney General upon the investigation;

5) The power of the Attorney General under sub section (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions;

6)

7)

8) In the exercise of the functions vested in him by sub-sections (3) and (4) of this Section, and by S.44 and 55, the Attorney General shall not be subject to the direction or control of any other person or authority”.

Under the above Section, the Attorney General’s inherent powers to investigate and prosecute may be exercised through other officers in accordance with the Constitution or any other law. But if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy, this court would intervene under S. 123 (8) of the Constitution.

In the case of **EMMANUEL KURIA GATHONI & ANOTHER V ATTORNEY GENERAL CRIMINAL APPLICATION 1384/01** the court considered what constitutes an abuse of court process

and the court found the following principles relevant;

- “a) whether a criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed;**
- b) whether the person against whom the criminal proceedings is commenced has been deprived of his fundamental right of a fair trial as envisaged in the provisions of the constitution;**
- c) Whether the prosecution is against public policy.”**

In the instant case if the police officer acted in a biased manner, capriciously, maliciously, or contrary to public policy, in instituting the criminal case against the Applicant, then that power to investigate or institute criminal proceedings can be challenged. That is the challenge that the Applicant brought to the court by way of the Originating Summons, that her fundamental rights have been or are likely to be infringed.

All I can say at this stage is that the Attorney General acted within his powers in carrying out investigations and preferring charges against the Applicant there having been a complaint made by the Interested Party and a reasonable cause having been established. The ultimate question will be whether in carrying out the Attorney General’s duties there were procedural improprieties as a result of which, the Applicant’s rights were violated.

Along with the Originating Summons challenging the police investigation and preferred charges, the Applicant filed an Application under Order 36 Rule 8A and 12 of the Civil Procedure Rules and Rule 11 (a) of the Constitution of Kenya.

The court gave ex parte orders staying the Criminal proceedings against the Applicant. The interim orders and the whole Originating Summons have become the subject of challenge in the 1st Interested Party’s Application of 21st October 2005. The question that has arisen is whether the 1st Interested Party can challenge the Constitutional Reference at this stage or should it proceed to full hearing?

In the **ALOGGOH CASE (supra)** the Court of Appeal held that once a party alleged breach or threatened breach of fundamental rights and freedoms, the party who alleges should be given an opportunity to be heard. However, that decision is not a rule of the thumb and there are instances when the party may not be entitled to be heard on a constitutional reference. Such instances are;

a. Plea of Res Judicata – where a matter has been litigated in another court between the same parties, the court cannot reopen the case to hear it. In **HC APP NO. 1652/04 BOOTH IRRIGATION V MOMBASA WATER PRODUCTS LTD (BOOTH 2)** Justice Nyamu held

“I hold that Res judicata does apply to constitutional matters and asking a constitutional court to deliberate and determine the issues surrounding the unchallenged consent order is with respect the height of absurdity when our fundamental principles give avenue of challenge in a civil court.”

- 2. A Constitutional Application brought in violation of fundamental principles of law is incompetent and may be dismissed;
- 3. Non disclosure of material facts is sufficient to warrant the dismissal of a constitutional reference **‘LILIAN’S CASE;**
- 4. An unchallenged court order cannot be a basis for one to file a constitutional reference;
- 5. If the reference is an abuse of the court process-**KURIA GATHONI CASE.**

The above named instances can call for the determination of constitutional reference before a hearing on merit.

The 1st issue I will deal with is whether there was material non disclosure of facts by the Applicant in obtaining the order of 14th October 2005.

In the **ANDRIA CASE**, the court held that it is axiomatic that in ex parte proceedings, there should be full and frank disclosure to the court of facts known to the Applicant and failure to make such disclosure may result in the discharge of any order made on the ex parte Application even if the facts were such that an order would have been justified had there been full disclosure. The same was held in the “**LILIAN’S**” **CASE**. In such a case the facts so withheld should also be relevant to the order issued.

In the **DE POLIGNAC CASE**, the court declined to grant an order of prohibition for the reason that the deponent of an affidavit had concealed from the court certain facts which were relevant to the decision in the matter. The **BRINKS CASE** (pg 192) which was cited in the “**LILIAN’S**” **CASE** the court set out 6 principles to consider when there has been relevant non-disclosure and the consequence of the failure to disclose. They are:

- (i) The duty to the Applicant is to make a full and fair disclosure of all the material facts;
- (ii) The material facts are those which it is material for the judge to know in dealing with the Application as made. Materiality is to be decided by the court not the Applicant;
- (iii) The Applicant must make proper inquiries before making the Application;
- (iv) The extent of the inquiries which will be held to be proper depend on the circumstances of each case, the nature of the case and the effect of the order;
- (v) If material non-disclosure is established, the court will be astute to ensure that the Plaintiff is deprived of any advantage he may have derived from the order;
- (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the facts of the case;
- (vii) It is not for every omission that the injunction will be automatically discharged.

The Interested Parties contend that the Applicant failed to exhibit all the pleadings in HCC 1184/05 and 1190/05 in which either party wanted the title of the other investigated. It is the 1st Interested Party who first filed HCC 1094/05 seeking to be declared the lawful owner of LR No 6863/75.

On 29th September 2005, the 2nd and 3rd Interested Parties to whom the Applicant had transferred the land in issue, filed HC 1184/05 seeking a declaration that the land in issue belongs to them and at prayer (d), sought an order that the 1st Interested Party’s title be investigated. In an Application dated 12th October 2005, in HC 1184/05, the 1st Interested Party sought an order that pending the hearing of the Application, the Director of Criminal Investigations Department do investigate the circumstances under which the Applicant got the title in respect of LR 209/7577. I do note that the Applicant did not exhibit this Application in the annexures to the Originating Summons and Chamber Summons. It is apparent that both the 2nd and 3rd Interested Parties and the Applicant wanted either of the titles investigated. Though the Applicant, 2nd and 3rd Interested Parties had indicated that desire first, they did not make any move towards reporting to police to commence investigations but the 1st Interested Party did, by reporting to the Director of Criminal Investigations Department.

From the documents laid before the court, and the affidavit of Inspector Kirorei, investigations were carried out in respect of both titles LR 209/7577 and LR 6863/75. The question is why would the Applicant want the 1st Interested Party’s title to be investigated and not her title? The question of both parties having prayed for investigations into the two titles was neither disclosed in the Originating Summons nor in the Chamber Summons filed by the Applicant.

I hold that it was very relevant to the issuance of the interim court order that disclosure be made that both parties had shown a desire in their pleadings, that both the titles investigated. If both parties wanted the titles investigated and investigations had been carried out it is absurd that the party charged as a result of the investigations can purport to stop the arrest and charges that resulted for the said investigations. The Applicant failed to exhibit all documents relating to the pleadings before the Civil Court which contained material relevant to the case before the court. It is irrelevant that the advocates who filed the civil suit were different from those in the reference. The Applicant is the 1st defendant in HCC 1184/05 and has been served with process and indeed reference is made to them in her affidavit. The fact that no reference was made to the prayers for investigations, by the Applicant in her pleadings, the only conclusion this court can reach is that, that was meant to conceal material facts and consequently I will find and hold that the Applicant was not entitled to the conservatory order for reason of non disclosure of material facts to the court that granted the interim order.

The Interested Parties exhibited to the Affidavit of Peter Mbugua, filed in court on 15th November 2005, a letter dated 9th November 2004, from J.M. Okungu, Commissioner of Lands addressed to Lennah Catherine Koinange, the Applicant herein. It was written about a year before the Civil suits were filed. The letter was cancelling the letter of allotment dated 10th September 1991 which offered the Applicant the parcel of land LR 209/7577. The letter said that LR 209/7577 was private land and the Applicant was asked to return the allotment letter to the Lands Office and the original receipt for purposes of refund. There has been no denial by the Applicant of this correspondence. It would be expected that the Applicant would also exhibit this letter to the Originating Summons because all facts known to the Applicant were supposed to be placed before the judge to enable him reach a fair decision. That aside, the allotment letter to the Applicant having been cancelled by the Commissioner of Lands, the Applicant in continuing to deal with the land in total disregard and disobedience of that letter and direction, cannot expect protection of the law which she has disobeyed. The Commissioner of Lands was discharging her duties as by law provided. The court would be perpetuating an illegality if it were to allow the order of 14th October 2005 to subsist in favour of the Applicant, (see **MICROSOFT CASE**) and consequently the Applicant is not entitled to the court's orders especially at the interim stage when the contrary has not been shown. The Applicant's action of seeking the court's protection with full knowledge of existence of the above facts which were unknown to court is both non disclosure of material facts and an abuse of the court process.

The Originating Summons which is under attack is brought pursuant to section 84 (1) and (2) of the Constitution.

Sub-Section (1) and (2) provide as follows;

“subject to subsection (6), if a person alleges that any of the provisions of S 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

2) The High Court shall have original jurisdiction-

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

(b) to determine any question arising in the case of a person which is referred to court in pursuance of subsection (3),

and may make such orders, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the provisions of any of the provisions of section 70 to 83 (inclusive)

3)

Under S. 84 (1) if there is an allegation of contravention or threatened violation of one's fundamental rights, they can apply for redress to the High Court. This is what the Court of Appeal held in the LAWRENCE NDUTU CASE (supra) and the RASHID ALOGGOH CASE.

It is upto the Applicant to state with precision the nature of the complaint, the provision of the Constitution that has been infringed, and the manner in which it has been infringed. There is now a wealth of decided cases on the above proposition.

In the ANARITA KARIMI CASE, Trevelyan and Hancox JJ said as follows (pg 156);

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in 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.”

Similar holdings have been made in the cases of AG V BATAMBALA & JARED KANGWANA (supra). In another later decision of Justice Khamoni in the case of CYPRIAN KUBAI V STANLEY KANYONGA NRB MISC APP 612/02, the Judge had this to say;

“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 paragraphs and subparagraph of the Section out of 70 and 83, allegedly contravened plus relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the Respondent prepare accordingly and also to know the exact extend and nature of the case it is handling.....”

It is the Applicant's contention that she has complied with all the requirements by setting out the Sections contravened and even the subsections and the nature of the infringement. Mr. Orengo submitted that the Interested Parties did not in their arguments, consider each pleading to ascertain whether or not the Applicant had a cause of action.

Mr. Nyachoti on the other hand considered the Applicants affidavit and made specific reference to the allegations and concluded that the Applicant had not demonstrated that any of his rights had been infringed. I will consider each allegation later in this ruling.

Fundamental rights and freedoms of the individual are protected under Chapter V of the Constitution: S. 70 of the Constitution provides as follows:

“whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (a) life, liberty, security of the person and the protection of the law.
- (b)
- (c)

the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

The protection of fundamental rights and freedoms under the above section is not absolute.

The rights of the individual are subject to the rights of others and those of the public. In *GITHUNGURI V REP* (1986) KLR 1 the Constitutional Court held, “rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community.” The Applicant has alleged contravention of her rights as under:-

Section 70 (a), (1) Secure protection of the law;

S 72 (1) – protection to personal liberty

S 74 (1) – protection from inhuman treatment

S 77 (1) and (2) (b) – rights to a fair hearing and equality before the law

S 82 (2) & (3) – protection from discriminatory treatment on grounds of sex.

Mr. Orengo urged that the Applicant had not been accorded a chance to prove the allegations made and the matter should be heard at a full hearing. In a Constitutional Reference all the affidavits on record form the factual basis of the party’s case. Though the Court of Appeal indicated in the *ALOGGOH CASE* that there was possibility of calling viva voce evidence, there was no such intimation that the Applicant intended to call such evidence in this matter and in any event, that would depend on the discretion of that court whether to allow oral evidence or not.

Calling of viva voce evidence in Constitutional Reference would be allowed in very few cases because Constitutional References are supposed to be heard expeditiously and if viva voce evidence were to be called in all cases, it would defeat that spirit. So, the evidence on which the court will rely upon to determine the Originating Summons is already available on record and the court can look at it to determine whether there is a cause of action disclosed or not and this court’s jurisdiction is to enquire into whether there has been violation of the Applicants rights by the Respondents as alleged.

At paragraph 6 of the Originating Summons, it is alleged that the Applicant’s right to personal liberty under Section 70 (a) and 72 (1) of the Constitution were contravened because she was held in custody for more than 8 hours. At para 18 of her Affidavit dated 12/10/05, the Applicant maintained that she was interrogated for the whole day and only released by Inspector Kirorei at 5.30 p.m.

Section 72 (1) and (3) provide as follows:

“No person shall be deprived of his personal liberty save as authorized by law in any of the following cases;-

(a)

(b)

(c)

(d) for the purpose of bringing him before a court in execution of the order of the court;

(e) upon, reasonable suspicion of having committed or being about to commit, a criminal offence under the law of Kenya;

(2)

(3) A person who is arrested or detained

(a)

(b) Upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court, within 24 hours of his arrest, or from commencement of his detention, or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

S 72(3) (b) provides an exception to the general protection to personal liberty. One can be denied that protection if suspected to have committed or about to commit an offence.

Firstly the Applicant was never arrested. She was only detained at the police station for purposes of interrogation and taking her statement for about 8 hours. The law allows detention of upto 24 hours. Though the detention may have caused inconvenience to the Applicant, it was within the powers of the police to detain her for purposes of investigation and it was not unconstitutional for the police to do so. If this were not so, the investigatory powers of the police would be hampered and rendered useless.

At ground 8 of the Originating Summons, the Applicant alleges to have been subjected to torture, harassment, inhuman and degrading punishment and/or treatment by being threatened with detention and being forced to write an extra judicial statement. The applicant has not stated in what manner she was tortured or harassed nor is there evidence of a medical report to support the allegations.

Being interrogated for 8 hours does not amount to inhuman treatment as there was reasonable cause to interrogate the Applicant and it was within time allowed by the law. The Applicant was not even arrested. In any event, all these allegations can be raised by the Applicant in her defence in the Criminal proceedings. They do not raise Constitutional issues to be considered by this court

At paragraph 4 of the Originating Summons, the Applicant alleges breach of the right to secure protection of the law under S 70 (a) and 77 (1) and (7) of the Constitution as the protection against self incrimination will be compromised.

S 77 (1) and (7) provide as follows;

“77” (1) if a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence –

(a) Shall be presumed innocent until he is proved or has been proved guilty;

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

(6) (not applicable)

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial”

At paragraph 19 of her affidavit, the Applicant claims to have been forced to write an extra judicial statement that is likely to be used in evidence against her. It is noteworthy that even if the statement were a confession, it is not admissible in evidence in any court of law and would not be admissible either in the criminal or civil proceedings. The law was amended and did away with the use of confessions in evidence. There is no way it would amount to self incrimination.

In the case of Ex parte J.P. SENNIK AND ANOTHER V THE SUBORDINATE COURT OF THE 1ST CLASS MAGISTRATE, CITY HALL NRB & AG, MISC APPLICATION 652/05, Nyamu Judge

considered the International Convention on Civil and Political Rights 1966 (ICCPR), a signatory to the African Charter on Human Rights and Peoples Rights ACHPR) in the context of what constitutes a fair hearing in terms of Section 77 of the Constitution of Kenya. He summarized them as:-

- (1) The right to equality before the law;
- (2) The right to presumption of innocence;
- (3) The right to be tried by a competent, independent and impartial tribunal established by law;
- (4) The right to a fair hearing;
- (5) The right to equality of arms and adversarial proceedings.

In the instant case, the above issues will not come into question because though the Applicant was charged, she did not appear before the court and therefore cannot challenge the court's competence or ability to hear and determine the case fairly. S.77 is pleaded prematurely as it applies to hearing before a court.

At paragraph 7 of the Originating Summons, the Applicant alleges that S 77 (2)(a) and (2) (b) of the Constitution have been contravened in that the presumption of innocence has been violated because the Applicant has been held in custody and has been threatened with detention without an order of the court which is tantamount to subjecting the Applicant to extra Judicial punishment and secondly that the Respondent did not inform the Applicant as reasonably as practicable in a language that the Applicant understood and in detail, the nature of the offence which she is suspected to have committed.

I reiterate what I have held above that though the Applicant had been charged, she did not appear before the court for a plea to be taken but instead moved this court and obtained interim orders staying the criminal case. There was no opportunity for the court to read the charge to the Applicant and the competence or otherwise of the court to afford the Applicant a fair hearing cannot come into question. Besides, just like the officers from the Lands Office who were summoned to record statements regarding the alleged, fraud the same could apply to the applicant and that cannot amount to breach of any right if the Applicant was summoned. The Applicant was never detained. If at all, it was within the time allowed by the law the above section cannot be called to question and no cause of action is disclosed.

Of Discrimination, the Applicant at paragraph 7 of the Originating Summons, depones that she is being treated in a discriminatory manner because she is a woman and has no local connexion with those in authority. S 82 (2) provides that no person shall be treated in a discriminatory manner by a person acting by virtue of a written law or in the performance of the functions of a public office or a public authority. S 82 (3) describes what amounts to discrimination;

“(3) In this Section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective description of race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

From the material placed before this court by the Applicant, there is no evidence of discriminatory treatment on account of sex, or other connexion. There is no evidence that the Interested Parties had other connexion that influenced the police decision to investigate the Applicant, file and prefer charges against her but not them. Both titles were investigated and it cannot be discrimination just because the outcome of the investigations leaned against the Applicant. That allegation is baseless.

The Originating Summons dated 12th October 2005 sought 4 prayers:

1. The matter be certified urgent;
2. A hearing date be appointed for the hearing of the application inter partes;
3. That the Application be served on all parties in HCC 1094/05 and 1184/05;
4. That the arrest, detention, indictment and prosecution of the Applicant arising out of the complaint by the Respondent be stayed until the hearing and determination of the Originating Summons.

There was no prayer for interim stay. The Application was expressed to be brought under Order 36 Rules 8 A and 12 Civil Procedure Rules and Rule 11,(a) of the Rules made under the constitution. The Interested Party contends that under the circumstances, the court had no jurisdiction to grant the interim stay. On the other hand, the Applicant's Counsel urged that the Originating Summons was brought under S 84 of the Constitution and the court has jurisdiction to grant any orders to ensure that the ends of justice are met. Ordinarily, the court's jurisdiction has to be invoked for any order to be granted. Under S 84 of the Constitution however, even if the prayer is not sought specifically, the court has a wide discretion to grant orders to meet the ends of justice, but it has to be based on evidence. The judge had the jurisdiction to grant an interim stay under S 84 of the Constitution based on evidence. Unfortunately, the court record is very scanty and not much was recorded by the court to show the basis upon which the stay was granted. So as not to be seen to sit on appeal of my brother judge's order, that is all I can state of the interim order. However, the court can still set aside a stay order on the ground that the Application has no substance. In the *K.B.S. LTD & OTHERS V THE AG & OTHERS MISC APP 413/04* Justice Nyamu observed that a stay order can be set aside by the court on Application if it would be unreasonable, unfair and oppressive for an aggrieved party to be burdened with the order until the determination of the Originating Summons. I hold that it would be unreasonable and unjust to paralyse the proceedings in the criminal case for all the reasons given in this judgment and the fact that the Originating Summons lacks substance. The stay order should be set aside.

It was Mr. Katwa's contention that the 1st Interested Party's Application cannot be sustained because the 1st Interested Party is not the Respondent in this case but it is the Attorney General's powers which are the subject of attack. The 1st Interested Party was joined to these proceedings by consent of the parties. The 1st Interested Party is affected by the orders of this court and I hold that it is within their right to challenge the Chamber Summons or the Originating Summons filed herein plus any orders that affect them.

In conclusion, this court finds that there was material non disclosure of facts by the Applicant, the Application lacks substance, as it is not demonstrated that any of the Applicant's rights have been or are likely to be violated. The criminal justice system provides sufficient safeguards in the Constitution and the Criminal Procedure Code to ensure a fair trial in a criminal court and it was unnecessary for the Applicant to move this court under the constitutional provisions. The issues raised were either premature or could be raised in her defence in the Criminal Case. I accordingly set aside the interim order issued on 14th October 2005, and strike out the Originating Summons dated 12th October 2005 for being frivolous and an abuse of the court process and disclosing no reasonable cause of action. Costs of the Originating Summons and Chamber Summons be borne by the Applicant, Lonnah Catherine Koinange.

Dated and delivered this 23rd day of February, 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mrs. Aulo for Applicant

Mr. Nyachoti for Interested Party

Mr. Rimui holding brief for Mr. Luseno for 4th Interested Party

Mr. Makongo – Respondents

R.P.V. WENDOH

JUDGE