



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civil Appli 2 of 2004
(CONSTITUTIONAL APPLICATION)

IN THE MATTER OF: H.C.C. NO. 483 OF 1984

AND

**IN THE MATTER OF: SECTIONS 26,60,75 AND 84 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

MUTARATARA ENTERPRISES LTD

MARTIN WAINAINA KENYANJUIAPPLICANTS

VERSUS

ATTORNEY GENERALRESPONDENT

R U L I N G

The dispute before this court is the one expressed in a notice of motion taken out pursuant to Sections 26,60, 75 and 84 of the constitution. In this motion, the applicants namely: Mutaratara enterprises Ltd and Martin Wainaina Kenyanjui asked for 2 main prayers:

- (a) A declaration that the applicants' fundamental rights as guaranteed by the constitution violated by the Attorney General, the Respondent herein.
- (b) An order directing the A.G. to compensate the applicants for loss and damage arising from the violation of the fundamental rights being the decretal amount together with interest to date plus general damages.

In support of the motion is the affidavit of Martin Wainaina Kenyanjui. It is the submission of Mr. Gikandi advocate for the applicants that the late Hon. Mr. Justice Mathew Guy Muli, the then Attorney General grossly interfered with the execution of the applicants' judgment in Mombasa H.C.C.C. NO. 483 of 1984 between **Mutaratara Enterprises Ltd =vs= Mohanlal Shah & 3 Others.** It is the argument of the applicants that the late Attorney exerted a lot of pressure and intimidated the applicants to the extent that the judgment debtor became bankrupt before satisfying the decree. The applicants annexed copies of

various correspondences exchanged between the Attorney General and their advocate. For these reasons this court was urged to grant the orders sought.

Mr. Mutungi, learned Litigation appeared as representing the Attorney General and opposed the application. He attacked the motion on the ground that there was nothing constitutional which was disclosed save for the fact that the issue in dispute is in respect of execution proceedings. The learned litigation Counsel accused the applicants of relying on sections of the constitution out of context. He further pointed out that the motion was filed out of time in that the cause of action arose in 1984 and yet the motion was filed in 2004 about 20 years later.

The history of this dispute appear to be short and straightforward. By a plaint dated 26th June 1984, Mutarataru Enterprises Ltd., the 1st applicant herein sued Mohanlal Motichand Shah, Mariamu Kirigo Hamadi Aboud Maalim, Ahmed Aboud and Fauzia Abdalla Shallik (Shah) in which it sought for judgment in the sum of Kshs.3,332,772 plus interest in respect of a contract of guarantee entered between the parties on 15th February 1984. Judgment in default of appearance was entered in favour of the applicant on 25th July 1984 which judgment gave rise to a decree which was later executed by way of attachment of the defendant judgment debtor's property. One of the judgment debtors, Mariam Aboud approached the late Hon. Justice Mathew Guy Muli to intercede to save her property from the auctioneers' hammer. It would appear the late Attorney General telephoned the applicants' advocate Mr. Ushwin Khanna and verbally requested him to suspend sale of the property to allow the parties negotiate the way forward in settling the decretal sum. There was also evidence of exchanged written correspondences in form of letters. In the end the property which had been attached in execution of the decree were released at the request of the Hon. Attorney General the late Justice Mathew Guy Muli. In one of the correspondences i.e. the letter dated 7th November 1984 Mathew Muli A.G. said:

“My intervention in this matter was purely on humanitarian grounds because I have no standi in suits but you will appreciate that presented with a petition like the one I had, I had to seek for your indulgence which you appear to have extended unreservedly.

Thank you again and keep me informed of any defaults should they occur because I feel that any breach of the arrangement would amount to letting me down.”

So, the applicants' claim that the Attorney General's involvement in the matter was wrong, undue and unlawful interference with the due process of law by the Government which led to the applicants failing to recover anything from the judgment debtor.

I have anxiously considered the arguments put forward for and against the motion. I have carefully also read the application and the accompanying affidavit. I must confess I do not understand what fundamental constitutional rights the Attorney General breached. What appears from the correspondences availed to this court is that the Attorney General was humbly pleading with the applicants' advocate to accommodate the judgment debtor. The late Attorney General knew he had no powers at all to stop the execution of the decree. In fact he expressed in his letter of 7.11.84 that he had no *locus standi* in the matter but that he intervened purely on humanitarian grounds. I agree with the submissions of Mr. Mutungi, the learned litigation Counsel that the Attorney General never breached any of the constitutional provisions cited. It has been alleged that the Attorney General intimidated the applicants' advocate by involving very powerful and Senior Government officials to prevent the execution of the decree which remains unexecuted up to date. This allegation cannot stand because there is no credible evidence to prove that the Attorney General and Senior Government officials indeed frustrated the applicants in executing the decree. In fact the Attorney General was quite categorical in his letter of 7.11.1984 that he should be kept posted of any defaults. The only way this court can believe the veracity of these allegations was for the applicants to secure an affidavit from Mr. Ushwin Khanna to state under oath how the Attorney General and other senior government officials intimidated him to frustrate the recovery of the decretal sum by execution of the decree. The failure by the applicants to secure such a vital affidavit meant that such threats and intimidation never existed.

I have a feeling that the applicants realized that they will not be able to execute the judgment because it is already time-barred by virtue of section 4(4) of the Limitation of Actions Act (Cap.22 Laws of Kenya). The applicants had the option to be vigilant in monitoring the judgment debtor's financial position and to make sure that they strike by executing the decree in time before the judgment debtor went under. The applicants have not explained to this court why they took about 20 years before instituting these proceedings.

In the final analysis and for the above reasons the motion must fail for being unmeritorious. It is hereby ordered dismissed with costs to the Attorney General.

Dated and delivered at Mombasa this 14th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Murangi h/b for Mr. Gikandi for the plaintiff and N/A for the Attorney General.