



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Case 220 of 2007

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER SECTION 84(1) AND (6) OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY SATYA GADHI FOR AN ORDER OF ANTICIAPTORY BAIL OR BAIL BEFORE ARREST AND/OR CHARGE

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

ON 70,72,76 AND 123(3), OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 LAWS OF KENYA, THE PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW

BETWEEN

SATYA GANDHI APPLICANT

VERSUS

THE DIRECTOR OF CID1ST RESPONDENT

THE COMMISSIONER OF POLICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Before me is a Chamber Summons dated 19th March 2007 filed by Onesmus Githinji & Company Advocates on behalf of SATYA GANDHI under Section 70,72,76 of the Constitution and Section 123(3) of the Criminal Procedure Code (Cap. 75 of the Laws of Kenya). It seeks for two substantive orders, that

Ø The applicant be arrested and subsequently to the said arrest the applicant be admitted to bond pending resolution of this application.

Ø The respondents their servants and agents be restrained from causing any arrest, confinement, annoyance, threats, intimidation and any other illegal acts of debt collection against the applicant herein.

The application has two grounds on the face of the Chamber Summons. It is supported by the affidavit of the applicant **SATYA GANDHI** sworn on 19th March 2007. The application is opposed and a replying affidavit sworn by Lilian Kiamba a Senior Superintendent of police was filed.

At the hearing of the application, Mr. Githinji appeared for the applicant. He submitted that the matter in issue was a civil matter and disputes were to be sorted out by way of arbitration. The police were, however, harassing the applicant. He contended that Section 123(3) of the Criminal Procedure Code conferred on this court power to arrest and grant bail in anticipation.

Learned State Counsel, Ms Nyamosi, submitted that Section 123(3) of the Criminal Procedure Code merely provided for powers of the High Court to grant bail. It did not confer on the High Court powers of arrest. She submitted that the only problem herein is that the applicant had refused to co-operate in recording a statement. The police still wanted to obtain the applicant's statement.

I have perused the legal provisions cited. Sections 70,72 and 76 of the Constitution relate to protection of fundamental rights and freedoms. If the applicant wants orders under those sections, he should file an appropriate application in the Constitutional and Judicial Review Division of the High Court Nairobi, not the Criminal Division.

I am told that section 123(3) of the Criminal Procedure Code (Cap. 75).confers on the High Court the powers to arrest and granting bail to someone, who has not been charged. The said section provides

“123(3) The High Court may in any case direct that an accused person be admitted to bail on that bail required by a subordinate court or a police officer be reduced”.

In my view, the above section confers powers on the High Court to grant bail only but to somebody who has been accused. The applicant herein has not been charged with any offence. I am requested to arrest him and grant him bail. I cannot do so. The section does not confer on the High Court the power to arrest somebody, and grant him bail. I am afraid under the section cited, I am not able to grant the orders sought. The application therefore has to fail.

Consequently, I find that the application lacks merit and I dismiss the same.

Dated and Delivered at Nairobi this 16th May 2007.

GEORGE DULU

JUDGE

In the presence of –