



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC CIVIL APPLI 365 of 2005

IN THE MATTER OF AN APPLICATION UNDER SECTION 65:

BETWEEN

LT. COL. ROBERT T M KIBISU
APPLICANT

AND

LT GENERAL JEREMIAH MUTINDA KIANGA COMMANDER, KENYA ARMY.....1ST
RESPONDENT

BRIGADIER OYUGI PRESIDING OFFICER COURT MARTIAL.....2ND
RESPONDENT

JUDGMENT

The applications before me are dated 14th May 2007 and 12th June, 2007 respectively and both applications seek leave to institute contempt proceedings arising from Court Martial proceedings against the applicant.

I have considered the affidavit filed in support and against the grant of the orders sought. I have also taken into account the skeleton arguments filed on behalf of the parties.

In this matter the substantive point is whether or not the orders issued by the High Court directed at the court and intended to stay the Court Martial proceedings had been served before the proceedings of the Court Martial commenced.

In this matter I intend to be extremely brief for the reason that it is clear, at the outset that the issues raised were the subject matter of a High court judgment of 7th December 2006, Court Martial Criminal Appeal No. 1 of 2005. It is a unanimous decision of my sister Lady Justice Lesit and my brother Mr Justice Makhandia.

At pages 6 and 7 they framed the issues for determination as under:

(1) Did the High Court order in judicial review application staying the proceedings of the Court Martial take effect?

- (2) Were the proceedings of the Court Martial properly convened?
- (3) Were the charges against the Appellant defective, null and void?
- (4) To (8) Not relevant.

The learned judges made a determination at pages 8,9 and 10 to the effect that the order had not been extracted nor served on the Respondents and that the Order had lapsed.

I must therefore dismiss this application for the following reasons:

- (1) A judicial review court is not an appeal court. I cannot sit on judgment of my learned colleagues – whether wrong or right.
- (2) Judicial review proceedings are generally not directed at merits of decisions but with the decision making process.
- (3) Proceedings in the High Court are not subject to judicial review.
- (4) The applicant failed to disclose the existence of a High Court judgment dealing with same point and this constitutes a serious non disclosure of a material fact.
- (5) From the above observations, the application, constitutes an abuse of the court process.

For the above reasons the applications are dismissed. I make no order as to costs.

DATED and delivered at Nairobi this 26th October, 2007.

J.G. NYAMU

JUDGE