



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 54 Of 2006

DR CHRISTOPHER NDARATHI MURUNGARU PLAINTIFF

AND

THE KENYA ANTI-CORRUPTION COMMISSION 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

I have considered the able arguments of the learned advocates. I have also taken into account the various authorities cited to the court.

The parties did agree this morning to have arguments on prayer 2 of the application dated 1st February 2006 which was filed together with an Originating Summons of the same date.

It is not disputed that the applicant has properly come before this court under s 84 of the Constitution because the Originating Summons does speak for itself. However what is in dispute is whether prayer (2) of the Chamber Summons is competent in law. For the purpose of this ruling even with the obvious constraint as regards time available it is important to set it out in extenso.

2. “The Hon Court be pleased to direct that in accordance with rule 10(b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 that all further proceedings whether investigatory or prosecutorial by the defendants be stayed pending the determination of the question raised by the plaintiff in the Originating Summons dated 1st February, 2006.”

The learned Senior Counsel for the applicant Hon. Paul Muite in his submissions has indicated that the applicant has accessed the court pursuant to rule 11(a) of the Rules made under LN 133/2001 and not rule 10(b) as set out in prayer 2. He has not however applied to amend the prayer yet he had the opportunity to do so. The court must therefore confine itself to the prayer as crafted by the applicants team of advocates.

To my mind the prayer assumes that there is an automatic stay under rule 10(b) when a Chamber Summons and an Originating Summons are filed at the same time. With respect there cannot be any automatic stay in the circumstances of this case because the Originating Summons cannot be said to be a pending proceedings under the rule.

Rule 10 in the view of the Court imposes an automatic stay when the Constitutional question has arisen in the course of existing proceedings e.g. due to lack of due process etc. When that happens upon the filing of a Notice of Motion an automatic stay is imposed and it stops the challenged proceedings.

In the current case the constitutional questions raised arise or arose outside any proceedings as envisaged in rule 10(b). Even if rule 10(b) were to apply the applicant has come by way of a Notice of Motion and not by a Chamber Summons.

The prayer therefore asks the court to act contrary to the rules and direct a stay. The court does not have any such power under the rules.

Even on the assumption that the court allows that the prayer be read with Rule 11(a) as inserted instead of Rule 10(b) as prayed, the prayer sought remains substantially the same in that under rule 11 the court does not have any such powers to direct an automatic stay. In the view of the court the prayer is procedurally incompetent. It is a constitutional requirement under s 84 upon which both the Originating Summons and the Chamber Summons are grounded that the right of access is subject to the Rules made under s 84(6). It is a constitutional requirement that the rules must be adhered to. The innovative courage of the Judges as cited in the GITHUNGURI II was on account of the absence of the rules at that time. This is why GITHUNGURI II shall remain a landmark – both in terms of courage and innovation.

The upshot of the above analysis is that the order sought as per the wording cannot be granted because Rule 11 does not impose any such automatic stay.

I find that even without going into the merits of the prayer the same must fail for the above reasons.

All the same in view of the submissions of Counsel on both sides concerning the provisions of s 84 it is necessary to touch on the merits of the prayer because of the ambit of s 84 of the Constitution.

At page 16 of the Originating Summons the applicant has raised 9 grounds as the basis for the application. At this threshold stage all the court needs to do is to consider whether they raise arguable constitutional points and whether or not there is a threatened contravention or violation of any of the rights set out in chapter 5 of the Constitution or as pleaded.

On this point the court is of the prima facie view that what has been demonstrated so far is a threatened violation in the manner the 1st defendant intends to carry on the investigations.

In a situation such as the court now finds before it the role of the court is to consider the weight of the individual applicant's right as pleaded as against the public interest. The basis for this is that all the Chapter 5 rights are subject to the provisions on s 70 of the Constitution which clearly states that the fundamental rights are subject to the rights of other persons and the public interest.

Indeed as I held last week in a case involving the right to access bankers books the responsibility of the court is to strike a balance between the individual rights ie the due process and the societal rights of crime detection, prevention and control. A balance has to be struck between these two ideals. The additional factor is that in the criminal justice system such as ours the need for the law enforcement agencies to have reasonable workability in attaining the values of crime detection, prevention and control cannot be disregarded by the courts.

I know of no democratic state which has ignored this value and survived.

I have held in some of my judgments that fundamental rights do occupy a special place in the scheme of our Constitution but in the real world and even under the provisions of the Constitution the rights are not absolute and they are subject to the public interest.

The upshot is that s 70 demands that the court in enforcing and securing those rights must also consider the public interest.

In the circumstances of the case when I put the ideals as set out above my inclination is to uphold the public interest in crime detection, prevention and control since any feared shortcomings in the due process can easily be taken up by the applicant as when and if they happen.

I therefore disallow this prayer on this ground as well. I decline to make any conservatory order as prayed in prayer 2. Yesterday I did deal with prayer 3 in that I did order the service of the application and the O S on the defendant and it is admitted that they have been served and were present this afternoon. As regards prayer 4 I direct that the matter be mentioned before me at any time convenient to counsel for an order of reference to the Hon the Chief Justice in respect of the hearing of the Originating Summons. The courts order on costs is that they shall be in the cause.

It is so ordered.

DATED and delivered at Nairobi this 2nd day of February 2006.

J. G. NYAMU

JUDGE

Further order

A the request of counsel the matter be mentioned in my chamber tomorrow at 9 00 am.

J. G. NYAMU

JUDGE