

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 38 OF 2006

REPUBLIC.....
APPLICANT

VERSUS

DEPUTY REGISTRAR HIGH COURT OF KENYA AT ELDORET1ST
RESPONDENT

TRANS-NATIONAL BANK LIMITED2ND
RESPONDENT

EX-PARTERICHARD A.
ONDITI

R U L I N G

Richard Akwesera Onditi who feels aggrieved by the Deputy Registrar’s decision to commit him to civil jail on account of a debt, owing to Trans National Bank Ltd., has moved this Court seeking leave under Order LIII of the Civil Procedure Rules, to commence proceeding for the prerogative orders of prohibition and certiorari against the said Deputy Registrar.He bases his request on the grounds that the alleged loan giving rise to Eldoret HCC No. 7 of 1999 between him and the Interested party and one Timothy Bartholomew Lamba was paid and the case concluded; that the order committing him to civil jail for unexplained debt is a travesty of justice; that he is bound to suffer irreparable loss and damage, that he does not enjoy good health, and finally that he was not given a chance to explain facts and circumstances of the case.

In an application of this nature, the Court is required to consider whether the applicant deserves the orders, which he seeks. It is thus called upon to exercise its discretion, which discretion must be exercised judiciously. It is therefore important that I consider the legal nature of the orders, which this applicant seeks leave to apply for. It is for this reason that I have had to have look at the case of **Kenya National Examinations Council Ex-parte G. G. Njoroge and others CA No. 266 of 1996**, where Appellate Judges examined the orders exhaustively, and where their Lordships laid down the legal positions as follows:

“An Order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from

the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. It is clear that "once an order has been passed, it can not be quashed either in an appeal or by an order of certiorari..... an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision".

The Court of Appeal also held that *"only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons".*

I have looked at the grounds, the statement and the supporting affidavits which form part of the pleadings herein, and it is clear in my mind, that the issues raised by the applicant pertain only to matters of fact, and it cannot be said to fall within the ambit of issues, they being legal issues that would be expected to be canvassed in an application for prerogative orders of certiorari and prohibition, such as action undertaken in excess of jurisdiction or absence of it, or departure from the rules of natural justice, none of which were alluded to.

I do in the circumstances find that the application lacks in merit and I decline to grant leave to the applicant.

Dated and delivered at Eldoret this 2nd day of February 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Obwatinya for the ex parte applicant