



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 615 of 2005

FRANCIS MBURU MUNGAI ..... PLAINTIFF

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> DEFENDANT

ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT

RULING

What is before me is an application dated 23<sup>rd</sup> May 2005 brought by way of an amended Chamber Summons.

It seeks inter-alia

(a) directions under O 36 Rule 10(1)

(b) a temporary injunction in terms of prayer 1 of the Amended Originating Summons filed on 9<sup>th</sup> November, 2005.

The prayer reads:-

**“A declaration that on the facts set out in the supporting affidavit filed herewith the plaintiff fundamental rights and freedoms are being and/or are likely to be violated by the defendants.”**

(c) That in the alternative and without prejudice to the foregoing prayer the plaintiff be admitted to bail in terms of section 123 (3) of the Criminal Procedure Code (cap 75).

The application is supported by an affidavit sworn on 9<sup>th</sup> November, 2005 by the applicant which depones inter- alia that the defendants intend to arrest him concerning a matter that is civil by nature in that it involves a lease between two limited companies and the payment of rent under the lease. He claims that the lease agreement has an arbitration clause which has not been invoked and for the above reasons the matter cannot form the subject matter of any intended criminal proceedings.

The applicant has filed and relied on written submissions filed on 2<sup>nd</sup> March 2006.

The respondent relies on the affidavit of Mr Jeremiah Ikiao who is a Chief Inspector of Police attached to Banking Fraud Unit and who states that he is in charge of investigations. He depones that he has not completed investigations and all he has done so far is to summon the applicant and to bond him so

that investigation can continue.

The respondents also rely on skeleton arguments filed on 14<sup>th</sup> March 2006 which have highlighted the point that the fact that the subject matter is civil in nature does not rule out the same matter being criminal at the same time and that S 193A of the Criminal Procedure Code is clear on this duality.

Mrs Murenjo for the respondent has also stressed that S 72 1 (e) of the Constitution does allow deprivation of liberty. The section reads:

**“No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases.**

**(d) “upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.”**

I find that the Penal Code and the Criminal Code and all other laws defining offences do satisfy the principle of legality which is a precondition of the derogation.

Having taken into a count the points of law and other matters raised as above by the parties I find and hold as follows:

1. The Chamber Summons is incompetent in that it is grounded on the Civil Procedure Rules instead of being brought under S 84(2) of the Constitution and the Rules made under S 84(6) of the Constitution. Since the substantive pleading is the Originating Summons the applicant ought to have come under Order 36 of the Civil Procedure Rules. In constitutional matters it has been held severally that the provisions relied on must be set out and particulars of contravention relied on given. Moreover the applicant seeks a declaration as an interim relief and this cannot be granted before the actual hearing prayer 1 of the Originating Summons does not seek an injunction but seeks a declaration. Whereas an injunction may be granted as an interim measure a declaration declaring finally the rights of the parties is unsuitable in my view as an interim measure of relief.
2. In addition section 72(1)(e) does allow departure of liberty upon reasonable suspicion. The effect of any interim order would be to prevent investigations being undertaken. The carrying out of investigation is a function recognized under S 72 of the Constitution and I cannot bar the police from performing their function as they are acting on suspicion and are not abusing the process.

As I held in my recent impromptu ruling in *Murungaru v Attorney General Civil Suit No.54 of 2006* (unreported) crime detection, prevention and control are also values recognized by our Constitution and the court has a duty to weigh these values against any alleged violation of the due process and in ascertaining whether the principle of legality is in place, so as to justify any derogation. In this case it is alleged that the criminal process is being used in a manner that is civil but it is clear to the court that investigations have not been finalised and any alleged abuse at this stage appears to the court to be speculative. Under our Constitution pre-hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self incrimination or violate the right of silence or because of the manner they have been conducted they seriously erode the presumption of innocence if and when the suspect is charged. It is clear that the presumption of innocence commences upon the suspect being charged – see S 77(2)(a) of the Constitution contrary to popular belief the burden of proof may be placed on an accused in certain cases through a written law or statute see S 309 of the Criminal Procedure Code and there is nothing unconstitutional under the principle of legality.

For the above reasons the Chamber Summons is dismissed with no order as to costs.

DATED and delivered at Nairobi this 5<sup>th</sup> day of April, 2006.

**J. G. NYAMU**

**JUDGE**