



REPUBLIC OF KENYA

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

Misc Civ Case 52 of 2006

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 (1) OF THE CONSTITUTION

OF THE REPUBLIC OF KENYA

FOR THE ENFORCEMENT OF

FUNDAMENTAL RIGHTS AND FREEDOMS

**IN THE MATTER OF AN INQUIRY BY THE KENYA POLICE CRIMINAL INVESTIGATION
DEPARTMENT INQUIRY NUMBER 6 OF 2005**

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

SECTIONS 60,70,72,74,75,76,77,79 AND 84

**JAMES OCHIENG' ODUOL
APPLICANT**

VERSUS

**THE COMMISSIONER OF POLICE1ST
RESPONDENT**

**THE DIRECTOR CRIMINAL INVESTIGATION DEPARTMENT 2ND
RESPONDENT**

**THE PRINCIPAL MAGISTRATE KIBERA, NAIROBI 3RD
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL 4TH
RESPONDENT**

RULING

The Notice of Motion dated 17th March 2006 brought by an “affected” party seeks to set aside a conservatory order given by me in favour of the Respondent on 1st February 2006 under the provisions of s 84 of the Constitution following the filing of an Originating Summons brought by the Respondent. The Conservatory order stayed the search warrant and Inquiry directed at the firm of advocates in which the Respondent is a partner. The conservatory order was intended to preserve the status quo pending the

hearing of the Originating Summons on merit.

The application is based on eleven grounds which inter-alia include the ground that the Respondent obtained the conservatory order through fraud by strategically misrepresenting to the court that the police actions in question were directed at him in his capacity as an advocate acting for his clients yet the demonstrable truth is that the said main applicant was being investigated for apparent criminal acts committed by him as an individual in company with others particularly his so called clients.

When the application to set aside the conservatory orders came for hearing before me on 21st September, 2006 the advocate for the Respondent Mr Orara indicated that he would want to argue a preliminary objection filed on 7th September, 2006 and served on the applicant. Ground (a) states that this court has no jurisdiction to entertain the application in view of the ruling by my brother Hon Mr Justice Emukule of 18th May 2006 where he dismissed the current applicant's application to join in the proceedings. Although, at the time this matter was canvassed before me I had not read my brother judge's ruling I now have been able to peruse it. The learned judge held that the current applicant has no interest in the issues raised in the Originating Summons. There is a pending application dated 20th July 2006 to set aside Hon Emukule's ruling.

The main application is grounded on the provisions of s 84 of the Constitution. It is a matter between the Respondent and the State or its officers. Fundamental rights are inherent in the individual and are based on the oneness and dignity of the human race. It is therefore philosophically and constitutionally wrong for a third party to oppose the vindication of those rights by an applicant. Crime detection prevention and control and also the liberty of the individual are objectives that are basically in the province of the State. As regards the later, it is the State which guarantees liberty and other fundamental rights and violations are blamed on the State. It is not immediately clear why a third party would have an interest in conservatory orders touching on the above matters. Fundamental rights are vertical not horizontal and the current applicant's application is in my view seriously flawed.

In this regard I wish to reiterate my judgment in the case of *KARIUKI NDUATI v NDUATI Miscellaneous Civil Application No. 7 of 2006 (O.S.)* where I inter-alia held that it is the State which is liable under the Constitution in respect of any violation of fundamental rights and not an individual. The violations by an individual against another belong to the common law or State responsibility under the International Convention.

In this connection I endorse fully the holding by the Inter-American Court of Human Rights in the case of *VELASQUEZE v HONDURAS* which states:

“An illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention.”

Thus individuals cannot rightly litigate against each other as the current applicant purports to do.

In addition I am in agreement that my learned brother having finally determined the issue of who has an interest whether as an affected party or interested party and dismissed the application for joinder, I would have no jurisdiction to entertain the applicant's application in the same suit. No appeal has been preferred. Only another court can direct me to entertain any further application by the current applicant. The applicant has no standing rightly or wrongly this being the legal effect of the ruling by my brother, Justice Emukule.

I accordingly strike out the application to set aside the conservatory orders with costs to the Respondent.

It is so ordered

DATED and delivered at Nairobi this 26th day of October, 2006.

J.G. NYAMU

JUDGE