



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Application 550 of 2004

SAMUEL MUCIRI W'NJUGUNA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By an amended originating summons dated the 3rd of March 2003, the Applicant Samuel Muciri W'Njuguna sought to invoke the constitutional jurisdiction of this court under the provisions of **Sections 70, 72, 76, 84(1) and (6) and 23(8) of The Constitution of Kenya** seeking the following orders:-

*(i) A declaration be made that the Applicant's fundamental rights and freedoms of the individual under **Sections 70, 72, and 76 of the Constitution** have been contravened by the Respondent herein, that is to say that;*

(a)The Applicant's right to liberty, security of person and the protection of the law have been transgressed and or compromised by the Respondent, and,

(b)The Applicant has been subjected to unlawful and arbitrary search or entry of his premises/property by the Respondent and that his right to privacy has thereby grossly violated and/or has been transgressed by the Respondent.

(ii) A declaration that the remedy, grant and or relief of anticipatory bail and or bail pending arrest and charge is constitutionally provided for and that the same is lawfully available to persons under the provisions of **Chapter 5 of the Constitution of Kenya**.

(iii) A declaration that the Applicant has been deprived of the protection of the law by reason of the Respondent's failure and or neglect to charge in a court of law the persons implicated in offences against the person and the property of the Applicant.

(iv) Any further or other orders, directions or writs this court deems fit, just and appropriate to grant. **(v)** Costs of this suit.

This court heard the constitutional reference and delivered its considered ruling on the 17th of May 2004. At page 20 of the said ruling this court ruled that:

“Having so decided the declaratory orders that we make are as follows:

(i) The Applicant's fundamental rights and freedoms

of the individual under Section 70, 72 and 76 of the constitution

have been contravened by the Respondent herein, that is to say,

(a) The Applicant's right to liberty, security of person and protection of the law have been transgressed and compromised by the Respondent.

(b) It is hereby declared that the remedy/grant and or relief of anticipatory bail or bail pending arrest and charge is constitutionally provided for and that the same is lawfully available to persons under the provisions of Section 84(1) of the Constitution of Kenya and Chapter 5 of the Constitution of Kenya.

The costs of this application is granted to the applicant.”

It appears that after much soul-searching and reflection, the Applicant came to the conclusion that the said ruling delivered by this court was not to his liking. The Applicant was aggrieved by the said ruling. On the 13th of September 2004, the Applicant filed a Notice of Motion under the provisions of **Order XLIV Rule 1 of the Civil Procedure Rules** seeking the orders of this court that the ruling of the 17th of May 2004 be reviewed. The Applicant further prayed that he be awarded general damages. The motion was supported by the affidavit of the Applicant, Samuel Muciri W’Njuguna, and grounds stated on the face of the notice of motion. In essence, the Applicant stated that although he did not specifically plead in his constitutional reference to this court to be granted general damages, the fact that the Applicant’s counsel canvassed the issue during his submission before the court and the fact that this court reached a finding that the Applicant’s fundamental right to liberty, security of person and protection of the law had been transgressed and compromised by the Respondent, this court, ought to, as a matter of course, have ordered that the Applicant be paid general damages.

The Application is opposed. The Respondent objected to the application by filing a Notice of Preliminary Objection. In the said preliminary objection, the Respondent stated that the application was unconstitutional, contrary to the law and public policy. The Respondent further contended that the application was misconceived, and an abuse of the court process. The Respondent finally stated that the application filed by the Applicant was incompetent, null and void and should therefore be struck out. When this application came up for hearing, this court ordered that the Notice of Preliminary Objection filed by the Respondent constitute the Respondent’s reply to the Applicant’s application.

Mr Orengo, Learned Counsel for the Applicant submitted that this court did rule that the Applicant’s right to liberty, security of person and the protection of the law had been transgressed and compromised by the Respondent. The Applicant conceded that he had not applied to be awarded general damages. He however submitted that this omission by the Applicant could not bar the court from awarding damages to the Applicant. It was contended on behalf of the Applicant that submissions had been made in the said application for the Applicant to be awarded damages. It was argued that the court should have awarded the Applicant damages as provided by **Section 72(6) of the Constitution of Kenya** once it had reached a finding that the Applicant’s fundamental rights had been breached. It was further contended that the Applicant had suffered physical damage to his property and to his person. Learned Counsel submitted that the Constitutional reference which had been filed by the Applicant was brought by way of an originating summons as provided by the provisions of **Order XXXVI Rule 9 and 10 of the Civil Procedure Rules and Rule 10 of the Constitution of Kenya (Protection of Fundamental rights and Freedoms of the Individual) practice and procedure rules, 2001**. Under the said rules, it was a requirement that directions be first taken before the constitutional reference was placed before the Chief Justice for the constitution of a constitutional bench to hear the said reference. The Applicant submitted that in the said application, no directions were taken and therefore resulted in the Applicant being left without a remedy.

The Applicant submitted that the Court of Appeal in **Rashid Odhiambo Aloggoh & 245 others – versus- Haco Industries Ltd Civil Appeal No. 110 of 2001 (Nairobi)** (unreported) gave directions on how a constitutional reference was to be heard and orders issued accordingly. The Applicant argued that **Section 72 (6) of the constitution** granted the court jurisdiction to award compensation for unlawful

arrest and detention. The Applicant submitted that the court had made findings covering many sections of the constitution especially as it affected the fundamental rights of the Applicant. The Applicant urged the court to pursue a purposeful and functional approach in determining constitutional issues for the purposes of meeting substantial justices. The Applicant referred the court to the case of **Royal Media –versus- Telkom Kenya [2001]1 E.A. 210** where he submitted that the issue of how the court should approach constitutional issues was addressed. Learned Counsel for the Applicant submitted that there was no restriction on the way the court could be approached. The Applicant submitted that this court should interpret widely the constitutional provisions especially as it relates to breach of fundamental rights. The Applicant argued that the rules made under the constitution gave the procedure of enforcing constitutional rights under **Section 84 of the constitution**. The Applicant further argued that the court must have discretion in dealing with issues which will meet substantial justice.

In this regard, the court was mandated not to consider technicalities but to strive to uphold the law and deal with the substantial issues raised. The Applicant referred the court to the decisions made in **Marete – versus- A.G. [1987]KLR 690 and Sapa Studio –versus- Kenya National Properties Ltd (No. 2) [1985] KLR 1011** in support of his submission. Learned counsel submitted that the issue of damages was raised by the Applicant’s counsel in his submissions before court but no decision was made on the issue. It was the Applicant’s argument that the court fell in error when it failed to consider the said issue raised. The Applicant further argued that he had a right to refer to the rules of Civil Procedure where the rules made under the constitution and **Order XXXVI Civil Procedure Rules** were inadequate. The Applicant urged the court to purposively approach the issues raised before it.

The Applicant submitted that it was due to this inadequacy that he had made the current application under the provisions of **Order XLIV of the Civil Procedure Rules**. The Applicant contended that under **Order XLIV Rule 1(a) of the Civil Procedure Rules**, the Applicant could make an application for review for any sufficient reason. The Applicant submitted that the grounds put forward in support of the application were sufficient grounds for an order of review to be made by the court. The Applicant conceded that there was no mistake apparent on the face of the record. The Applicant agreed that if there was any mistake made, it was made by the Applicant who did not pray specifically for damages. The Applicant however submitted that the fact that the issue was raised by counsel during his submissions, the court ought to have considered it and made a decision. It was the Applicant’s further argument that if the court were to allow the application and order that general damages be paid, the court would be at liberty to ask the parties to put before it materials for the purposes of assessing damages. In any event, the Applicant submitted, there was some material before the court which could enable the court to grant general damages to the Applicant if the court was not inclined to call for further evidence and submissions.

Mr Okumu, the Learned Deputy Chief State Counsel for the Respondent strenuously opposed the application to review the ruling delivered by this court. He submitted that this court lacked jurisdiction to entertain the application. It was his argument that when the court delivered its ruling, it ceased to have jurisdiction to entertain any matter in connection with the said constitutional reference. In essence, Mr Okumu was saying that this court was *functus officio* and could not reopen **Nairobi HC Misc. Cr. Case No. 710 of 2002 Samuel Muciri W’Njuguna –versus- Republic** which had been determined by the court pursuant to powers granted to it under **Section 84(2) of the Constitution**. It was his further submission that if any party was aggrieved by the determination made on the 17th of May 2004, there was a right of appeal to the Court of Appeal as a matter of right under **Section 84(7)** of the Constitution. He further submitted that under Rule 12 of the Constitution of Kenya (Protection of Fundamental rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 the Appeal to the Court of Appeal would be governed by the procedure as provided by the Court of Appeal Rules. He further argued that **Section 84** of the constitution provided a special procedure which was substantially exhaustive. It was his further argument that this court should not go out of the procedure provided by **Section 84** of the constitution and the rules made thereunder, by for instance, considering the provisions of the Civil Procedure Rules.

Learned Counsel for the Respondent argued that **Order XLIV of the Civil Procedure Rules** was therefore inapplicable in the regard. He submitted that the constitutional reference in issue had already been determined and would not be reopened by way of an application for review. He further submitted

that from the submissions made by the Applicant, the Applicant was aggrieved that he was not awarded general damages. Learned counsel for the Respondent submitted that there was no right of review under **Section 84 of the Constitution**. Further, the Respondent argued that the court could not have granted what was not specifically pleaded or prayed for by the Applicant. Mr Okumu further submitted that the court had granted the prayers that the Applicant had sought in the constitutional reference as provided by **Section 84(2) of the constitution** and thereby determined the constitutional reference. Learned counsel for the Respondent submitted that if this court were to award damages, it would be acting in excess of its jurisdiction. It was further argued that this court could not be asked to violate the law pursuant to what the Applicant submitted was substantial justice, more so if the provisions sought to be overridden were constitutional provisions and the rules made thereunder.

The Respondent argued that **Section 84(2)(a) of the constitution** did not permit for a determination made in a constitutional reference to be reviewed. The Respondent submitted that even if the constitutional court had made an obvious error on the face of the record, the only avenue available to an aggrieved party was to appeal to the Court of Appeal and not apply for review. Mr Okumu argued that if the court were to grant the application for review it would violate the same constitution it was sworn to uphold. He submitted that in matters of procedure, the constitution should be strictly interpreted. He further argued that it was not an accidental omission that the Applicant was not awarded general damages. It was due to the fact that the court could not go beyond what the Applicant had asked for. He submitted that declaratory orders were remedies in themselves just as general damages is a remedy provided by the law. Learned counsel for the Respondent submitted that litigation had to come to an end. As regards the constitutional reference where the ruling was delivered, litigation came to an end. The Applicant, if he was aggrieved, ought to have gone to the Court of Appeal and he reiterated finally that the application made under the provisions of **Order XLIV of the Civil Procedure Rules** was therefore misconceived, incompetent and an abuse of the due process of the court and should be struck out with costs.

In response, Mr Orengo Learned Counsel for the Applicant submitted that the provisions of **Section 84(7) of the constitution**, provided that a party “may” Appeal. According to him the term was not restrictive or prohibitive and therefore a party was not barred from making an application for review. He submitted that the provisions of the Civil Procedure Rules applied as the rules made under the provisions of **Section 84 of the constitution** were not exhaustive. Learned Counsel argued that the courts were mandated to do justice to the parties and in the instance case, an appeal to the Court of Appeal would not solve anything. He submitted that the court had jurisdiction to deal with the present application before it. The Applicant contended that if sufficient cause was made out, this court had jurisdiction to review its decision in a constitutional reference. In the ruling sought to be reviewed, the Applicant submitted that the court had not addressed all the issues placed before it, including awarding the Applicant damages. The Applicant urged the court to allow the application as prayed.

We have carefully considered the submissions made by the Counsel for the Applicant and the Counsel for the Respondent. After considering the arguments made, the broad issues that have come fore for our determination are whether in the present case, this court can review its decision made earlier in the application referred to hereinbefore. It is not in dispute that the said application was, inter alia, premised under Section 84 of the constitution.

What does **Section 84 of the Constitution** state? Section 84 provides that:

“(1) Subject to subsection (6), if a person alleges than any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then, without prejudice to any other action with respect to any matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction- (a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance

of subsection(3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 (inclusive)

(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High court).

(7) A person aggrieved by the determination of the High Court under this section may Appeal to the Court of Appeal as of right”

The Chief Justice made practice and procedural rules pursuant to **Section 84(6) of the Constitution**. The said rules known as the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001** were published under Legal Notice No. 133 contained in the Kenya Gazette of the 21st of September 2001.

Rule 9 of the said rules provides that

“where contravention of fundamental rights is alleged otherwise than in the course of proceedings in a subordinate court or in the High Court, an application shall be made directly to the High Court.”

Rule 11 provides that

“(a) Applications made under rules 5 and 9 of these rules shall be made by originating summons and the procedure laid down under Order XXXVI of the Civil Procedure Rules shall, as far as practicable, apply.

(b) If the application is made otherwise than in criminal proceedings it shall be served on the Attorney General and the person against whom the complaint is made or directed within fourteen days from the date of filing.”

Rule 12 provides that:

“Any Appeal from the decision of the High Court to the Court of Appeal under Section 84(7) of the Constitution shall be governed by the Court of Appeal rules.”

Section 84 of the constitution and the rules made thereunder is thus elaborate on how an applicant who alleges that his fundamental rights and freedoms in proceedings (*other than those where suits are pending*) may approach the High Court for legal redress. In our view the **Section 84** of the Constitution and the rules made thereunder are conclusive on the procedure to be followed when an aggrieved party makes a constitutional reference to the High Court.

In the instant application, the Applicant has raised a novel point. He has argued that since this court, sitting as constitutional court, failed to address the issue of damages, then this court should review its ruling and make an appropriate order as to damages. The Applicant has submitted that **Section 84** of the Constitution and the rules made thereunder did not exclude the application of the Civil Procedure Rules made under the Civil Procedure Act. The Applicant has urged this court to adopt a purposeful approach to the application now before it and meet the ends of substantial justice. On the other hand, the Respondent has submitted that once the court, sitting as a constitutional court, made its ruling, then the only remedy available to an aggrieved party was to file an appeal before the Court of Appeal as provided by **Section 84(7) of the Constitution**. The Respondent argued that once the court delivered its ruling, it was *functus officio*. No application could be made to it to review its decision. The Respondent further argued that if

the court were to do so, it would contravene the law. Furthermore, the Respondent argued that this court could not have granted the Applicant a prayer that he had not sought in his original application made to the court.

We have considered the arguments made. It is conceded by the Applicant that he did not ask for damages in the application which he had filed and which this court gave its ruling on the 17th of May 2004. The Applicant has however submitted that even though he did not seek damages in his application, in the submissions made before court, he had asked to be given damages. The Applicant was aggrieved that the court did not address this issue that is why he made an application to this court to review its ruling. We have perused the proceedings of this court as relates to the application which was made by the Applicant. At page 18 of the proceedings, Mr Orengo, Learned Counsel for the Applicant submitted that

“... The declaration of violation (of) fundamental rights were made. The Applicant is not asking for damages only the declaration but that does not stop the court to give appropriate order (seeking enforcement including punishment to offenders.” (underlining ours)

At the conclusion of his response to the submissions which had been made by Mr Monda, Learned Counsel for the Respondent, Mr Orengo stated (in our view as an afterthought):

“We seek also for damages for unlawful arrests apart from the costs. Right of compensation is anyway specifically provided for under Section 72(6) of the constitution.”

It is this submission made that the Applicant is aggrieved that this court did not address and therefore wants this court to consider in his application for review. We however respectfully disagree with the argument made by the Applicant. This court was mandated to consider the issues which were pleaded by the Applicant in his application. This court could only grant the prayers that the Applicant had specifically prayed for. Although we are aware that this court

“...may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of Sections 70 to 83 (inclusive)”

as provided by **Section 84(2) of the Constitution**, it does not mean that the court will go out of its way and grant remedies or give orders which the Applicant did not specifically pray for or which the court could not glean from the pleadings filed in court. To do so would go against the established legal tenet that requires that a party to a suit must be availed with all the allegations against him so that he may have an opportunity of responding to it.

If this court were to be persuaded by the argument made by the Applicant and made the order prayed for by the Applicant, it would be contravening the very same constitution that it was sworn to uphold. We therefore hold that the submissions made by the Applicant that we did not address the issue of damages that he had raised in his submissions to be misconceived. As stated earlier in this ruling, the issue of damages that the Applicant alleges to have asked this court to award him was raised as an afterthought. The Applicant clearly submitted in his main submissions that he was not interested in damages but was interested in the declaration of his fundamental rights. This court granted the Applicant the prayers that he had sought. It is our view that the application made before us is therefore absolutely without merit.

The Applicant has urged us to adopt a purposeful approach to the issues raised so that he could get substantial justice. The Applicant has relied on the decision of the Court of Appeal in **Rashid Odhiambo Aloggoh & 245 others –versus- Haco Industries Ltd Civil Appeal No. 110 of 2001 (Nairobi)** (unreported). We however wish to distinguish the facts of this case from the said decision of the Court of Appeal. In the **Aloggoh** case (*supra*) the parties to the constitutional reference had sworn lengthy and detailed affidavits in support of their respective appreciation of the facts in dispute. The said affidavits challenged the version given by the opposing party in virtually all material respects. The Court of Appeal

held that the constitutional court was required to resolve the said issues raised in one way or the other including, if necessary, allowing the parties to give viva voce evidence. In the said case, the Applicants had pleaded their case. They had sworn affidavits raising issues which the constitutional court did not address. In the case before us, the Applicant did not plead that he should be awarded general damages. We could not therefore have granted orders which were not sought.

The other side issue which we are mandated to determine is whether or not the provisions of the Civil Procedure Act and the rules made thereunder are applicable in constitutional references. After considering the submissions made before us, it is our opinion that **Section 84 of the constitution** and the rules made thereunder does not contemplate that after the delivery of a ruling in a constitutional reference, a party can make an application to review the said ruling.

We have considered very closely the provisions of Section 84 of the Constitution which is the fulcrum of the application before us. We particularly observe that the Section 84(7) of the Constitution has given a right to the applicant to appeal against our decision. As observed earlier by us, we can confidently say that even under the provisions of Civil Procedure Act and the Rules made thereunder, the applicant has not made any case for us to review our ruling. We are bound by the facts of this case and it will be superfluous for us to give a specific determination of this issue, and we decline at this juncture, to make a final decision. We are however, reminded of Section 8(3) and 8(5) of the Law Reform Act which can be considered in the event of such an eventuality. In this regard the decision of the Court of Appeal in **Rashid Alloggoh & 254 others –versus- Haco Industries Ltd Civil Appeal No. 110 of 2001** (Nairobi) (unreported) supports our finding. In the said case the Court of Appeal held that the Constitutional Court could apply the provisions of **Order XXXVI of the Civil Procedure Rules** to resolve the issues raised by conflicting affidavits. The procedure under **Order XXXVI of the Civil Procedure Rules** is specifically provided by Rule 11 (a) of **the Constitution of Kenya (Protection of Fundamental rights and freedoms of the individual) practice and procedure rules, 2001**. **Order XLIV of the Civil Procedure Rules** as relates to review of decisions made by a constitutional court will not therefore be applicable. In the circumstances of this case we hold that the provisions of Order XLIV of the Civil Procedure Rules are not applicable. If the Applicant was aggrieved by the ruling of this court he ought to have filed an appeal to the Court of Appeal as provided for by **Section 84(7) of the Constitution**.

Finally the other issue which arose during the argument of this application is whether a constitutional court is *functus officio* once it has delivered its ruling. We considered the submissions made by Counsel before us. A constitutional reference under **Section 84 of the constitution**, by its very nature, is an application by individual seeking the declaration or the enforcement of his rights as provided by **Chapter V of the Constitution**. Having given our decisions on all the issues presented before us, then this court became *functus officio*. Now the applicant cannot appear before us seeking to review or vary the orders issued by us. We are however not saying that there cannot arise a situation where the said constitutional court will be required to invoke its inherent jurisdiction to do justice to the parties and uphold the constitution. In the instant case, the Applicant could not make an application to review the ruling of this court. This court, sitting as a constitutional court, was thus *functus officio*. The only remedy available to the Applicant was to file an Appeal. In conclusion we wish to state that had the Applicant in this case pleaded that he be awarded damages, this court having found that his rights had been infringed, would have been mandated under the provisions of **Section 72(6) of the constitution** to award him compensation.

For the reasons stated hereinabove, it is clear that the Application filed by the Applicant herein lacks merit. The same is dismissed with costs.

DATED at NAIROBI this 28th day of January, 2005.

K. H. RAWAL

JUDGE

L. KIMARU

JUDGE