



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 880 of 1977

GICHUHI KIMIRA.....APPLICANT

VERSUS

SAMUEL NGUNAU KIMOTHO.....1ST RESPONDENT

MAAKA MUKUHI MUGWERU by.....2ND RESPONDENT

Substitution and in personal representative of

SIMION MUGWERU WATHIRWA.....3RD RESPONDENT

RULING

At the hearing of the Notice of Motion of the 8/12/2004 Mr. Njiru took a preliminary point that a Constitutional Reference has been filed in the High Court and that as a result a stay of all proceedings is in place pursuant to LN No. 133 of 2001 which promulgated rules in respect of Constitutional matters. The relevant provisions of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure Rules 2001) Rules 10 (a) and (b) which state as follows:

10 (a) Where violation of fundamental rights and freedoms is alleged pending in the High Court, application for determination of the question shall be made by Notice of motion in the matter and in that case the Provisions of the Civil Procedure Rules shall as practicable, apply.

(b) Pending the determination of such question all further proceedings shall be stayed.

I will deal with rule 10 (a) later. In reply Mr. Nyamu referred to a Ruling of the Chief Justice dated the 15th October 2004 in which he declined to refer the application of the Respondent herein to a Constitutional Court as he held that there was no pending matter in the High Court which could be the subject matter of a Constitutional Reference. As such Mr. Nyamu submitted that there were no proceedings to be stayed.

Accepting as I do the ruling of the Chief Justice that there were no proceedings pending which could be the subject matter of a Constitutional reference a fortiori there can be no question of a pending determination that can be stayed.

Further the provisions of Section 84 (6) of the Constitution under which the Rules were made states as follows:

“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).”

The rules therefore are to relate to the Practice and Procedure, jurisdiction and powers of the High Court.

In my view the word “shall” in rule 10 (b) should read as “may” and allow the Court a discretion to either stay or not the proceedings depending upon the nature of the application and the justice of the matter in each case. This being Subsidiary Legislation I do not think that it empowered the Chief Justice to legislate for a mandatory stay in any event. If that was the intent of the Legislature it should have been embodied in the Constitution itself.

For these reasons I dismiss the preliminary objection with costs to the Applicant.

DATED and DELIVERED at NAIROBI on 2nd MARCH 2005.

P.J RANSLEY JUDGE