



1. Constitution

2. Constitution reference: Filed in the High Court by way of motion application; within a suit pending for trial (dated 16.6.05)

3. Relationship of Parties: Employee/Employer and or agents

a) Allegation by employer and or agent:-

(i) Theft by servant

b) Allegation by employee/plaintiffs:-

(i) In process of investigations properties and moneys confiscated

(ii) Method of investigating the plaintiff irregular.

4. Main suit (18.5.04) Injunction:

a) To restrain defendants from harassing, assaulting the plaintiff.

b) Alienating plaintiffs property

c) Compel the defendants return the said properties.

Cause The defendants between 6 and 14 May 2004 subjected the plaintiff cruelty through mental and physical torture during illegal exercise of police powers.

5. Course of action lies in Tort: Sequence of events in proceedings.

a) Duty Judge (Ransley J) refers matter for hearing to TORT Bench (P1/RD) Ang'awa, J.

b) Plaintiff changes advocate (3.5.05) (Julius Nyakiangana & Co. Advocates)

c) Parties given time to deal with discovery and other pretrial issues under their own supervision (23.5.05).

d) Formal mention 15.6.05 to confirm pre trials is complete: Advocate for plaintiff absent formal mention 16.6.05

e) On formal mention 16.6.05 – advocate for plaintiff notifies court he is no longer acting for plaintiff as former advocate are now re engaged by plaintiff.

f) On 16.6.05 notice of motion filed by former advocate, now on record Under the constitution of Kenya section 60,70(a),70(c), 72,74,75,76,77,81 and 84 rules 10(a) and (b) of The Constitution of Kenya (Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 and Order L of the Civil Procedure Rule).

6. Effect of Constitution reference:-

(a) That court should refer matter to CJ to constitute 3 bench to hear

reference.

b) That proceedings be stayed.

c) The above two points dealt by duty judge

d) That matters can be dealt by one judge on the constitution reference (12.7.05).

7. Prior to hearing of constitution application Notice of Motion 16.6.04 before Ang'awa

a) During submissions by plaintiff disclose various cases filed in divers court not previously known to court.

b) Plaintiff and wife undertook and did withdraw cases

### I: CRIMINAL CASES

i) Chief magistrate court Nairobi Mis.Cr. Appeal No.6.2005

ii) Attempted murder report – complaint by plaintiff

iii) Complaint by Mrs. B.W. Thuo wife to plaintiff against the defendant

iv) Chief Magistrate criminal case 162/05 – against defendant but terminated by Attorney General.

v) Proceeding against Coca-Cola International (Atlanta USA).

### II CONSTITUTION REFERENCE (intended prosecution)

vi) High Court Mis.Cr.Application No.1029/05

Defendants v the plaintiff

vii) High Court Misc. application No. 179/05 OS

W. Egbe v Republic – bail pending arrest

viii) Misc. Applcition 27/05 OS.

Zahir Sheikh and W. Egbe v Republic

### III: COMPLAINTS BY DEFENDANT

ix) Complaint by Coca Cola East and Central Africa Ltd to CID 6.5.2004

Complaint by Coca Cola East Africa Ltd of abuse of criminal process.

The defendants reserved their rights and stayed their respective proceeding 179/05 above.

1029/05 and the complaints II and III above

8. Pending

The plaint for hearing of main suit

The notice of motion on constitution reference.

9. Hearing of constitution application 16.6.04

a) Issue:-

i) Declaration that defendant violated plaintiffs fundamental right and freedoms as guaranteed by constitution S.70(a),70

(c),72,74,75,76,77 and 81.

ii) Damages

iii) Restitution

iv) Cost and interest

v) Once notice of motion determined it finalized the main suit which

*stands spent.*

*Defendants: In reply*

- i) No jurisdiction by court to entertain reference*
- ii) Notice of motion defective infringements of rights not particularized.*
- iii) Complaints under TORT*
- iv) Court requires to hear full evidence in a trial at the main suit.*

#### *10. Held*

- 1. That the Notice of Motion is incurably defective and be struck out*
- 2. Where the counter action is contained within a plaint the same cannot be raised by way of a notice of motion application.*
- 3. Notice of motion struck out, parties to proceed to main suit for hearing of the suit.*

*Obiter dictum:*

- 1. A constitution reference under rule 10(a) and (b) must be raised where there are pending proceedings.*
- 2. That the constitution reference arises out of an order by magistrate or judge and not on matters that occurred outside the proceedings*
- 3. That the Notice of Motion disclosed no cause of action and is invariably defective.*

#### *11. Case Laws referred by advocates and court*

- a) Lawrence K. Nduku & 156 Others v Kenya Breweries Ltd Hccc 279/03 unreported (Hayanga, Ouna, Kariuki JJJ)*
- b) Githunguri v R. (1986) KLRI (Madan AG CJ Aganyanya and Gicheru JJ)*
- c) Marete v Attorney General (1987) KLR 690 (Shields J)*
- d) Ramesh Lawrence Malanaraj v Attorney General of Trinidad & Tobago (No.1*

*and*

*No.2) 1979 AC 387*

- e) Gairy & Another v Attorney General of Grenada (2002) I AC 167*
- f) Peters v Marksman & Another (2001) IL RCI*
- g) Rashid Odhiambo Aloggish & 245 Others v Haco Industries Ltd CA 110/01 unreported (Omolo Tunoi and Okubasu) JJA*
- h) Dominic Akony Amolo v Attorney General Mics application 494/03 (unreported) Aluoch, Waweru Lenaola JJA)*
- i) Cyprian Kubai v Stanely Kaiyongi Mwenda Nbi High Court Misc. Application 612/02 (Khamoni J)*
- j) Njoya & Others v Attorney General & Others (2004) 4 LRC 554*

*(Ringera, Kubo, Ksanga JJJ)*

- k) Anarita Karimi Njeru v The Republic (1979) IKLR 154 Trevelyn ,Hancox)*
- l) Spencer v Attorney General & Others (1999) 3LRC 1.*
- m) Attorney General B Butambaka (1992) LCC Const) 495*
- n) Welamondi v The Chairman, Electoral Commission of Kenya (2002) IKLR 486*
- o) Republic v Commissioner of Police – exparte Nicholas Gituhu Karia Nairobi High Court 534/03 unreported (Nyamu, Ibrahim, Makhandia JJ).*
- p) William Kipruto Arap Chelashaw v Republic No.1 and No.2 High Court Cr. Appeal 693 and 898/03 (not referred to)*
- q) Mitchell & Others v Director of Public Prosecution and Another (1987) LRC (const) 127*
- r) Remington v Scoles (1897) 2 CH I.*
- s) Slough Estate Ltd v Slough borough Council & Another 1967 2 ALL ER 278*
- t) Royal Bank of Scotland Ltd v Litrusdal Investments Ltd (1971) 2 ALL ER 558*
- u) Stephen Kimotho & Others v Attorney General & Others Mic. High Court Miss. CA 833/04 (Nyamu J) unreported.*
- v) Olive Casey Jacindao v Attorney General of Guyanda (1971) AC 972*
- w) Maharaj v Attorney General of Trinidad & Tobago (1978) 1 ALL ER 670*
- x) Re Lanes (deceased) Kinapman v servian & Another (1978) 2 ALL ERI*
- y) Peters and Another v Attorney General & Another (2002) 3 LRC 32*
- z) Williams & Anothers v Spautz (1993) 2 LRC 559*
- aa) John Kamau Kinyanjui v Attorney General High Court Misc. application 1181/04 unreported, Nyamu J.*
- bb) Kenya Bus Services Ltd & Others v Attorney General & Others Nairobi Hccc Misc. 413/05*

*cc) Ali Said Chizondo & 2 Others v Republic  
Criminal Appeal No.8/1998 Mombasa Court Appeal*

4. .

5. *That the Notice of Motion disclosed no cause of action and is invariably defective.*

12. *Statute Law Referred to:-*

- a) The constitution of Kenya and rules*
- b) Civil Procedure rules order 39 r 8,12 Civil Procedure Rules*

13. *Article*

*Ruling on Procedure under section 84 of the Constitution of Kenya Nairobi Law Monthly No.51 of January 1995. Apaloo CJ (as he then was)*

14. *Advocate*

*a) Applicants*

- i) P Mwangi – M/s Mwangi & Co. Advocates led by G. Imanyara advocates*
- ii) K. Kairu M/s Hamilton Harrison & Mathew & Co. Advocates led by J. B. Orenge - Advocate*

15. Dates of hearing (submissions)

28.7.05  
20.9.05, 22.9.05  
14.10.05  
27.10.05  
31.10.05  
1.11.05  
3.11.05  
9.11.05

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 506 OF 2004**

**PATRICK THUO GITANGU ..... PLAINTIFF**

**VERSUS**

**ZAHIR SHEIKH .....1ST DEFENDANT**

**WILLIAM EGBE ..... 2ND DEFENDANT**

**COCA-COLA EAST AFRICA LTD .....3RD DEFENDANT**

**RULING**

**ON THE CONSTITUTION REFERENCE**

1: **PROCEDURE**

1. A constitution reference was filed in the High Court of Kenya at Nairobi by way of a Notice of Motion application within this suit that is pending before this court and dated the 16 June 2005.

2. The relationship of the parties herein is that of employee/Employer and or agent. The employee, Patrick Thuo Gitangu (herein referred to as the plaintiff) was allegedly said to have been accused by his employer M/s Coca Cola East Africa Ltd (herein referred to as the 3rd defendant) of theft by servant. In the process of investigating the said allegation through Zahir Sheik (herein referred to as the 1st defendant) on instructions from W. Egbe (herein referred to as the 2nd defendant) and the director of the 3rd defendant, the plaintiff was required to surrender his properties and moneys including those of his wife. The plaintiff claimed that the process of investigating the whole matter was irregular as only the Kenya police could interrogate and investigate him.

3. Patrick Thuo Gitangu being aggrieved filed this present suit on 18 May 2004. He sought prayers for an injunction. On the same day he filed a chamber summons seeking that the court to issue him with orders for injunction to:-

a) Restrain the defendants from harassing and assaulting him,

b) That between 6 to 14 May 2004 he was subjected to cruelty through mental and physical torture.

5. Ex parte prayers for an injunction restraining the defendants were granted by the court (Nyamu J, 18 May 2004 duty judge) pending inter –parties hearing within 14 days. On 31.5.04 (Ojwang J) leave was granted for parties to file further affidavit. The matter was mentioned on 3.6.04 (P. Kihara, J) and again

on 22.6.04 (Mugo J) when it was stood over generally. Parties entered into consent on 7 July 2004 to deposit moneys in the joint names of both advocates. On 18.5.04 there had been a consent by parties to release Ksh. 200,000/- to the plaintiffs advocates M/s P. Mwangi & Co. Advocates. An application by defendants to appoint a receiver was rejected by Ramsey J 20.4.05 but he did restrain the plaintiff from disposing or transferring the properties. 5.

What was therefore left was the issue of hearing of the main trial. The cause of action lies in tort. I wish to outline the sequence of events to explain how this matter came before me. I deal, in the Civil bench divisions on cases of TORT. Apart from the law of defamation, this would include personal injuries claim and running down claim. This at times would extent to hospital negligence, industrial accidents, air crash cases and malicious prosecution cases, inter alia. The then duty judge, Ransley J referred the suit for full hearing before me. On the date the parties were to appear before me for trial, the plaintiff changed advocates to M/s Julius Nyakiangana & Co. Advocates (3.5.05).

I gave both parties time to prepare their case and deal with issues of discovering and other pre-trial issues under their own supervision (the rules committee of the court having done away with summons for directions but, which I believe would soon be reinstated in the rules with the new amendments). The defendants were all represented by M/s Hamilton Harrison & Mathews (K. Kiragu). 6. The suit came up for mention on the 15 June 2005 to confirm whether pretrials had been finalized. The advocate for the plaintiff failed to attend court. When he did attend (16 June 05) he stated that he was no longer acting for the plaintiff and that the former advocate P. Mwangi had been re-engaged to act for the plaintiff. Indeed, P. Mwangi did attend court on 16 June 2005 having filed a notice of change of advocate. It was generally agreed on the way forward of the trial, that the plaintiff would amend his plaint and the issue of discovering be dealt with.

7. It was then that Mr. P. Mwangi informed the court that he had filed a Notice of Motion on the same day of the 16 June 2005 under:-

“The Constitution of Kenya section 60,70(a),70(c)72,74,75,76,77,81 and 84 rules 10(a) and (b) of the constitution of Kenya (Fundamental Rights and Freedoms of the Individual) Practice and procedure Rules 2001 and order L of the Civil Procedure rules.

8. This indeed was a constitutions reference. Under its rules, the effect would be that the court should immediately refer the whole suit to the Chief Justice to constitute a bench of 3 judges to hear the reference. The second effect would be that the “proceeding” would be immediately stayed, namely, I as the court would not be permitted to proceed to hearing of the trial as long as there was a constitution reference filed.

9. The file was placed before the duty judge to deal with the above two points. He concluded that the constitution reference can be heard by one judge. Indeed, this was clarified by Apaloo CJ, and Chesoni C.J. at different forums. Apaloo CJ (as he then was) stated in an article reported in the Nairobi Law Monthly No.51 of January 1995 at page 44 entitled:-

“Ruling on Procedure under section 84 of the constitution of Kenya.”

That

“The legally mandated composition of a High Court when excising its “constitutional jurisdiction.” is a single judge.

10. This meant that the enforcement of rights under section 84(2) and (3) of the Constitution does not necessary require more than a single judge to hear a reference. Apaloo nonetheless stated that a reference under section 67 there is a “legal mandatory” requirement to constitute a 3 bench. This would concern the interpretation of a provision of the constitution or a substantial question of law.

11. Chesoni CJ (as he then was) held, when I referred to him a suit concerning a constitution reference to

appoint a 3 bench judge in the High Court of Kenya, that the reference can be heard by one judge. (See Ali Said Chizondo & 2 Others v Republic Mombasa Criminal Appeal 8/98 and section 5 of the Judicature Act Cap. 3 Laws of Kenya. 12. Ransley J, as duty judge, on hearing the parties referred the file back to me for hearing of the constitution reference after dealing with the issue of “whether or not the directions on the plaintiffs application of 16.6.05 be referred to the Hon. The Chief Justice?”

13. When the matter came up before me on 28.7.05 I was under the impression that the parties would renew this issue, instead the applicant/plaintiff engaged Mr. G. Imanyara to lead Mr. P. Mwangi, in representing him in the reference. The defendants on the other hand engaged Mr. J. Orenge to lead Mr. K. Kiragu. It was generally agreed that as the advocates on record were versed well with the fact they would address me on the fact whilst the senior advocates would address me on the point of law. The order of submission was done with leave of the court (although generally the lead counsel addresses the court).

14. It was after P. Mwangi completed his submission and the facts of the case that Mr. G. Imanyara stood to inform the court on a disclosure. This being that there were several cases pending before various courts between the parties which he thought ought to be disclosed to the court. I was surprised, as what was a simple Tort case was now a constitution reference, then a series of cases unknown to the court. Mr. Imanyara then made a proposals that his client was willing to withdraw all the suits before all the courts and be left with only this present one. The respondent/defendants, at first, hesitated and wished to take further instructions and consult on the point. One of their principle officer (defendant No.1) was then out of the country.

15. It then transpired, that after filing this present suit, the plaintiff, who deponed in a verifying affidavit that there were no suit pending between the parties, (correctly then) then made a report to the Kenya police of his harassment and assault. The defendants had also reported the alleged fraud and or theft by servant to the police on 6 May 2004. This was 12 days before this suit was filed. The police are alleged to have taken no action. The defendants wrote to the Anti-Corruption Commission on 22.2.05 (KAA/INV6/I.VOL. III(43), folio 399) who in turn made inquires with the Attorney General.

Warrant of arrest were issued against the 1st and 2nd defendant on the complaint by the plaintiff. Both defendant applied for bail pending arrest which was granted. The plaintiff’s wife had also made complaints to the CID. In the six to eight matters that arose since before and at the filing of this suit the parties agreed to the following:-

15. 1) Misc. Hccc application 27/2005
  - a) Zahir Sheikh ..... 1st applicant
  - b) William Egbe ..... 2nd applicant v
  - c) Republic

Subject

Bail pending arrest (section 84 Constitution) fundamental rights

Position:

The matter is spent and marked as settled.

15,2, Mis. application 179/05 OS

William Egbe v Republic

Subject

## Arrest of William Egbe Conservatory order

That order 3 issued on 3.2.05, the arrest indictment detention and criminal prosecution of the applicant or the institution or any criminal proceeding arising out of a complaint (now spent) to the police, the criminal investigation department by Patrick Thuo Gitangu or arising from the subject matter of the Nairobi High Court Civil case no.506/04 be and is hereby stayed until the hearing and determination of Nairobi High Court Civil Case No.506/04.

15.3. The conservatory order made in HCC Misc. Application 1029/05 Coca-Cola East and Central Africa Ltd

i) Ephraim Maragwa

ii) Kenneth Onyango

iii) Zahir Sheikh

Ex parte applicant Republic of Kenya Chief Magistrate Court Central registry Patrick Gitangu Thuo Beatrice Wambui Thuo (Interested Parties)

and specifically order of 6 July 2005

### Order;-

“That the arrest, indictment detention and criminal prosecution of the applications on the institution of any criminal proceeding arising out of a complaint to the police and or Criminal Investigation Department by Patrick Thuo Gitangu and or Beatrice Thuo or arising from the subject matter of Civil Proceeding in Nairobi High Court Civil Case No.506/2004 be and is hereby stayed pending the hearing and determination of Hccc 506/04.

15.4. The investigation, if any into

i) The complaint made by Coca Cola East and Central Africa Ltd against Patrick Thuo Gitanga on 6 May 2004 regarding alleged fraud and or theft by servant be and is hereby suspended pending the hearing and determination of Hccc 506/2004.

ii) The complaint by Coca-Cola East and Central African Ltd against the Kenya Police and which is subject matter of a letter dated 22 February 05 from the Kenya Anti Corruption Commission Ref. KACC/INV 6/22/22/1/VOL III (43) folio 399 in Misc. Application 1029/05 Coca Cola East Africa and Central Africa Ltd & Other and Republic.

### Chief Magistrate

To the Director of Public Prosecution on allegations of corruption by the Kenya Police may be investigated by the Anti-corruption Commission.”

16. What this consent really says is that the plaintiff and his wife (who is not party to these proceeding) are withdrawing all their complaints previously made against the defendant/respondents. They leave only this present complaint. The defendants/respondent on the other hand are not withdrawing their complaints. They instead agree to stay any proceeding filed to safe guard themselves until the determination of this current suit.

17. The six cases concerns, I believe criminal charges against the defendants in the Chief Magistrate Courts. It seems a nolle prosequi (CM Case 162/05,196/05) was issued against these cases. The plaintiffs attempted a private prosecution thereby forcing the defendants to seek for bail pending appeal protection orders from the High Court. Other orders were by way of complaints of attempted murder (Cr.

Appl.6/2005) by the plaintiff and complaints to the CID by his wife (21.6.05). This necessitated constitution reference being filed to protect the defendants.

18. I am not able to understand why the change of heart by the plaintiff in dropping their claims. Could it have possibly been the frustration of not having their suit expeditiously dealt with? I could only guess from the remarks made by my brother Nyamu J in the case law of:-

18 (i) Kamau John Kinyanjui V Attorney General

HCC Misc. Application 1181/04 “The applicant had (declined to) and did conceal that there was a pending appeal, nor [did he file] a constitutional reference”

It would have meant that two courts on the same jurisdiction hearing the same suit. In a subsequent case of:-

18(ii) The Kenya Bus Services v Attorney General & Others

Misc Application 413/05 Where Nyamu J relied on the decision of: Booth Irrigation v Mombasa Water Products Ltd. Hcc Misc.1052/2004 in which he also held inter alia “Non disclosure of material facts is sufficient to warrant the dismissal of a constitutional application.”

19. The applicant has disclosed the said pending cases in order that he may probably not have this application rejected. I am therefore left with the constitution reference to determine and the main suit supported by a plaint. Arguments before me were on the constitutional issue. II: The Plaint

20. As stated earlier the Plaint arises out of a cause of action on TORT namely,

“That between 6 May 2004 and 14 May 2004, the defendant[s] herein jointly and severally subjected the plaintiff to cruelty through mental and physical torture during an illegal exercise of police powers.” The prayers sought were for the following orders against the defendant[s] jointly and severally:-

“a) An order of injunction restraining the defendants their servant or agents from harassing assaulting, calling, accosting or trespassing on the plaintiff or any member of his immediate family.

b) An order of injunction restraining the defendants their servant or agents from alienating, occupying, taking possession of, encumbering or in any way interfering with any assets or property or bank accounts of the plaintiff or any member of his immediate family.

c) An order of injunction compelling the defendants their servants or agents to reconstitute to the plaintiff any assets, property money documents instrument, deed or any other chattel or immovable property belonging to the plaintiff and possessed alienated occupied encumbered or in anyway interfered with by the defendant in any of their servants or agents.

21. There was no mention of any prayer for constitution rights except in para 17 of the pleading. There was also no claim for General Damages. In para 17 it states:-

“The plaintiff states the above conduct (ie illegal search at Evergreen estate, seizing of plaintiffs properties, stealing documents, forcing plaintiff to withdraw money from the bank, forcing plaintiff to execute various documents under duress in favour of the defendants) by the defendants was tortuous and an abuse of the plaintiffs rights and a derogation of the plaintiff constitutional right to wit.

a) Right to personal liberty

- b) Protection from inhuman and degrading treatment
- c) Protection from deprivation of property
- d) Protection form arbitrary search and seizure
- e) Right to due process of the law
- f) Protection of freedom of movement.”

(Emphasis supplied)

22. In para 18 the plaintiff applicant further avers that the said conduct of the defendants was criminal and contrary to the Penal Code as follows:-

- a) Robbery with violence
- b) Assault
- c) False imprisonment
- d) Trespass

23. None of the above was prayed for in the plaint. The latter advocate for the plaintiff recommended to the court that he may require to amend his plaint. The former advocate Mr. P. Mwangi had applied to amend the plaint to include the words to the prayer of General Damages only (Emphasis supplied).

24. No proceeding had commenced by way of hearing of any evidence. Earlier there was an application by the defendant to appoint a receiver which was heard and declined by the duty judge in April 2005. An application to enter judgment against the plaintiff on admission, is also pending dated the 2.3.05.

I have now a Notice of Motion filed seeking a constitution reference.

### III Constitution Reference

25. The Notice of Motion dated 16 June 2005 which was the subject matter of this judgment is brought under:-

“The constitution of Kenya section 60,70(a) 70(c) 72,74,75,76,77,81 and 84 rules 10(a) and (b) of the constitution of Kenya (Fundamental Rights and freedoms of the Individual Practice and Procedure Rules 2001 and order L of the Criminal Procedure Rule.”

And prayed for the following orders and declaration:-

25.1. A declaration that the defendant[s] have violated the plaintiffs fundamental rights and Freedoms as guaranteed by section 70(a) and 70(c) of the Constitution. 25.2. . . . the plaintiffs right to personal liberty as guaranteed by section 72 of the constitution. 25.3. . . . the plaintiffs right not to be subjected to inhuman and degrading treatment as guaranteed by section 74 of the constitution

25.4. . . . the plaintiffs right not to have his property compulsory taken possession of as guaranteed by section 75 of the constitution. 25.5. . . . the plaintiffs right to have the person or property subjected to search or to have his premises entered without his consent as guaranteed by section 76 of the constitution

25.6. . . . the plaintiff right to due process of the Law as guaranteed by section 77 of the constitution. 25.7. . . . the plaintiff right of movement without evidence as guaranteed by section 81

of the constitution. 25.8. Damages for breach of the aforesaid constitutional rights.

25.9. An order for restitution of the plaintiffs property by the defendant. 25.10. Costs of this Constitutional application 25.11. Interest on 8 and 10 above 25.12. Any such further orders with and or directions considered appropriate for the purposes of enforcing or securing the enforcement of the fundamental right of the plaintiff that have been violated.

#### IV: Arguments by the applicant/plaintiffs.

26. The plaintiff was an employee of Coca Cola East Africa Ltd as a research assistant or manager. He was employed on 16 April 1998. During the tenure of his employment he incorporated a company known as Trends and Analysis Company. He was able to do business with and actually traded with his employers' company. It is alleged that he made about 14 million from this business. On the 5 April 2004 he gave a 3 month notice to quit. It was accepted and the company gave him a glowing tribute for his wonderful and "invaluable services".

Thirty days later his letter was recalled by the managing Director (defendant No.2) and the 3rd defendant lodged a complaint with the police. He was accused as per letter attached else where and not to the application that the plaintiff was accused of an alleged Fraud/Theft by servant of a sum of \$US1,075,651/- and Ksh.885,000/- being the sums paid to Trends and Analysis for services actually not rendered. Because the letter was termed as "possible fraud the plaintiff/applicant was not quite clear what the charges against him was. Nonetheless the defendant froze his account pending investigations. Before the police could freeze the account, the defendant proceeded to take the plaintiff to the bank where he withdrew moneys.

Instead of leaving the Kenya police to conduct investigations on the matter, the defendants held independent investigations. The plaintiff, met with certain persons, was detained, interrogated in the security officers of the 3rd defendant. The title deeds and property for the defendants including the cheque book and passports were taken possession of together with the wife's property which was transferred in her absent.

27. The accusation was that the defendants made themselves judges of their own cause and actually took the law into their own hands. They actually took the role of the police in the whole matter. All this amounted to the contravention of the constitution rights of the plaintiff that now requires to be protected. Any consent signed by the plaintiff was actually under duress and coercion. The search done in the plaintiff's house was illegal and at all times he was being accompanied. His rights of liberty and movements were therefore infringed at the time he was at the office, in May 2004, he was actually treated to degrading and inhumane treatment. The interrogations against him was being done by "Peat Marwick" without a single police officer being present. This denied him the due process of the law. In all this there are no dispute that these facts actually occurred.

28. The plaintiffs alleges that he was slapped by 1st and 2nd defendant and made to sign documents and made to believe that if he did so, everything would be settled. Nonetheless the defendant had traded with the plaintiff. All along they were aware of this ownership of the company through his mail box, the telephone numbers that he had.

29. The plaintiff thus argues that if his rights are protected and prayers granted there would be no need to hear the main suit and these matter would be a finality.

#### V) Arguments by the defendants/respondent

. Although the allegation had been made against them, the arguments by the defendant/respondent was that they deny the said allegation. Nonetheless in order to establish whether the allegations are true or not there must be evidence given on oath, cross examination of witnesses so that the court would come to the correct position on the law. The facts require to be substantiated.

30. On the law, the respondents claim that the notice of motion does not disclose any cause of action. This court has no jurisdiction to actually entertain the said reference. A reference arises out of the proceeding and not outside the proceeding as is in this case. Further the declaration prayed for are not particularized. The court had been given sections of the constitution but not told what subsection had been infringed. This renders the said application null and void. The affidavit that had been relied on in support of the Notice of Motion did not belong to the applicant but the respondents.

These affidavits were deposed for other purposes and not in support of the application. The same cannot be relied on. The applicant asked that the application be struck out. They would in any event wish to proceed with the main suit, having filed counter-claims.

V: Court findings.

31. Legal Notice 133/01.

The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) practice and procedure Rules, 2001.

Provides that where a reference arises under rules 10(a) and (b) which states that:

1. "Where violation of fundamental rights and freedoms is alleged in any proceedings 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 order L of the Civil Procedure Rules shall as far as practical apply.
2. Pending the determination of such question all further proceeding shall be stayed.

The applicant herein applied for a constitution reference through a notice of motion using the above section of the rules. As stated earlier no evidence had commenced although by filing of a plaint it is plain that proceedings had commenced. It has been about a year from 18.5.04 to 16.6.05 when this application was made. To my mind, violation of one's constitution rights should have arisen within the proceedings as the case goes on.

Namely, from the orders of action of the judge or magistrates etc. If the plaintiff rushed to immediately go into a constitution reference, he should come to court by way of an Originating Summons under rules 11(a) that provides, this with the rules applied under order 36 r 8,12 Civil Procedure Rules. All along the plaintiff/applicant's intention was to obtain an injunction and thereafter have any harassment stopped and the return of his properties back to him. The issue of a constitution reference arose as an after thought and for purpose of staying these proceedings before court. That is perhaps the reasons the application before court is defective.

The defendant/respondents say as much. This is not denied by the defendant/respondent. The Notice of Motion Mr. Imanyara admits, lacks in want and form as of procedure but this he says was not fatal in his words. "There were errors and shortcomings in [the application] I admit in identifying the section in the constitution. The TEST to apply is not the narrow interpretation but the broader interpretation where justice lies.

32. He referred to me the case of Githunguri v Attorney General (1986) KLR. Where the court there took a judicial review application and converted it into a constitution application under section 84 (1) of the constitution and determined the issues in question.

33. Mr. Orenge on the other hand stated that the application is defective by not stating the precise section relied on and to be particularized together with the procedure. He referred to the case law of:-

Cyprian Kubai v Stanely Kaiyongi Mwenda.

Where the Hon. Judge stated that an application under section 60,65, and 84 of the constitution must be precise and to the point. This must not, he stated not only be to the section but also to the sub sections. The party concerned must state what alleged contravention had been done in order that the other party may be able to know what to answer to the case and to what extent. That Originating Summons was struck out.

34. I have before me a Notice of Motion that has failed to disclose the various sections and subsection together with particularizing the extent of the contravention. The plaintiff asks that I look at this Notice of Motion then determined the case to his favour. The result would be that the main suit would be spent.

35. I do not think that this is the correct procedure. There are allegations the defendant states that require a full hearing and cannot be dealt on affidavit evidence. Where there is an Originating Summons then it is not difficult to go for direction then state that the case be heard through evidence. In a notice of motion the parties could under Order 18 Civil Procedure Rules call the deponent of the affidavit to be cross examined.

The defendant/respondent all along had objected to the affidavits being adopted as they were not deponed to for the purposes of supporting the constitutional reference through the Notice of Motion. I would agree that indeed the affidavit deponed to were in fact those of the defendant/respondent and did so in support of their applications and not the applicants application for a constitution reference. The plaintiff has individual rights which he claims has been infringed. He himself must support clearly and precisely what these rights are, that have been infringed.

36. The allegation of the contravention of the plaintiffs rights are very serious and worthy to be looked into. This to my mind cannot be done in a summary form. It is the task of a constitution court to investigate the contravention of the rights claimed that have been infringed and thereafter to make a determination. In the case law of:-

Rashid Odhiambo Allogal & 25 Others

V

Haco Industries Ltd

CA 110/01

Where a declaration was sought by 246 employees of the defendant company through a constitution reference. The judges at the High Court stated that the issue in question was that of employment, master/servant and therefore not a constitution matter. The Court of Appeal outlined the task of the constitution court not agreeing with the holding of the two judges. That the court had to first consider whether the allegations are true. The application had been brought under an Originating Summons (Order 36 r 10(1) Civil Procedure Rules) under such circumstances the parties go for directions. The court would, if it so decides treat the affidavit, as pleadings and take down vivo-voce evidence. With the evidence before it

“the court would be able to make up its mind on which side of the divide the truth lay”.

It would then be called to determine upon what material facts amounts to or constitute a contravention.

37. I accordingly would agree that it is not possible in circumstances of this case to determine the issue in question on affidavit evidence. The process of investigating is not sufficient from the bar. There are too many questions, gaps and doubts. When this matter was reported to the police on 6 May 2004 why did they not take any action?. If the plaintiff's interrogation was completed on 14 May 2004 why did he file suit 4 days later 18 May 2004?. Why was it necessary to file parallel suits? (Now withdrawn). The issue

of parallel suits are dealt with in the case of: *Slough Estate Ltd v Slough Borough Council* (1967) 2 ALL ER 270

Where the plaintiffs ran two sets of proceedings concurrently to increase their chances of getting a decision quickly. It was held that the duplication of cases was in the circumstances vexatious, oppressive, and an abuse of the process of the court.

The case of: *Royal Bank of Scotland Ltd v Citrusdal Investment Ltd* (1971) 3 ALL ER 558 Where a tenant filed an application for the extension of his lease in the county court. The landlord filed a subsequent suit stating they are entitled to possession. It was held the 2 sets of cases should not be allowed to proceed concurrently.

The landlords Originating Summons was stayed till the tenants case was completed. 38. I do not believe in this case, the issue of parallel proceeding arises as the plaintiff has withdrawn these cases. What I wish to bring out is that an application for a constitution reference in this circumstances should have been filed under an Originating Summons, Order 36 Civil Procedure Rules and not a plaint. The plaintiff's advocate state there is nothing wrong with this. Under section 84 one could come by way of a plaint, Judicial review, Orders 53 Civil procedure Rules or by way of an Originating Motion (see the cases of *Juandoo v Attorney General of Guyana* (1971) LRC 972). This was the position prior to the year 2001. You could come into court by any means provided you are heard

Since 2001 the rules have been made by the Hon. Chief Justice that substantiate where there are no pending proceedings this must be by Originating Summons. Where the proceedings are pending by way of Notice of Motion. In the case law of:- *Republic* ..... Applicant The Commissioner of Police respondent *Ex parte Nicholas Gituku Kaira Hcc Mis.App. 534/03* (unreported)

The applicant filed a Notice of Motion that contained both the prayers by way of Judicial Review, the Law Reform Act and the Constitution of Kenya. This was brought by way of a notice of motion. It was held that there must be pending proceedings in the High Court in support of an application for constitutional determination. That further failure to specify the constitution provision contravened and relief claimed whether by way of declaration or otherwise was fatal.

40. What is unique in this case is that the Notice of Motion filed did not refer back to proceedings before the court but incident that occurred before the suit was filed. This means that the court will always have to look for facts outside the proceedings to determine the notice of motion. I believe the best position is if a litigant files a plaint seeking other remedies, in this case a remedy in tort and an injunction; and where such litigant has prayed for constitution remedy of a declaration it must be heard within the main suit and not an application.

41. I envisage a situation whereby a trial is proceedings the plaintiff's of property is impounded or is arrested whilst the proceedings are ongoing, then an application of the infringements of those rights may be filed by way of a notice of motion and determined. I do not think that in this case an application by way of a notice of motion may be filed simply because it has been mentioned in the plaint although not asked or prayed for. 42. It is also worthy to note that damages can be awarded of any contravention in constitution reference. The latest one is the case of:-

42.1. *Dominic Akony Amolo v Attorney General Hccc Misc.494/03* Where the applicant was able to establish before that court that his rights had been breached by being detained in prison longer even after being released. He was awarded damages of Ksh.2.5 million. Evidence in the constitution reference was in fact called and heard. 4.2.2. In the case of:-

*P. Marete v Republic* (1987) KLR 690 Where the court declared that the plaintiffs had been held in servitude. Damages was awarded of Ksh.100,000/-.

43. The plaintiff seeks an award of Ksh.50 million in this matter. I find it hard to investigate this claim by the submissions given. There must be a trial on all the issues before the court in order to allow a full

investigations.

44. In the Spencer V Attorney General & Others cases (supra) referring to Wenlock v Moleney (1965) 2 ALL ER 871

The court discouraged summary procedure hearing. This must be only in clear and obvious cases. A statement of defence and 10 affidavits were struck out by the “master” when he concluded that the case was unlikely to proceed. It was held that there must be full discovering, oral evidence and cross-examination. A full trial was desirable to be heard.

45. I would accordingly find that the notice of motion be duly struck out as being defective in form. That the issue on the constitution rights be dealt with in the main suit and plaint. In Conclusion:-

46. Whereas the applicant plaintiff has filed a suit by way of a plaint and whereas he has mentioned, though not prayed for, contravention of his constitutional rights and damages. The applicant is not permitted to file an application raising the same question by way of a notice of motion.

47. That the proper procedure is for the hearing of the suit by way of a plaint as a complete whole.

48. The law requires under rule 11(a) of the fundamental rights of an individual where there is a contravention of those rights that a suit by way of an Originating Summons be filed.

49. Where there is already a suit filed, a notice of motion is then filed. This court does not hold that this can be done where the question is pleaded in the plaint.

50. Whereas the applicant concedes the notice of motion is incurably defective the same be and is hereby struck out with costs to the respondent. 51. The parties are to proceed for trial in the main suit for court to determine the issue in question. 52. The costs to the defendant/respondent is together with costs for two counsel.

Dated this 24th day of November 2005 at Nairobi

**M.A. ANG’AWA**

**JUDGE**