

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

MISC. APPLICATION NO. 216 OF 1999

CLEMENT NDUNGU NJUGUNA.....PLAINTIFF

VERSUS

STEPHEN CHETEKA.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The 1st Defendant, Stephen Chiteka, has moved this Court by a Notice of Motion made under **Order 1 Rule 1 of the Civil Procedure Rules, Section 3A and 63(3) of the Civil Procedure Act** seeking the orders of this Court to lift and or set aside the warrant of arrest issued on the 8th of July 2004 and reissued on the 12th of October 2004. The 1st Defendant has further prayed that any further execution against him be stopped. The Application is based on the grounds stated on the face of the Application and supported by the annexed affidavit of the 1st Defendant, Stephen Chiteka. The Application is opposed. The Plaintiff has filed grounds of opposition to the application. Mr Lawrence Macharia Karanja, the Advocate of the Plaintiff has sworn a replying affidavit in further opposition to the Application.

Mrs Odhiambo and Mr Karanja, Learned Counsels submitted before me urging the respective positions of their clients. The issue before me for determination is whether a public officer acting in his official capacity can be made to be personally liable for costs which were ordered to be paid by the Court after the Plaintiff was successful in his suit. The facts of this case are not in dispute. The 1st Defendant was sued together with the Attorney- General by the Plaintiff when he was aggrieved by the Criminal Proceedings that were brought against him. The Plaintiff alleged that the said criminal proceedings against him as brought by the 1st Defendant, the then Officer Commanding Station (OCS) Subukia Police Station, were actuated by malice. The 1st Defendant and the 2nd Defendant (*the Attorney - General*) filed their separate defences to the suit. The 1st Defendant was however represented by the Attorney General.

Mr Justice Rimita agreed with the Plaintiff. He granted the prayers sought by the Plaintiff and ordered the termination of the criminal proceedings brought against the Plaintiff. The Defendants were ordered to pay the costs of the suit to the Plaintiff. The Plaintiff taxed his costs and has sought to execute for the said costs awarded to him against the 1st Defendant. It should be noted that the said costs were ordered to be paid by the Defendants and not specifically by the 1st Defendant. The Plaintiff has submitted that he had every right to execute against the 1st Defendant as he was a party to a suit like any other Defendant. The Plaintiff further submitted that the 1st Defendant's action in bringing the criminal proceeding against him was motivated by malice. The Plaintiff argued that in bringing the said criminal charge against him, the 1st Defendant was acting outside the scope of his employment and therefore he was "fair game" when it came to executing against him for the costs awarded.

I however do not agree with the submissions made by the Plaintiff. **Section 4(1) of the Government Proceedings Act (Cap 40 Laws of Kenya)** provides that:

“Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity, it would be subject –

(a) in respect of torts committed by its servants or agents.

.... Provided that no proceedings shall lie against the Government by virtue of paragraph (a)

in respect of any act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”

Section 21(4) of the said Act states that:

“Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the Government of any money or costs and no person shall be individually liable under any order for the payment by the Government of or any Government department, or any officer of the Government as such, of any money or costs.”

The plain reading of the above sections of the Government **Proceedings Act** clearly show that a public servant cannot be made liable for any act or acts which he commits in his capacity as such a public servant. **The Government Proceedings Act** does not give an exception to this law. It does not matter whether or not the public servant acted within the scope of his employment. In **Siree –versus- Lake Turkana Elmolo Lodges Ltd [2000]2 EA 521 (CAK)** it was held by the Court of Appeal that even when a public servant (in the particular case, a District Officer) had acted like a tin-pot dictator or like a village tyrant, and had clearly acted in excess of his scope of employment, the Government was still found to be liable in damages.

In the instant case, the 1st Defendant could not be said to have acted out of the scope of his employment when he arrested and charged the Plaintiff. There were complainants who made a complaint to the 1st Defendant. The 1st Defendant acted upon the said complaint and charged the Plaintiff. The High Court found that the Defendants had brought the Criminal proceedings to justify the shooting of the Plaintiff and therefore afford the Defendants a defence in the civil suit.

The said Court did not find the 1st Defendant to be specifically liable. They were both found to be liable. In applying the provisions of **Section 4(1)(a) and Section 21(4) of the Government Proceedings Act**, the Plaintiff ought to have claimed the costs awarded to him from the Government (i.e. the 2nd Defendant) and not from the 1st Defendant. The 1st Defendant is protected by the law from such execution process.

In the premises therefore, the application filed by the 1st Defendant must succeed. The warrant of arrest issued on the 8th of July 2004 and reissued on the 12th of October 2004 is hereby set aside. The Plaintiff is hereby barred from ever executing against the 1st Defendant in respect of the costs awarded in this case. The Plaintiff should claim the said costs awarded from the 2nd Defendant. The 1st Defendant shall have the costs of this application.

DATED at NAKURU this 24th day of November 2004.

L. KIMARU

AG. JUDGE