

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PROBATE AND ADMINISTRATION CAUSE NO.114 OF 1996

PROBATE AND ADMINISTRATION CAUSE NO.114 OF 1996 IN THE MATTER OF:

THE ESTATE OF AHMED MOHAMED NASSIB (DECEASED)

R U L I N G

This ruling is in respect of an interlocutory matter arising from the arrest of one Abdulkarim Mohamed purportedly on the orders of this court issued on 21.5.01. The arrested person was brought before me on 12.6.01 accompanied by his Advocate, Mr. Abubakar who submitted that the arrest was illegal and that the arrested person was not even a party to the proceedings.

On perusal of the court file I confirmed that this court issued an ex parte temporary injunction on 4.5.01 against one Abdulkadir Hassan Abdulaziz who is variously described as the “Respondent”, “Defendant”, “Objector/Respondent” in the documents filed. The order expired on 19.5.01 as it was not extended on 14.5.01 when counsel for the Applicant Mr. Khatib appeared ex-parte and sought a mention date for 21.5.01 to record a consent in the matter. When both counsel appeared on 21.5.01 however the only consent recorded was for extension of “interim orders”. But there were no such orders in existence!

Be that as it may, an order appears to have been extracted on that day purporting to have been obtained from me on some Chamber Summons dated 30.4.01 (which I cannot find) which was coming up for hearing on 21.5.01 (which is not so), and required the Objector/Respondent to be restrained from intermeddling with some plots the subject-matter of this dispute and further directed the OCS Bamburi Police Station to enforce the order (which orders I never made).

As I could not find such an order on record although it appeared to have been signed by the Deputy Registrar of this court, it was not clear where the order emanated from and it appeared to me that the records of this court had been falsified for selfish ends of the perpetrator which would be a grave abuse of the court process.

I made orders releasing the arrested person on terms and requiring that Notices be issued to counsel for both parties, the Deputy Registrar and the OCS to give their explanations.

The Deputy Registrar explained that the order was signed by her inadvertently as it was nowhere in the court record but it had been submitted to her by M/s Khatib & Co., Advocates who are on record for the Applicant. I issued a further order on 19.6.01 for a Notice to be served on the Advocate to Show Cause Why he should not be cited for interfering with court records resulting in illegal orders and unlawful arrest of an individual.

Mr. Khatib Advocate in his explanation extricated himself by stating that the mistake was committed by a court clerk in his offices one JULIUS NGUMBAO. He apologized on behalf of his Firm. The clerk who was also given an opportunity to explain admitted that he had prepared the order before he submitted it to the Deputy Registrar for signature. He stated however that he used the notes recorded by the Advocate on their office file. The Advocate was Mr. Khatib. After extracting the order he placed it on Mr. Khatib’s desk. He later found it on his desk and proceeded to file it in court. It was his assumption that the Advocate had approved the order as drawn. He did not however peruse the court file to confirm the order issued by the court. He too apologized to the court.

It is clearly therefore the case that the order appearing on record herein and dated 21.5.01 was an illegal order. It was never made and ought not to have been extracted or issued for execution.

What orders should then be made?

I think if there was any good candidate for application of this court's inherent powers as reserved under S.3A of the Civil Procedure Act, then this is the case. The Section states:

- "3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

I need not therefore wait for a formal application to be made by any party to redress what is clearly an abuse of court process. The Rules of natural justice required that an opportunity be given to those concerned to be heard before any orders are given. I heard them. The ends of justice require that I make orders to dissuade such parties from future abuse of court process.

Short of a deliberate attempt to subvert the process by falsifying court records, I find on the material before me that the Advocate seized of the matter, Mr. Khatib and the clerk Julius Ngumbao proceeded with reckless abandon to extract and execute the order in question. The least they ought to have done was to peruse the court file. It does not avail the clerk to say that he used another precedent in their office file which had nothing to do with this case. It was the Advocate's duty also to check the order drawn up by the clerk before releasing it for filing in court. The buck for all that happens in the office in the end stops at his desk.

Both have apologized to the court. That would have served as mitigation if their actions did not result in the unlawful loss of liberty of an individual, a most cherished human right. The Deputy Registrar of this court was misled.

I think in the circumstances I must impose some penalty not only to underscore the seriousness of the transgression but to deter others of like inclination. Accordingly the Advocate Mr. Mohamed Faki Khatib and the clerk Julius Ngumbao shall pay a fine of Kshs.3,000/- each. In default they will serve 15 days Community Service under the Community Service Orders Act.

Dated this 20th day of July, 2001.

P.N. WAKI

J U D G E