



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISC APPLICATION NO. 356 OF 2000**

**SAMUEL KAMAU MACHARIA**

**& ANOTHER.....APPLICANT**

**VERSUS**

**1. ATTORNEY GENERAL..... RESPONDENT**

**2. NGENGI MUIGAI..... RESPONDENT**

**RULING**

The first and second respondents in essence pray by way of preliminary objection that the applicants Notice of Motion dated 5.4.2000 be struck out as it is incompetent in law. That application seeks two orders namely:

1. ....
2. Proceedings in Senior Principal Magistrates court at Kibera criminal case no. 2560/2000 Republic versus Samuel Macharia and Joseph Gilbert Kibe be stayed until the suit is heard and determined.
3. Alternatively such conservatory orders as court may deem fit be granted.

The pending suit is the originating motion dated 5.4.29000 It is a constitutional application brought under section 72, 73, 74, 77, 82 and 84 of the constitution by the originating motion applicants complained that their rights under the constitution are being infringed by, inter alia, being subjected to oppressive vexatious unfair and malicious in that the criminal charges they are facing are or matterially based on Civil dspute pending in court between applicants and the 2nd Respondents. Applicants further complan that the sole object of the criminal charges is to put pressure on the applicats to settle

Civil claims. By the originating motion applicant seek several declaration intended to protect their alleged rights under the constitution.

The Notice of motion which is the subject matter of the preliminary objection is brought under order L rule 1 and 2 Cp Rule section 84 of the constitution section 3 of the Judicature Act; and section 3A of civil procedure Act. The purpose of the Notice of motion is temporarily sto the criminal proceedings pending the hearing of the originating motion. The notice of motion is grounded inter alia, on the facts that the originating motion has great prospects of succeeding and if interim stay is not grante, the originating motion will be rendered nurgatory.

The Hon C.J has already ruled that the originating motion is within the confines of law and procedure and that the matters raised in the originating motion are of considerable complexity and gravity which cannot escape public interest. Consequently the Hon. C.J. has ordered that the originating motion be heard by a bench of three Judges to be appointed in due course., The hearing dates of the originating motion have not been fixed by Hon. C.J. has expressly stated that it will not be heard before the month of September 2000. His Lordship further ordered that the Notice of motion under consideration be heard by a single judge pending the full hearing of the originating motion.

The orders of Hon. C.J. are very clear. The originating motion is to be heard by a bench of three judges while the Notice of Motion for interim stay to be heard by a single judge. I am dealing with the notice of motion as a single Judge. It is clear when dealing with the notice of motion I am not sitting as a member of bench of three judges who will hear the originating motion because the panel to sit in the constitutional case has not been named. Thus my powers are limited. I cannot usurp the jurisdiction of the constitutional court to be formed and appear to deal in any manner with the originating motion. If I were to do so; I would in effect be pre-empting the originating motion and thereby prejudicing the applicants and embarrassing the constitutional court. I recognise my jurisdiction in the present application as that of weighing the strength of each party's case without finally determining the contested issues of law and procedure which touch on the pending originating motion. I also recognise that the issues sought in the notice of motion are discretionary and that discretion must be exercised judicially. I have said all that because some of the grounds of preliminary objection to the notice of motion also go to the root of the originating motion and indeed impinge on the competency of the originating motion.

For instance Mr. Bwonwonga for 1st respondent submitted that the application is fundamentally flawed as applicants would only have competently come to court through referral by the trial Magistrate under s. 84(3) of the constitution. It was also his submission that the first respondent is not a proper party to these proceedings. On the other hand, Mr. Gathenji for 2nd Respondent submitted inter alia that there is no competent application in court as applicants have not specified the rights under the constitution which have been violated. Both Mr. Bwonwonga and Mr. Gathenji contended among other things that since the originating motion is fundamentally flawed the notice of motion for interim stay has no foundation. Both Mr. Bwonwonga and Mr. Gathenji have addressed the court on several days and cited several authorities. Dr. Kamau Kuria for the applicants has also addressed the court on several days and has cited many authorities in defence both of the originating motion and the Notice of Motion.

It is apparent that both the originating motion and the notice of motion are based on the same facts and law. The two applications are supported by the same affidavits and documents. As I have already said the issues of law and procedure raised in the present application go to the root of the originating motion. As the reply of Dr. Kamau Kuria shows, the issues of law and procedure are seriously contested. There is no binding authority from the Court of Appeal finally settling the issues of law and procedure herein raised which means that the law is not yet settled.

Firstly the contested issues of law and procedure which are not yet settled cannot be a proper basis of a preliminary objection to an interlocutory application. Prima facie the High Court has jurisdiction to entertain the originating motion as s.84(2) of the constitution expressly states.

Secondly, if the court were to determine finally on the contested issues of this law and procedure, the originating motion will have been preempted. The constitutional court will have been embarrassed and the applicants will have been denied a right to be heard by the constitutional court. The order of the Hon the Chief Justice that the originating motion be heard by a bench of three Judges will have been rendered futile. This court will have arrogated to itself and usurped the jurisdiction of the constitutional court. This is not judicially acceptable.

Thirdly, what applicants are seeking interim stay of proceedings is the exercise of the court's discretion. It is the law as stated in *Makisa Biscuits versus West End Distributors* (1969) E.A 696 at page 791, that a preliminary objection cannot be raised, inter alia if what is sought is the exercise of judicial discretion. In my view in an application of this kind, the discretion of the court should be exercised in the same way the court exercises its discretion in the normal course of its business. In the case of stay of execution or

proceedings pending appeal the general principle is that the court ought to exercise its best discretion in a way so as to prevent the appeal if successful, from being rendered nugatory.

The purpose of stay of execution or proceedings is to preserve the subject matter in dispute so that the rights of an appellant are safe guarded and to prevent the appeal if successful from being nugatory. Courts also issue interlocutory injunction to preserve the status quo pending the determination of the suits. By analogy applicants are saying that their fundamental rights and freedoms have been breached and are asking by this application for preservation of their rights pending the determination of the application.

The Hon the chief Justice has already found that the Originating motion is not frivolous as it raises matters of considerable complexity and gravity. He has already found that the originating motion is not frivolous as it raises matters of considerable complexity and gravity he has consequently ruled that the originating motion be heard by a bench of three Judges. Fourthly, an interim stay of proceedings has been granted by courts before. In *Jaren Benson Kangwana versus Attorney General Misc Application No. 446 of 1995 O'Kubasu (now JA)* granted an order staying proceedings pending the hearing of an application to prohibit the continuation of criminal proceedings in *Maharah versus Attorney General of Trinidad and Toabaldoz (1978) 2 All Cr 670* court granted a conservatory order releasing the applicant from prison pending the hearing of his application for redress for breach of his constitutional rights and freedoms.

I am satisfied for the foregoing reasons court has jurisdiction to grant the orders sought and that in the circumstances of this case it is just and equitable that the criminal proceedings should be stayed pending the hearing of the originating motion.

Consequently I overrule the preliminary objection with objection with costs and grant order interims of prayer 2 of the application dated 5.4.2000.

E. M. Githinji

Judge

18.7.2000

Mr. Bwonwonga present

Dr. Kamau Kuria present

Dr. Kamau

I apply for leave to take photostat copy of the order to enable me to serve.

Mr. Bwonwonga

I apply for copy of the Ruling

Order: Court order extracted as hereunder leave to take photostat copy of the extracted order granted Ruling to be typed and supplied.

E. M. Githinji

Judge

18.7.2000

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC APPLICATION NO. 356 OF 2000**

SAMUEL KAMAU MACHARIA & ANOTHER.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL & ANOTHER.....DEFENDANT

ORDER:

1. Preliminary objections to the application for stay of criminal proceedings is overruled with costs to applicant
2. The proceedings in Senior Principal Magistrates court at Kibera criminal case no. 2560 /2000 are stayed until the hearing and determination of the originating motion by the constitutional court.

E. M. Githinji

Judge

18.7.2000

Dr. Kamau present

Mr. Bwononga present

Order: Leave to applicants advocates to take photostat copy of the orders

E. M. Githinji

Judge

18.7.2000