



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT LODWAR**

**PETITION NO. 1 OF 2016**

**WILLIAM EWALAN.....PETITIONER**

**VERSUS**

**JOSEPH KEBO NGIMICHURUS.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion under **Rules 20 & 21 of the constitution of Kenya, 2010 High Court Practice and Procedure Rules and Articles 22 (1) and 23** of the constitution the petitioner moved the court for orders:-

**That this Honourable Court be pleased to issue a conservatory order restraining the 1<sup>st</sup> Respondent from Executing the decree obtained in Lodwar PMCC No.11 of 2007 between Joseph Kebo Ngimichurus and the trustees of the Legions of Mary by way of arrest and committal to civil jail of the applicant/petitioner pending the hearing and determination of this application and determination of the petition.**

2. The petition was supported by the grounds thereon to wit.

**1. The petitioner is an employee of the legion of Mary (Maria) of Africa Church Mission a religious Christian Organization registered under Societies Act.**

**2. 1<sup>st</sup> Respondent commenced Lodwar SRMCC No.11 of 2007 against the Trustees of the Legion of Mary as the 1<sup>st</sup> defendant and the Bishop of Lodwar as the 2<sup>nd</sup> Defendant and obtained judgment there on 8<sup>th</sup> August, 2016 which they now seek to enforce by way of warrants of arrest while an appeal is pending in Kitale High Court being civil Appeal No.42 of 2013.**

**3. The petitioner has no obligation to satisfy the decree in Lodwar SPMCC No. 11 of 2007 since he is not one of the Registered Officials of the church as per section 15 of the Societies Act.**

**4. His intended arrest and incarceration amounts to violation of his rights protected under Article 11 of the United Nations Convention on Civil and Political Rights ratified by Kenya under Article 2 of the constitution.**

3. The petition was supported by an annexed affidavit sworn by the petitioner giving factual basis of the matters raised herein and stated that unless conservatory orders are granted he shall be subjected to great pain, loss and suffering.

4. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Joseph CK Cheptarmus his advocate on record where he deponed that he acts for the 1<sup>st</sup> Respondent in Lodwar **SRMCC No.11 of 2007, KITALE HIGH COURT MISCELLANEOUS APPLICATION NO. 34 of 2012 AND KITALE CIVIL APPEAL NO. 42 OF 2013** and that this petition was filed after one year and did not have instruction from the 1<sup>st</sup> Respondent who was then serving in Somalia on AMISON MISSION duties.

5. He deponed that the 1<sup>st</sup> Respondent obtained judgment on 5/9/2010 where: - cost of Kshs.260,095/= were awarded the subject matter of the notice to show cause and warrant of arrest complained of herein. The petitioner thereafter filed Kitale High Court Misc Application No.34 of 2012 for leave to file an appeal out of time which was dismissed on 14/5/2013 with costs. On 24/7/2013 the petitioner filed an application in Lodwar SRMCC No.11 of 2007 for stay of execution of the decree from the judgment obtained therein pending review and setting aside of the proceedings and resulting judgment or consequential orders for the suit to start a fresh which application was on 25/11/2013 dismissed with cost.

6. On 14/1/2014 he was served with Kitale High Court Civil Appeal No.42 of 2013 filed on 17/12/2013 in which the petitioner and the church sought orders for setting aside the orders issued on 25/11/2013 in Lodwar SRMCC NO 11 of 2017 which matter is still pending. It was depended that there has been neither violation or contravention of the constitutional rights of the petitioner nor the United Nations Convention thereon against the petitioner who at all material time attended court and swore affidavits on behalf of his church which requires protection and supervisory jurisdiction of this court.

7. The 1<sup>st</sup> Respondent swore an affidavit in reply together with annexures in support thereof. The 2<sup>nd</sup> Respondent did not enter appearance.

8. On 3/8/2017 the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection to have the petition struck out and dismissed on the grounds that;

**1. This court has no jurisdiction to entertain matters touching on this Lodwar SRMCC NO. 11 of 2017, Kitale HCC MIS Application No. 34 of 2012 and Kitale High Court Civil Appeal No. 42 of 2013 and or resjudicata matters ( sic)**

**2. Warrant of arrest against attempts to arrest and all other questions on execution process against the petitioner the subject of this matter shall be determined by the courts including the Kitale High Court and the lower court executing the decree and not by way of this petition.**

9. On 19/9/2017 this court (Riechi J) issued the following orders.

That the status quo be maintained pending the hearing of this application.

10. On 15/11/2017 the judge gave direction that the preliminary objection be heard by way of written submission and on 4/4/2018 confirmed filing of submissions by both parties and set ruling on 18/4/2018.

11. On 4/10/2018 this matter was listed before me and in the absence of the said ruling in the court file and in the absence of the advocate for the petitioner 1 reversed the said ruling and fixed the matter for highlighting of the written submissions.

### **SUBMISSIONS**

12. On behalf of the 1<sup>st</sup> Respondent it was submitted that the petitioner is yet to pay cost awarded prior to the petition which are being executed by way of notice to show cause and warrant of arrest which are still in force. It was submitted the court's jurisdiction flows from either the constitution or legislation or both as per the case of **LUCAS CHANGWONY & 3 OTHERS – VS – STANLEY CHEBIATOR, COURT OF APPEAL AT ELDORET CIVIL APPEAL NO. 109 OF 2008**. It was submitted further that the matter was resjudicata under section 7 of the Civil Procedure Act which states that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in former suit for which the cases of **THOMAS OWEN ONDIEKI & ANOTHER – VS – NATIONAL BANK OF KENYA LTD & ANOTHER COURT OF APPEAL NO. 182 of 2011 at ELDORET and WILLIAM KOROS – VS – HEZEKIEL KIPTOO KOMEN AND 4 OTHERS COURT OF APPEAL AT ELDORET CIVIL APPEAL NO. 223 OF 2013** were submitted.

13. It was therefore submitted that this court having rendered the decision given on 14/5/2013 and 9/7/2014 in the Kitale HCCC Misc application No. 34 of 2012 and Kitale High Court Civil Appeal No. 42 of 2013 that arose from the Lodwar SRMCCC No. 11 of 2007 is for all intents and purposes functus officio. The court it was stated should find it untenable and contrary to the laws to sit on appeal over decision of the same court. It was submitted that the issues raised in the petition should have been canvassed in the subordinate court at Lodwar and the High Court at Kitale.

14. On behalf of the Petitioner it was submitted that the petitioner as a person has never been a party to any of the three cases mentioned by the Respondent and has never raised any of the issues being raised as a preliminary objection on a point of law. It was submitted that the petitioner is questioning the constitutionality of the attempt to arrest him and take him into custody using warrants of arrest in execution of a decree which does not bear his name and therefore interfere with his freedom of movement.

15. It was submitted that **Mukasa Biscuit Manufacturing Co. Ltd – VS – Westend Distributors [1969] EA 696** defines what constitute a preliminary objection on a point of law as cited in **JOHN WANGUSI – VS – BUSOLO WABUYELE & ANOTHER NAIROBI HIGH COURT CIVIL SUIT NO. 195/2011**. It was further submitted that the petitioner's case is based on Bill of Rights and raises serious constitutional questions which the court should hear on its merits. It was submitted that the Respondent had not pleaded clearly the issues he raised to enable the court easily make a determination of the question of res judicata, it was noted that under Article 159 (2) (d) justice shall be administered without undue regard to procedural technicalities the court's jurisdiction to hear this matter being confirmed under Article 23 (1) and 165 of the constitution.

16. At the hearing herein Mr. Cheptarus highlighted his submissions while Mr. Samba through Mr. Ondabu adopted his written submissions.

### **ANALYSIS AND DETERMINATION**

17. From the pleadings and submission herein the following issues have been identified by the court for determination.

**a) Whether the preliminary objection herein meets the legal test for a preliminary objection on points of law**

**b) Whether the issues herein is res judicata**

c) **Whether this court has jurisdiction to entertain the matter.**

18. Preliminary objection on point of law has been defined in the case of **Mukasa Biscuit Manufacturing Co. Ltd – V – Westend Distributors [1969] EA 696 quoted by Mabeya J in JOHN WANGUSI – V – BOSOLO WABUYELE (supra)** submitted by the Respondent as follows:

“I have considered the deposition of the parties herein in regard to the preliminary objection herein. The threshold of a preliminary objection was set out in Mukasa Biscuits Manufacturing Co Ltd (Supra) as follows;

**“So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Example are an objection to the jurisdiction for the court or a plea of limitation or a submission that parties are bound by the contract, giving rise to the suit to refer the dispute to arbitration.**

19. From the pleadings and submission herein the Respondent has raised the issue of the jurisdiction of this Honourable Court to handle this matter and the issue of res judicata which is to say that the issues the subject matter of this petition have been conclusively adjudicated upon by a court of competent jurisdiction and the matters herein arise out of the same transaction or subject matter which if determined in his favour is likely to dispose of this suit. I therefore find and hold that the same qualify as a preliminary objection on points of law.

20. Is the petitioner’s claim res judicata? Whereas the petition is framed as a constitutional petition, the subject of the petition is a conservatory order arising from execution of a decree obtained in Lodwar PMCC No. 11 of 2007. The question which this court ought to answer is whether the issues of execution of the said decree has been subjected to litigation by the petitioner herein and or parties claiming through them. It is not in dispute that the 1<sup>st</sup> Respondent filed a suit against the Trustees of the Legions of Mary and the Bishop of the Legion of Mary for an order of eviction in respect of plot/land **LODWAR MUNICIPALITY/NAKWAMEKWI/NGITAKITO/155** and judgment obtained therein together with costs.

21. It is also not in dispute that being dissatisfied with the order of the trial court the petitioner applied for leave in Kitale Miscellaneous Application No.34 of 2012 which was dismissed on 14/5/2013 and that there after the petitioner went back to the lower court for an order to set aside the trial courts determination which was once again dismissed on 25/11/2013. Arising out of the said determination the petitioner filed Kitale High Court Civil Appeal No. 42 of 2013 which is still pending before that court as per the submission by Mr. Cheptarus.

22. From the petition, the petitioners complaint as regarding the constitutionally of execution proceedings against him. This issue should have been raised at the hearing of an application dated 24/7/2013 wherein the same sought for review and setting aside of all the proceedings and the resultant judgments which the petitioner did not do thereby bringing this matter under section 7 of the Civil Procedure Act where explanation 4 states that;

**“Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”**

23. I therefore find and hold that the matters raised in this petition should have been raised by the petitioner at the time when the same had attacked the determination of the trial court by way of review and should not have been raised by way of a constitutional petition.

24. Should I be wrong in the above finding then based on the fact that there is still an Appeal pending in Kitale High Court Civil Appeal No. 42 of 2013 then this matter is subjudice and the issue herein can be adequately advanced and determined in the said Appeal as the issues of the violation of his constitutional rights can still be adequately addressed in the pending appeal. Where there is a procedure provided for them, then parties ought to utilize the said procedure and not resort to using constitutional petition to circumvent the adequate procedure premand from as was stated in the case of **SPEAKER OF THE NATIONAL ASSEMBLY – V – JAMES NJENGA KARUME [1992] eKLR** where the Court of Appeal states as follows:

**“in our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievances prescribed by the constitution or an Act of parliament that procedure should be strictly followed”.**

25. Whereas the petitioner may have a valid claim in respect of the alleged violation of his constitutional rights the civil procedure under section 38 to 40 and order 22 rules 7,31,32 and 35 provides for how execution by way of committal to civil jail may be effected and the safeguards thereon and therefore the constitutional right of the petitioner are still safeguarded there how as was stated by Justice Lesiit in **NATIONAL BANK LTD – V – LINUS KURIA NDUGU MILIMANI ( HCCC NO. 81 of 1998** thus

“The rule is very clear concerning the issue that the court should consider and be satisfied before making the order for committal to civil jail. First to be adhered to is the requirement that the reason for which informed the Deputy Registrar to decide the way he did must be recorded”.

26. Justice M Ibrahim as he then was convicted on the procedure provided in the Rules in **ELIJAH MOMANYI p/a ANNASI MOMONYI & CO ADVOCATES – V - BARTERAMAIYO HIGH COURT AT ELDORET MIS 149 of 2005.**

“In my view execution by way of arrest and committal to civil jail must be done the last resort after all the options have been exhausted. The deprivation of an individual liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the fundamental rights and freedoms of the individual .....

27. I therefore take the view that any alleged violation of the petitioner's rights can be adjudicated in the execution process as provided for under the civil procedure or in the alternative within the **KITALE HIGH COURT CIVIL APPEAL NO. 42 OF 2013** now pending before the court and therefore find merit in the preliminary objection by the Respondent which I hereby allow by striking out and dismissing the petition filed herein on 15/6/2015 with no order as to cost noting that in the said petition the petitioner was attempting to enforce his fundamental rights and courts are always slow to award costs in matters arising out of alleged violation of constitutional right.

28. In the final analysis I hereby allow the preliminary objection and dismiss the petition with no orders as to cost and it is so ordered.

Dated, signed and delivered at Lodwar this 6<sup>th</sup> day of December, 2018

**J WAKIAGA**

**JUDGE**