



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CONSTITUTIONAL PETITION NO. 19 OF 2012

IN THE MATTER OF SECTION 84 (1) OF THE FORMER CONSTITUTION

AND

**ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER
SECTIONS: 72 (1) AND 74 (1)**

AND

ALLEGED VIOLATION OF SECTION 42 (1) (a) OF THE CIVIL PROCEDURE ACT

BETWEEN

JOEL ESHIKUMO PETITIONER

VERSUS

SIMON NABUKWESI 1ST RESPONDENT

BUNGOMA CHIEF MAGISTRATE'S COURT ... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ... 3RD RESPONDENT

JUDGMENT

This is a Petition filed on 31st October, 2012 by the Petitioner Joel Eshikumo, who was a judgment debtor in Bungoma Chief Magistrate's Civil Case 415 of 2006 filed by Simon Nabukwesi, who is named in the Petition as the 1st respondent. The Bungoma Chief Magistrate's court and the Attorney General were named in this petition as the 2nd and 3rd respondents respectively.

The Petition was 72 (1) and 74 (1) of the previous Constitution, which was repealed in 2010. It was also filed under Section 42 (1) (a) of the Civil Procedure Act (Cap. 21).

The prayers in the petition are that this court declares as follows -

1. That the act of the 1st and the 2nd respondents to have the petitioner detained in civil jail for a period exceeding the statutory six months was a gross and malicious violation of Section 42 (1) (a) of the Civil Procedure Act.
2. That the detention of the petitioner by the 1st and 2nd respondents in civil jail in excess of the statutory period was not only illegal but gross violation of the petitioner's fundamental right under

- Section 72 (1) of the former Constitution.
3. That specifically, the three months which the petitioner was detained in civil jail after completion of the initial six months was a violation of the petitioner's fundamental freedoms under Sections 72 (1) and 74 (1) of the former Constitution.
 4. That the 1st respondent is personally liable, and the 3rd respondent is vicariously liable on behalf of the 2nd respondent for the alleged detention of the petitioner in civil jail.
 5. That the violation of the petitioner's fundamental rights by the respondents is subject to monetary compensation by the respondents.

The Petition was filed with a supporting affidavit sworn by the Petitioner on 30th October 2012. It was deponed inter alia that the petitioner was arrested on 13th August 2009 through a warrant issued by the 2nd respondent with regard to an ex-parte judgment issued against him in favour of the 1st respondent. That as a consequence, he was imprisoned at Bungoma G.K. Prison for six months. That by an application dated 7th January 2010 which came up in court on 13th January 2010 in his absence, his imprisonment was extended for a further period of six months. That such action violated the principles of natural justice and was contrary to the provisions of Section 42 (1) (a) of the Civil Procedure Act (Cap. 21) which clearly stipulated that a judgment debtor will only be imprisoned for a maximum period of six months. That the petitioner was so imprisoned until 13th May 2010 when the 2nd respondent purported to have discovered that the orders issued on 13th January 2010 had been issued in error and vacated them. That the petitioner was therefore illegally detained for a period of three months. That the respondents were jointly to blame for the violation of his rights to civil liberty guaranteed under **Section 72 (1) and 74 (1)** of the former Constitution. A copy of the proceedings in the civil suit were annexed to the affidavit.

The 1st respondent filed a replying affidavit to the petition. It was deponed in the said replying affidavit that the petitioner was still a judgment debtor not having settled the decretal amount of Kshs. 1 million awarded by the court on account of defamatory fabrications made by him in the Citizen Newspaper. That the 2nd respondent, that is the court, and the 3rd respondent the Attorney General as Constitutional entities were not liable as alleged. That the 2nd respondent had the powers under Section 99 of the Civil Procedure Act (Cap. 21), to correct any clerical or arithmetic mistakes or errors arising from judgments, decrees or orders. That such correction could be done either on the application of a party or on its own motion. The 2nd respondent did not file a replying affidavit.

The petitioner through his counsel, K. N. Wesutsa & Company filed written submissions in support of the petition. Counsel emphasized that the legal principle that no man should be condemned unheard was not adhered to by the 2nd respondent in extending the prison term. The initial imprisonment to civil jail was to expire on 13/2/2010, however, an extension for six months was issued ex-parte a month earlier on 15/1/2010, extending the period of imprisonment for a further period of six months. In counsel's view, extension was not an arithmetic or an accidental error that could be corrected by the court under Section 99 of the Civil Procedure Act. Counsel submitted that Constitutional violations were committed in terms of Section 72 (1) of the former Constitution. There was an Constitutional violation of liberty as well as torture or mental anguish committed against the petitioner.

Counsel submitted further that though courts were protected from civil suits under the Constitution, the Attorney General would still be liable if Constitutional violations were committed by a Judicial Officer in the exercise of duty. Counsel relied on **Bungoma HCCC. No. 42 of 2012 – Moses Wamalwa Mukamari -vs- John O. Makali & Others**. He also relied on other cases.

The 1st respondent filed written submissions through his advocate G. Ombito. It was submitted by counsel for the 1st respondent that there was Constitutional immunity for judicial officers provided by both the Constitution and the written law. That the Attorney General could not be held liable for Constitutional violations in the circumstances of this case. He stated that the cases quoted by the petitioner's counsel were distinguishable as all the arrests therein were done by the police which was not the case herein. Secondly, the suit herein only sought declaratory orders. Damages could not be granted. Counsel argued that the orders of imprisonment herein were orders of the court. The 1st respondent could therefore not be held liable on account of orders from the court.

The 2nd and 3rd respondents filed written submissions through the Attorney General. They denied liability. Firstly, that the prayers sought herein were merely declaratory. The petitioner was therefore wrong in asking for an award of Kshs.3,000,000/= in the submissions. A party was bound by his pleadings and cannot vary the same in submissions. Secondly, counsel argued that the Constitution of Kenya 2010, under Article 60 (5), provided that a Judicial Officer was not liable for anything done or omitted to be done in good faith in lawful performance of the judicial function. This position was also stated under **Section 6** of the **Adjudicature Act (Cap 8)**. The Attorney General emphasized that the court had discretion to correct errors on the face of the record and the court in this case rightfully did so. Since the petitioner did not complain or allege lack of good faith by the court, he could not come and seek to be compensated through this court.

When the matter came before court on 29/4/2013, Mr. Ombito appeared for the applicant, Mr. Kundu for the 1st respondent and Mr. Onyiso for the 2nd and 3rd respondents. All agreed to rely on written submissions filed.

I have considered the petition, documents filed and the submissions of all the parties. This is a Constitutional petition. The petitioner alleges the contravention of his Constitutional rights by the respondents. The 1st respondent is the plaintiff in a civil case where the petitioner was the judgment debtor. The 1st respondent applied for execution of decree through committal of the petitioner to civil jail. The same was granted by the court for six months. Later, before the expiry of the six months, the same 1st respondent applied for extension of that order for a further six months. The court granted that extension ex-parte. After about four months however, the court on its own motion, vacated its previous orders of extension of the prison term.

The record of the court with regard to the extension of the prison term is as follows –

On 13/1/10, that the court in the presence of Mr. Ombito for the decree holder and in the absence of the decree holder and the judgment debtor (the petitioner herein), it was recorded as follows -

“Ombito – We have an application. We have dated 7/1/10 for extension of the committal. We need further six months. We shall pay the subsistence.

“Court – the judgment debtor to be committed for six months. The subsistence fees to be paid by the decree holder.

J. K. NG'ARNG'AR, SRM”

On 13/5/10 however, in Chambers, the same Magistrate in the absence of all of the parties made the following order -

“Court – I have seen the order issued herein on 13/1/10 and feel that there is an error appearing on the face of the record. Pursuant to Section 99 as read together with Section 100 of the Civil Procedure Act, I do order that a production order to issue for the JD to appear before me on 13/5/10 for further orders.

J. K. NG'ARNG'AR, PM”

On the same 13/5/10 the record shows that Mr. Ombito for the Decree holder and Mr. Makokha holding for Mr. Wesutsa for the judgment debtor came before the court and it was recorded as follows -

“Ombito – We wish to go on record that in view of the judgment debtor's liability is wanting; we have instructions to have

him discharged.

“Makokha – we can have him discharged. He can be removed from civil jail.

Court – By consent of parties herein the judgment debtor be discharged from civil jail forthwith.

J. K. NG'ARNG'AR, SRM”

With regard to the orders for discharge of the applicant, it is clear to me from the above that though the learned magistrate called for the file apparently, on his own initiative on the basis that there was an error on the record, the orders to discharge the petitioner were made by consent of counsel for all the parties. It cannot therefore be said that the magistrate had no basis for making the orders. It was not a secret or clandestine venture. The magistrate must have learnt somehow that there was an error which required correction. He corrected the error with the participation of all advocates on record.

With regard to the orders made on 13/1/10, it is clear from the record that such were made on the basis of an application by the 1st respondent, through his advocate, Mr. Ombito. Therefore the court and the Attorney General cannot be held responsible for the same. There was neither malice nor evidence of acting in bad faith by the court. In fact, the latter *suo motu* action by the court above, shows that it might have been misled by counsel for the decree holder. There was no deliberate move by the court to falsely imprison the petitioner. Again, since the court is protected by both the Constitution and the Judicature Act, and since there was no bad faith pleaded or proved, the petition fails with regard to the 2nd and 3rd respondents.

With regard to the 1st respondent, the orders sought for extension of the prison term appear to have been illegal ***ab initial***. However, was there malice and lack of probable cause? That is the only way to justify an action of false imprisonment.

The 1st respondent has not given reasons why he applied for the extension of imprisonment and whether they were justified in so doing. In my view, with the allegations levelled against him by the petitioner on violations of the provisions of **Section 42** of the Civil Procedure Act, he should have responded candidly to the allegations. He did not do so. It is also noted that he applied for the extension of the prison term one month before the expiry of the initial orders of six months imprisonment. He also did not serve the application or claim to have served the petitioner, before obtaining the prison extension.

Section 42 (1) (a) (b) of the Civil Procedure Act (Cap. 21) is clear and provides as follows –

“42. (1) Every person detained in prison in execution of a decree

shall be so detained -

- a. **where the decree is for the payment of a sum of money exceeding one hundred shillings for a period not exceeding six months;**
- b. **in any other case, for a period not exceeding six weeks.**

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be -

- i. **on the amount mentioned in the warrant for his detention being paid to the officer in charge of the prison; or**
- ii. **on the decree against him being otherwise fully satisfied, if the court so orders; or**
- iii. **on the request of the person on whose application he has so detained, if the court so orders;**
or
- iv. **on the omission of the person, on whose application he has been so detained to pay subsistence allowance.**

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but shall not be liable to be

rearrested under the decree in execution of which he was detained in prison.”

There is no legal provision for applying for extension of the maximum period of 6 months imprisonment. Though I find that the 1st respondent was malicious in applying for extension of the 6 months civil jail term, and that such was illegal, I find no violation of Constitutional rights by him. The alleged wrong was committed in January 2010 before the coming into force of the present Constitution on 27th August 2010. Under the replaced Constitution, violation of Constitutional rights could only be the responsibility of the State. The present Constitution expanded the spectrum under Chapter 4 to cover violations by private individuals or persons. Since the acts complained of were committed during the currency of the replaced Constitution, it cannot be said that the 1st respondent committed Constitutional violation against the petitioner.

This was a claim of violation of personal liberty under the tort of false imprisonment or something similar to that. In my view, the petitioner was misadvised to bring a Constitutional petition in this matter. This court cannot grant any of the declarations sought, as this is not a Constitutional matter and no Constitutional violation have been established.

To conclude, I find no merits in the petition and dismiss the same. In view of the circumstances of the matter, each party will bear their own costs.

Dated and delivered at Kakamega this 15th day of May, 2014

George Dulu

J U D G E