

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 384 of 2008

RAEL CHELANGAT CHEPKONGA.....APPLICANT

Versus

THE ATTORNEY GENERAL.....RESPONDENT

RULING

The Petitioner, Rael Chelangat Chepkonga has moved this court under S.84(1) of the Constitution alleging breach of her fundamental rights under Sections 70, 72 and 74 of the Constitution. The Petition is dated 26th June 2008.

The Applicant's prayers are that this court do order a stay of CRC 520/06 in which she is charged, with 2 others, for an offence of stealing. Secondly, she prays that the proceedings against the Petitioner in CRC 520/06 be declared null and void for violating her rights under S. 72 of the Constitution. She alleges that the police delayed in charging her and they have not given any explanation for the delay thus violating her rights under the above section.

The Respondent raised a preliminary objection to the petition, that it offends Rules 25 and 26 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, commonly known as the Gicheru Rules, Legal Notice 6/06.

Mr. Mule, Counsel for the Respondent submitted that the petition is premature because according to Rules 25 and 26, the Applicant should have raised the issue of breach of his rights in the subordinate court where the criminal trial is proceeding, the court would frame questions and the same would be forwarded to the High Court in the prescribed form. He urged that failure to observe that procedure renders the whole petition incompetent. In reply, Mr. Ruto argued that the preliminary objection is brought under the wrong provisions of law and urged that for one to challenge breach of fundamental rights he comes by way of petition.

Rule 11 and 12 of Legal Notice 6/06 provides that an individual who alleges contravention of fundamental right and freedoms under Sections 70-83 of the Constitution should do so by filing a petition to the High Court as set out in Form D. However, Rule 25 provides that where a party to proceedings in a subordinate court alleges contravention of fundamental rights or freedoms under Sections 70-83, he shall apply informally to the presiding officer during the pendency of the proceedings, that a reference be made to the High Court to determine the said questions and under 26, the presiding officer considers the said informal application and if satisfied that there is merit in the application, will frame the questions and refer the same to the High Court in Form F.

There are criminal proceedings pending before the Chief Magistrate's Court No. CRC 520/06. The issues raised before the court arose in that case. The rules are clear as to the procedure to be adopted. It is not true that in all cases one has to file a petition. One only files a petition if the issue is a fresh one and not arising in proceedings before another court. I do agree with the Respondents that the Rules do provide a

procedure which should have been adhered to by Petitioner. Rules of Procedure are not made for beauty but to achieve a certain purpose. In this case, it would avoid duplication of results and even save on costs if the Applicant were to abide by Rules 25 and 26 of Legal Notice 6/06. I do uphold the preliminary objection and hold that the petition as filed is incompetent and offends Rules 25 and 26 of the Legal Notice 6/06 and is hereby struck out with costs.

Dated and delivered this 8th day of May 2009.

R.P.V. WENDOH

JUDGE

Present:

Mr. Mule for the Applicant

Muturi: Court Clerk