IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI, & LAKHA, JJ.A.)

CIVIL APPEAL NO. 42 OF 1994

BETWEEN

KENNETH STANLEY NJINDO MATIBA……..APPEALANT

AND

THE HONOURABLE ATTORNEY GENERAL…….....….RESPONDENT

(Appeal from the high court of Kenya at Nairobi (Mr. Justice Pall) dated 24th January, 1994)

In

(H.C.MISC.CIVIL CAUSE NO.60 OF 1994)

JUDGEMENT OF THE COURT

Kenneth Stanley Njindo Matiba, hereinafter referred to as the appellant, is a well known politician in Kenya. He has served as an elected member of Parliament and as a cabinet minister. He was once a contender for the Presidency of this country.

In early 1993 the appellant authored and caused to be published a book titled KENYA RETURN TO REASON. By November, 1993 he had sold to the public about 1,000 copies. However, the appellant gratuitously sent free copies. However, the appellant gratuitously sent free copies of his book to, among other distinguished Kenyans, H.E. The President, Daniel Toroitich Arap Moi, all Cabinet Ministers, Members of Parliament, the Attorney General and the Commissioner of Police.

On 14th January,1994, the then Minister of State, Mr .Jackson Kalweo, prohibited the publication of the book in exercise of the powers conferred by section 52 of the Penal Code (Cap 63) of the laws of Kenya. The prohibition was published in the issue of the Kenya Gazette Supplement No. 2 in legal Notice No. 2 of 1994 of the same date.

The book contains a concise record of Kenya's political, economic history and human rights. It also contains various articles and material previously published in the print media. Such material includes Controller and Auditor-General's Report and other Governmental (NGO's) reports.

In the statement pursuant to Order 53 rule 1 (2) of the Civil Procedure Rules, the appellant

avers that at no time prior to the said prohibition was any notification of the intended prohibition given to him nor was he called upon to show cause why his book should be declared a prohibited publication. He states that he was not afforded any opportunity to be heard or to make representations upon the prohibition of the book **KENYA RETURN TO REASON** . To the appellant, the prohibition is not reasonably justifiable in a democratic society. Moreover, he urged, the order was made in violation of his right to freedom of expression and is inconsistent with and in contravention of section 79 of the Constitution of Kenya and in breach of the rules of natural justice.

By a chamber summons dated 21st January, 1994, and brought under order 53 of the Civil Procedure Rules and the Law Reform Act (Cap26) of the Laws of Kenya the appellant sought the following orders that:

1. THE APPELLANT be granted leave to apply for an order of Certiorari to remove into the High Court and quash the Order made by Minister of State under Section 52 of the Penal Code Cap 63 of the laws of Kenya on 14th January, 1994, in the Kenya Gazette Legislative Supplement No.2 in Legal Notice No.2 of 1994 declaring the publication of the book entitled KENYA RETURN TO REASON to be a prohibited publication.

2. THE GRANT OF LEAVE do operate as a stay of the said order in question made by the Minister of State until the determination of the application for the order of certiorari."

On 24th January, 1994, Mr. Kariuki, counsel for the appellant, appeared before Pall, J (as he then was) who granted leave but directed that the order would not operate as a stay. The record of the proceedings for that day reproduced in full were as follows: -

"24.1.94 PALL J

G B M KARIUKI for the Applicant

Leave to apply for judicial review is hereby granted but the order will not operate as a stay. The N/M may be filed within 3 weeks.

G. S. PALL

JUDGE "

Mr. Kariuki's main ground of appeal is that the learned Judge did not afford him as counsel for the appellant an opportunity to address him on the application and in particular on the prayer for stay in respect of which he proceeded to deny the appellant without any representations being made to him. Further, he argued, a stay should have been ordered during the pendency of the case.

On the face of the record it would appear that Mr. Kariuki made no submissions before the learned Judge. Normally, if counsel made submissions before court the record of the proceedings would show it. The converse would apply if he does not make any. Since there is an order on record without any submissions by Mr. Kariuki it would appear that it was made by the learned Judge in the presence of Mr. Kariuki but without affording him an opportunity to address the learned Judge.

Further, it is difficult on our part to disagree with Mr. Kariuki that the order of stay was not refused without any representation being made on behalf of the appellant. The rule that no man shall be condemned unless he has been given a fair opportunity to be heard is a cardinal principle of natural justice. In the result, the rule having been breached, this court cannot sustain any order that flows from such a fundamental breach.

It will not be necessary for us to consider the other grounds of appeal which, also, at first blush do impress us as being particularly persuasive. The appeal is therefore allowed and the order of the Minister of state made on 14th January, 1994 is stayed pending the hearing and disposal of the application for the order of Certiorari in the High Court. The appellant will have the costs of the appeal.

In conclusion, we observe that the Attorney-General, though duly served with the hearing notice, did not appear during the hearing of the appeal. On three other past occasions he showed a Lamentable lack of interest in the appeal which had to be adjourned due to his absence.

Dated and delivered at Nairobi this 13th day of November, 1998.

J.E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL