



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Petition 1 of 2007

RUDOLFO GREECHIPETITIONER

VERSUS

THE HON. ATTORNEY GENERAL

THE COMMISSIONER OF POLICE

THE PPO COAST PROVINCE

THE DCIO, MALINDI

THE OCPD, MALINDI

RIMONDI GABRIELLA

MASSIMULIANO PIERANIRESPONDENTS

RULING

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The petition was filed under the High Court vacation Rules under the Judicature Act being Rules 3(1) and (2) and related to a matter of section 84(1) of the Constitution of Kenya and section 70,72(1),e, (2), 74, 76, 77, (1), (2) (3) (4) (9), (81) and 82 of the Constitution of Kenya.

Mr. Kinyua for the Respondent addressed this court saying the petition was filed in Mombasa in January 2007 because there was no judge in Malindi. The Judge in Mombasa directed that the parties come to Malindi and so they appeared before Hon. Justice Ombija. The Hon. Judge under the then Gicheru Rules transferred the file to the Hon. Chief Justice for directions. The matter went before Nyamu J (as he then was) and he gave certain directions for the hearing of the petition. The 6th and 7th respondents were then concerned that interim orders had remained on record for over a year and so they made an application to discharge them. Hon. Justice Nyamu then ordered that only Justice Maraga who had dealt with the application could hear the application to discharge the orders and he directed that the file be sent to Maraga J in Nakuru. Hon. Maraga delivered a ruling on 27-3-09 directing that the matter be fixed within 15(fifteen) days for mention with a view to obtaining from the judge in Malindi a date for hearing of the chamber summons failing which, the conservatory order of 23rd January 2007 shall stand discharged unless the judge at Malindi is persuaded to extend the period.

Mr. Kinyua then goes on to state that 15 days after Easter vacation ended on 21st April 2009, which would take us up to 12th May 2009, by which date the matter had not come before the court for extension of the orders and he submits that the same were automatically discharged.

Then Mr. Mwadilo (for the petitioner) went to the registry on 28-4-09 and took 14th May 2009 as a date for mention (i.e two days after the orders had lapsed) and when the matter went before court, the orders were not extended – direction given were that application be heard on 13-7-09.

However on 13-7-09, the court was not sitting and the petitioner's advocate appeared before the court on 16-7-09 blaming the court for the lapse of the orders and obtained further *ex parte* orders extending the orders given in 2007. Mr. Kinyua argues that *ex parte* orders did not lapse on 13th July 2009, they lapsed on 12-5-09 and the court was not to blame for that lapse.

Mr. Kinyua points out that the court was misled into giving the orders of 16-7-09 as there was nothing left to extend.

Mr. Mwadilo on behalf of the petitioner submits that the whole problem is in the interpretation of the judge's direction - that whereas Mr. Kinyua understood it in the manner submitted, he understood it differently – in his mind directions by Hon. Justice Maraga meant that the matter was to be fixed for mention within 15 days i.e they would have to take a date within those 15 days. So in their view the orders never lapsed on 13-7-09. He denies misleading the court, saying they simply interpreted the order in such manner. But Mr. Kinyua protests to this saying the order does not require interpretation as it is very clear – the matter was to be fixed for mention within 15 days and the petitioner had to obtain the orders of extension within those 15 days – the judge was not concerned about turning up in the registry – the order required the petitioner to appear before the judge since it was not the registry that would be extending the orders. Further that Hon. Maraga J did not say the orders were extended until the hearing date – so that the bottom line is the petitioner did not appear before a judge within 15 days after the

vacation as was directed. Does the order require interpretation"

The order reads as follows;

“I therefore direct that this file be sent to the High Court registry at Malindi and petitioner do fix the matter for mention within 15 days after the Easter vacation with a view to obtaining from the judge there a date for hearing his said chamber summons failing which the conservatory order of 23^d January 2007 shall stand discharged unless the judge at Malindi is persuaded to extend the period.”

A reading of the order suggests that the petitioner was to have the matter fixed for mention within 15 days after the Easter vacation – which means that within those 15 days the matter had to be mentioned - it did not say take a date within fifteen days. It says mention within 15 days and really there is no need for interpretation – it is clear and unambiguous. The orders of extension were therefore extinguished because as judge Maraga had directed, such failure would result in a discharge of the conservatory orders so by 13-7-09 the conservatory orders had lapsed and stood discharged by 12-5-09. Indeed the court noted that the orders had lapsed and could not be extended (see record of 16-7-09).

However what this court then did was to issue fresh orders for preserving the subject matter – this was done based on the facts present to court to the effect that the lapse was as a result of the court not sitting, on 13-7-09 – which was incorrect and thus misleading because the lapse was two months prior. To that extent then the fresh orders were improper and went against the spirit of Maraga J’s directions as indeed there was no such fault and the “otherwise persuaded” does not arise and I find it appropriate to set aside the orders made on 16-7-09.

The petitioner may proceed to set down the Chamber Summons application for hearing – dates to be taken in the registry.

Delivered and dated this 11th day of **February 2010** at Malindi.

H. A. Omondi

JUDGE



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