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IN THE HIGH COURT OF KIRIBATI	)	HIGH COURT CIVIL CASE 69 OF 2011
CIVIL JURISDICTION	)	
HELD AT BETIO	)	
REPUBLIC OF KIRIBATI	)	

BETWEEN:	MIKAERE TERAOI	PLAINTIFF
AND:	ATTORNEY GENERAL iro THE REPUBLIC OF KIRIBATI	DEFENDANT

FOR PLAINTIFF: NANCY WALKER

FOR DEFENDANT: BITARANA YEETING

Date of Hearing: 16 October 2012

JUDGMENT

By way of notice of motion, the defendant seeks an order for dismissal of the action upon two grounds as quoted below:

- That pursuant to section 4(5) of the Proceedings by and Against the Republic Cap 76A the defendant cannot be a party to this proceeding.
- That the action was taken out on a writ of summons, in breach of Order 58 rule 1 and 2 of the High Court Civil Procedures Rules 1964.

By way of a brief background, the plaintiff had been charged and convicted of two offences. He was sent to prison on Kiritimati Island from November 2009 to June 2010 when he was released on bail pending the hearing of his appeal. In July 2011 the plaintiff filed suits against the Republic seeking constitutional redress on the grounds of false imprisonment and a breach of some of his constitutional rights by the magistrates and police officers.

Section 4(5) of the **Proceedings by and Against the Republic Ordinance, Cap 76A** reads as follows:

" No proceedings shall lie against the Republic in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities or a judicial nature vested in him, or any responsibilities which he has in connection with the execution of a judicial process."

The defendant argued that it cannot be sued for the actions of magistrates or police officers as they are judicial officers exercising judicial functions. The plaintiff, on the other hand, is arguing that the Constitution is the supreme law of Kiribati and that the **Proceedings by and Against the Republic Ordinance, Cap 76A** is only an enactment and like every other enactments they are all subject to the provisions of Constitution of Kiribati, as our supreme law.

The plaintiff relied on Article 17(1) of the Constitution of Kiribati which gives right to any person alleging breach of any of his/her constitutional rights to seek constitutional redress. I agree with the plaintiff's argument. This first ground must therefore fail. The plaintiff must be allowed to have his case heard and proved.

The Republic is also seeking dismissal orders on the ground that the proceeding is ill-conceived, that is, that the proceeding was instituted by Writ of Summons but should have been instituted by Originating Summons.

The basis of the Republic's argument is that the action is one of torts and should have been correctly instituted by way of writ of summons but because the plaintiff is seeking constitutional redress as a remedy, the proper form to use is that of an Originating Summons. The defendant went further to say that Constitutional redress is not an action for compensation, rather it is an action requiring a declaration from the High Court to declare or confirm whether or not a person's right had been infringed.

The plaintiff, on the other hand is relying on Order 2 rule 1 and the interpretation of the word 'action' in the interpretation clause of the ***High Court Civil Procedure Rules, 1964.*** Order 2 r 1 of this Rule states that every action shall be commenced by writ of summons and the interpretation of 'action' allows an action to be initiated by 'other manner' as may be prescribed by the rules of court...which includes an Originating Summons. Counsel for the plaintiff went further to state that her client is seeking a civil claim not a declaration hence the use of a writ of summons.

In the case of *National Bank of Nigeria & Anr v Lady Ayodele Alakija & Anr,(1978) S.C.139/76, Supreme Court of Nigeria* there was an extensive discussion about the use of 'originating summons'. The issue for that Court was whether the trial judge should have ordered

pleadings rather than allowing the case to proceed by originating summons. The Court found that the trial judge should have ordered the pleadings for the reasons that the case was not one where it could be said that there is 'unlikely to be any substantial dispute (RSC Ord 5, r 4(2) (6) (England); nor that the facts are even undisputed as *Re Powers, Lindsel v Phillips* (1885) 30 Ch D 291; nor that they are uncontentious as in *Sir Lindsay Parkinson's case [1965] 1 All ER 609).*

For the same reasons above I feel that originating summons are most commonly used to determine short questions of construction of an instrument whether it is a deed, a will or any written law. It is also used in cases where the facts are not disputed or uncontentious. If a case is none of the above then the proper procedure to be taken is by way of writ of summons where the parties would have a chance to settle their pleadings.

Having said that, in my view this instant case, as could be seen in the pleadings, is a case where the facts are in dispute or are likely to be in dispute therefore a proper form to adopt is the writ of summons.

Both the defendant's argument must fail. I order that this case be continued until final determination.

Dated 19 February 2013.

HIGH COURT OF KIRIBATI

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TETIRO M SEMILOTA

COMMISSIONER OF THE HIGH COURT