



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 50 OF 2019

HUMANITY, ACTIVISM, KNOWLEDGE AND INTEGRITY TRUST

(HAKI AFRICA) & 5 OTHERS.....APPLICANTS

VERSUS

1. HON. ATTORNEY GENERAL

2. THE MINISTRY OF TOURISM & WILDLIFE.....RESPONDENTS

AND

1. COUNTY GOVERNMENT OF MOMBASA

2. NATIONAL MUSEUMS OF KENYA

3. NATIONAL LAND COMMISSION.....INTERESTED PARTIES

RULING

1. On 14/11/2019, the Notice of Motion herein dated 8/11/2019 for judicial review remedies was scheduled for hearing. However, neither the Applicant nor the Respondents nor their counsel were in court. There was nobody to prosecute the motion on behalf of the Applicants. The court therefore was left with no option but to dismiss the motion with no order on costs.

2. By a Notice of Motion dated 2/12/2019, the motion the subject matter of this Ruling, the Applicant sought to reinstate the aforesaid motion. The application prays for the following orders:

(i) This Honorable Court do certify this matter as urgent.

(ii) This Honorable Court be pleased to set aside its order made on 14/11/2019 dismissing the Notice of Motion application dated 8/11/2019 for non-attendance.

(iii) This Honourable Court be pleased to reinstate the Notice of Motion application dated 8/11/2019 for hearing on a priority basis.

3. The application is premised on the grounds set out therein, and is supported by affidavit sworn by Hussein Khalid Khamis on 3/12/2019.

4. The Applicants' case is that on 1/11/2019 they filed an application for leave to apply for judicial review and the orders were granted by Hon. Justice P.J. Otieno on the same day and, pursuant to the orders granted, the Applicants filed a Notice of Motion application on 8/11/2019 and proceeded to serve the application on the Respondents some of who were in Nairobi and managed to serve them and an affidavit of service filed. However, the Attorney General refused service and wrote to the Applicants on 22/11/2019 informing the Applicants that the Notice of Motion application had been dismissed. The Applicants then perused the court file and established that the registry placed the application before the Judge on 11/11/2019 without notice to the Applicants and the court gave an interparty hearing for 14/11/2019 and this date was not communicated to the Applicants. On 14/11/2019 the Notice of Motion was dismissed for non-attendance. The Applicants state they were not aware of the hearing date as the same was fixed by registry without notice to the Applicants. The Applicants aver that neither the Applicants nor the Respondents prompted the court for dismissal of the motion, and that the court did not issue notice of dismissal to either the Applicants or to the Respondents. The Applicants aver that the Notice of Motion raises weighty issues of public interest and national importance and the same ought to be reinstated to enable the issue to be determined on merit; that great prejudice will be occasioned to the residents of Mombasa if the application is not reinstated and the issues raised therein not determined on substance; that it is in the interest of justice to reinstate the motion; that the Applicant's application is meritorious and has high chances of

success; the same is made in good faith and in the sole interest of justice and fairness; that guided by the principle of access to justice which is a fundamental right, the Applicants deserve to be heard on merit; that the nature of judicial review proceedings provides a platform for citizens and civil right organizations to exercise oversight over the actions of state institutions and or state officers and provide one of the few opportunities to exercise their sovereign rights over the state and it is in the interest of justice that the Applicants be given a chance to prosecute the suit and orders sought herein be granted as prayed.

The Response

5. The 1st and 2nd Respondents oppose the application through a Replying Affidavit of Martin Mwandeje, state Counsel sworn on 27/1/2020. The Respondents also raised a notice of Preliminary Objection against this application on the following grounds:

- (a) That the suit as drawn and filed offends Article 6, 159 (2) (c), and 189 (3) & (4) of the Constitution (all read together) and therefore a non - starter and should be dismissed and/or referred to an alternative dispute resolution forum.
- (b) That this application is an Inter-Governmental dispute whose resolution is envisaged and provided for differently under the constitution.
- (c) The suit is instituted contrary to the Constitution and Sections 30 - 35 of the Intergovernmental Relations Act No 2 of 2012 which require National and County Governments to have mutual relations on the basis of consultation and cooperation and settle disputes amicably.
- (d) That the Court lacks jurisdiction to entertain the application dated 2nd December, 2019 as provided for under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Rule 31, Sec 35 of the Intergovernmental Relations Act No 2 of 2012 and the Inherent Powers of the Court to refer this matter for hearing and determination by alternative dispute resolution mechanisms.
- (e) This Court lacks jurisdiction on the matter until alternative dispute resolution mechanisms have been exhausted.

Submissions

6. Parties filed submissions to the motion, which I have carefully considered.

Determination

7. In my view, both parties have misconceived the application before the court dated 2/12/2019. In the Respondents' Preliminary Objection and in both parties' submissions, they have delved deeply into the merits of the Notice of Motion for judicial review orders before the court. Indeed, the Respondent's Preliminary Objection is purely merit based. Yet the issue before the court is the reinstatement of the motion which was dismissed for non-attendance. It is true that in urging the application for reinstatement, or in opposing the same, parties have liberty to refer to the merits of the motion. However, a court must be careful and tread with caution for the reason that if the court delves deeply into the merit of the motion to be reinstated, and allows the application for its reinstatement, then the court will have largely decided the matter.

8. In my view, the issue before me must be narrowed to whether or not I can allow application for reinstatement of the motion. It is to be noted that when I dismissed the motion on 14/11/2019 I did so simply because that was the cause of action open to me in the absence of all the parties. Now that the Applicant has come back to me to reinstate the motion, it is the duty of this court to consider the issue of reinstatement narrowly and without much regard to the merits of the motion sought to be reinstated.

9. From the Supporting Affidavit of the Applicant it is noted that the Applicants were not aware of the hearing date as the same was fixed by registry without notice to the Applicants, and after having been so fixed it was not served on the Applicants. Therefore, the Applicants had no knowledge of the hearing date. Further, the court did not issue notice of dismissal of the suit to the applicants or to the Respondents. A cursory look at the Notice of Motion to be reinstated shows that it raises weighty issues of public interest and national importance which should be heard on merit. The principle of access to justice establishes a fundamental right which this court has duty to protect.

10. The Respondent's submission and Notice of Preliminary Objection dwell largely on the merits of the motion and why this court should not reinstate the same. It is my view that if this court allows the application, the Preliminary Objection and merit arguments would be suitable to urge in the motion.

11. The decision to reinstate the motion herein is discretionary but that discretion must be anchored on justice. A court cannot say that a suit does not have merit without first hearing the suit. The dictates of justice require that parties be given their day in court. Under Article 50 of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Applicants submitted that their suit was dismissed before they were accorded an opportunity to be heard.

12. Under Article 159 (2) (d) of the Constitution, courts and tribunals are required to exercise judicial authority without undue regard to technicalities of procedure.

13. The Supreme Court of Kenya in Civil Application No. 7 of 2014; **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR** stated that:

“... [55] Be that as it may, the essence of Article 159 (2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties.”

14. Further in my view the overriding objectives of the Civil Procedure Rules is to provide a forum for fair, fast and inexpensive litigation.

15. Sections 1A & 1B of the Civil Procedure Act introduces the overriding objective principle and it states that the rules made under the act are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

16. The upshot is that the application before the Court dated 2/12/2019 is allowed as prayed with no orders as to costs.

Dated, Signed and Delivered at Mombasa this 28th day of May, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Ochoo for Applicant

Mr. Makuto for Hon. Attorney General

Mr. Kaunda Court Assistant