



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

(CONSTITUTION AND JUDICIAL REVIEW APPLICATION DIVISION)

JUDICIAL REVIEW NO. 3 OF 2018

SIMON KIBOWEN

(Suing on behalf of 47 Residents of Kibingor Sub Location....APPLICANT

=VERSUS=

NANCY JEPKEMBOI KOLUM.....1ST RESPONDENT

ASSISTANT COUNTY COMMISSIONER

MARIGAT WARD.....2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER

BARINGO SOUTH.....3RD RESPONDENT

RULING

1. By an application dated 29/11/18, the applicant sought principally an injunction to restrain the 2nd and 3rd Respondents from appointing the 1st Respondent as the area Assistant Chief Kibingor Sub-location pending hearing of the application inter parties. The applicant has filed a suit entitled **Plaint** but intituled **High Court Judicial Review**. The suit was filed by the applicant in person.

2. While the application was pending hearing and determination, the applicant filed another application dated 15/12/18 this time by counsel M/S Kemboi S.L & Co. Advocates appointed by the applicants by Notice of Appointment dated 13/12/18.

3. The application dated 15/12/18 sought by **Chamber Summons** “leave to apply for judicial Review and specifically **for an order of certiorari** to quash the decision for the 2nd and 3rd Respondent and their agents or servants appointing the 1st Respondent as the area Assistant Chief Kibingor sub-location and that the court be pleased to grant leave to the ex-parte applicants to institute **contempt of court** proceedings against the Respondents herein for contempt of court orders dated 4th December 2018.

4. The Respondents have taken a Preliminary Objection dated 17/1/19 against the Notice of Motion on the ground, principally, that the suit was filed offending provisions of section 6 of the Civil Procedure Act as there is pending before this court a dispute on the same subject matter.

Determination

5. The Court has considered the written submissions of the counsel for the parties on the Preliminary Objection and, with respect, agrees with the counsel for the Respondents that the second application filed herein by Chamber Summons dated 15/12/18 is *sub-judice* and also an abuse of the process of the court for the reasons given below.

6. Contrary to submissions by counsel for the ex-parte applicants, section 6 applies to suits and **proceedings** and, in any event, the prayer for leave by Chamber Summons for commencement of a Judicial Review application for certiorari is *a manner prescribed* within the meaning of the word “*suit*”, which is defined in section 2 of the Civil Procedure Act as “*all civil proceedings commenced in any manner prescribed*”. The Judicial Review application is in any event a proceeding under section 6 of the Civil Procedure Act, and, therefore, the rule on *sub-judice* applies to the matter.

7. Section 6 of the Civil Procedure Act is in the following terms

“6. No Court shall proceed with the trial of any suit or proceeding in which the in issue is also directly and substantially in a previously instituted suit or proceeding between the parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

8. As regards, the prayer for leave to commence contempt of Court proceedings, the same is an abuse of the process of the Court and a redundancy because the provisions of Order 40 Rule 3 (1) of the Civil Procedure Rules are clear on the right and procedure for seeking the redress breach of an order of the Court. In addition, the Contempt of Court Act 2016 no leave is required for application for committal for civil contempt for disobedience of a Court Order. See section 8 of the Act.

9. Even before the enactment of the Contempt of Court Act No. 46 of 2016 on 23rd December 2016 (commencing 13th January 2017) the Court of Appeal (Kihara Kariuki, Maraga and Ouko, JJA (as they then were)) in **Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others** (2014) eKLR on 14/12/2014 had declared that *“no leave is required to bring an application... for committal for contempt relating to breach of this court’s order.”*

The application on 15/12/18 was wholly unnecessary as a matter of law.

10. It is also an abuse of the process of the Court to mix several suits or proceedings for different causes of action for the same relief in the same suit as the applicant herein has done. The first suit and cause of action for **injunction** to restrain appointment of the 1st Respondent as a Chief, the Judicial Review proceeding for **Certiorari** to quash the appointment of the 1st Respondent after an order of the Court had preserved the status quo, and the application for leave to apply for **contempt of Court** are all geared to the same result from that the appointment of the 1st Respondent be restrained or invalidated. The proceedings sought to be commenced by the Chamber Summons on 15/12/18 are targeted to the same result as the first suit and application of 29/11/18.

11. Although Order 3 Rule 5(1) of the Civil Procedure Rules permits joinder of several causes of action in the same suit, it is clearly an abuse of the process to have more than one suit or proceeding in the same suit or proceeding. A judicial review proceeding for an order of Certiorari, an independent application for committal for contempt and a civil suit called *judicial review* for injunction all in one suit is a clear example of abuse. It is embarrassing to the defendant/ respondent who may not know the exact nature of the case he has to meet!

12. The Court is willing to consider **content over form** with regard to the pleading entitled *Plaint* but filed as a *Judicial Review* No. 3 of 2018, herein as the same seeks, consistently with the procedure by way of a *plaint*, an order or injunction rather than any *Judicial Review Orders*, and because the same was filed a party in person.

13. The application by Chamber Summons dated 15/12/18 was filed by Counsel for the applicants and being *sub-judice* and not warranted under the law of Contempt of Court in Kenya is not capable of being saved under the principle of **D.T. Dobie v. Muchina** (1980) eKLR that *“no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If the suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.”*

14. As the first suit and application dated 29/11/2018 is pending hearing and determination before this Court, the subsequent Chamber Summons of 15/12/2018 is *sub-judice* and, for being an abuse of the process of the court, it shall be struck out with costs to the Respondents.

15. The matter shall proceed to hearing and determination of the first suit dated 29/11/18.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kemboi & Co. Advocates for the applicant

Mr. Macheso Dan Weche, Litigation Counsel for the Attorney General.