



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APPLICATION NO. 33 OF 2018

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(3), 2, 10, 19, 20(1),(2),(3),(4), 21 AND 22 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE PROTECTION OF THE CONSTITUTIONAL RIGHTS ENSHRINED IN CHAPTER FOUR OF THE CONSTITUTION IN SO FAR AS THE APPLICANT'S CONSTITUTIONAL RIGHTS UNDER ARTICLES 27, 28, 29, 31, 40 & 47 HAVE BEEN VIOLATED

AND

IN THE MATTER OF PROTECTION TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT

(ACT NO. 1 OF 2013), PUBLIC OFFICERS ETHICS ACT

(ACT NO. 11A OF 2011)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF SECTIONS 118 AND 121 OF THE CRIMINAL PROCEDURE ACT (CHAPTER 75 LAWS OF KENYA

IN THE MATTER OF AN APPLICATION

BETWEEN

TIMOTHY MAUNDA MBITI APPLICANT

-VERSUS-

- 1. THE REGIONAL COMMISSIONER NYANZA1ST RESPONDENT**
- 2. THE COUNTY COMMISSIONER KISUMU2ND RESPONDENT**
- 3. THE REGIONAL POLICE CO-ORDINATOR NYANZA.....3RD RESPONDENT**
- 4. THE REGIONAL A.P. COMMANDER NYANZA4TH RESPONDENT**

5. THE COUNTY POLICE COMMANDER KISUMU..... 5TH RESPONDENT
6. THE COUNTY A.P. COMMANDANT KISUMU6TH RESPONDENT
7. THE KISUMU EAST SUB-COUNTY A.P COMMANDANT.....7TH RESPONDENT
8. THE O.C.P.D. KISUMU TOWN POLICE DIVISION8TH RESPONDENT
9. THE CABINET SECRETARY FOR INTERNAL SECURITY AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....9TH RESPONDENT
10. THE DIRECTOR OF PUBLIC PROSECUTIONS10TH RESPONDENT
11. THE ATTORNEY GENERAL 11TH RESPONDENT

RULING

This is a ruling on the Preliminary Objection raised by the Respondents. It is premised on the following Grounds;

- “i. The court lacks jurisdiction to entertain the Application as the suit is sub-judice and bad in law as it violates Section 6 of the Civil Procedure Act.**
- ii. That the Petitioner/Applicant is guilty of Material non-disclosure, that he enjoys similar orders in Petition No. 447 of 2016 issued on 05th March, 2018 by Hon. Justice J.M. Mativo.**
- iii. That the matter is sub-judice and bad in law as it violates Section 6 of the Civil Procedure Act.**
- iv. That the Application is therefore bad in law, fatally defective, unmaintainable and an abuse of the Court process as all the Orders sought herein are similar and achievable in Petition No. 447 of 2016 which was filed and already underway in hearing.**
- v. That the Petitioner/Applicant has also filed several other suits in courts of concurrent jurisdiction, for similar orders and thus a duplication of suits in a bid to waste precious judicial time.**
- vi. That the Respondents were justified in their actions as the Applicant was operating illegal gambling machines Contrary to Sections 53-55 of the Betting, Lotteries and Gaming Act (Chapter 131 Laws of Kenya).**
- vii. That the Applicant has not registered any business entity/form to carry out business and continues to operate without paying necessary tax obligations/contribution for his income.**
- viii. That the Applicant continued to operate without a business permit at the time he approached the court seeking interim orders.**
- ix. That the Applicant is not entitled to the orders sought and the Application should be dismissed with costs.”**

Material Non-Disclosure

1. The Respondents submitted that the Applicant had failed to disclose to this Court that he had already got orders similar to those that he was seeking in this case. Those orders were allegedly obtained in Petition No. 447 of 2016, when Mativo J. delivered a ruling on 5th March 2018.
2. Whether or not Mativo J. issued similar orders in Petition No. 447 of 2016 is a matter of fact.
3. The Respondents would have to provide this Court with evidence of the said orders, and the Court would then need to ascertain if the orders were similar to the orders sought in this case.
4. The Respondents appear to appreciate that the alleged non-disclosure was on matters of fact. I say so because the Respondents highlighted the following portion of the decision of the Court of Appeal in **BAHADURALI EBRAHIM SHAMJI Vs AL NOOR JAMAL & 2 OTHERS, CIVIL APPEAL NO. 210 OF 1997**

“It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex-parte statement, he should make a full and fair disclosure of all the material facts – facts not law. He must not mistake the law if he can help it – the court is supposed to know the law. But it

knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.

5. In so far as Preliminary Objections consist of pure points of law, and because they ought not to be raised if any fact had to be ascertained, I find that the alleged failure to make a full and fair disclosure of material facts cannot be the basis for a proper Preliminary Objection.

6. But even if it were to be presumed that there are already similar orders issued by Mativo J. or by any other Court, the penalty that the Applicant would have had to pay is the setting aside of any orders which this Court may have issued ex-parte.

Is the Case Sub-Judice?

7. By dint of the provisions of **Section 6** of the **Civil Procedure Act**;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same 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 sought.”

8. According to the Respondents, it was impossible to determine the issues raised in this application without the court having to delve into issues which had already been raised in the **NAIROBI CONSTITUTIONAL PETITION NO. 447 OF 2016**.

9. On the other hand, the Applicant insists that the matters in issue before me had not been raised in Petition No. **447 of 2016**.

10. In order to enable the Court determine whether or not the matters in issue in this case were similar to those in Petition No. **447 of 2016**, it will be necessary to delve into factual evidence.

11. In the case of **ORARO Vs MBAJA [2005] 1 KLR 141** the Court reiterated the following position on Preliminary Objections;

“A ‘preliminary objection’, correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

12. I reject the Respondents assertion that the question about whether or not this case is sub-judice is sustainable as a Preliminary Objection.

Whether the Application is Vexatious, Frivolous or an Abuse of this Court’s Process

13. The Respondents drew the Court’s attention to the following words of R. Nyakundi J. in **SAMUEL KAHU Vs JECINTER AKINYI SOSO, THE ASSISTANT COUNTY COMMISSIONER & ANOTHER (Kajiado) MISC. CONSTITUTIONAL APPLICATION NO. 2 OF 2018**;

“The Applicant is being vexatious and frivolous by virtue of seeking the declaration of the same characteristics as those pleaded in the Nairobi Petition No. 447 of 2016.”

14. It was the understanding of the Respondents that in that case, (at Kajiado) the learned Judge had made a finding that the application before him was seeking to enforce orders which had been issued by a court in Nairobi.

15. Apparently, the Applicant in that case had filed an application seeking a finding that the Respondent was in contempt of court, for having flouted the orders that had been made in Nairobi.

16. I fully appreciate why the learned Judge came to the conclusion that the act of filing an action in Kajiado, with a view to enforcing orders made by a court sitting in Nairobi, amounted to an abuse of the process of the court, as it constituted the institution of a multiplicity of suits.

17. Nonetheless, I find that the Respondents have not yet shown that the parties in the case before me are the same as those in Petition No. **447 of 2016**.

18. The Respondents are yet to satisfy the court that the matters in issue before me are the same as those in issue in Petition No. **447 of 2016**.

19. In the event, the court is unable, at this stage of a Preliminary Objection, to establish whether or not the application was vexatious, frivolous or otherwise an abuse of the process of the court.

20. I further find that a determination of the question as to whether or not the Applicants were entitled to the orders sought, is one that ought to be based on the merits of the application. A determination on the merits of an application is based on the evaluation of both factual evidence and the applicable law.

21. Therefore, I reject the Respondents invitation to dismiss the application on the grounds that the Applicant was not entitled to the orders sought.

22. In the result, I find and hold that the Preliminary Objection is not sustainable. It is therefore rejected, with costs to the Applicant.

23. However, I hasten to add that just because the court had rejected the Preliminary Objection would not be a bar to the Respondents putting forward submissions based on similar reasoning, when giving their substantive response to the application.

DATED, SIGNED and DELIVERED at KISUMU This 28th day of March 2019

FRED A. OCHIENG

JUDGE