



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL MISC APPLICATION NO 4 OF 2017

THOMAS MORARA NYABENGA.....1ST APPLICANT

CHARLES OKELLO OLALA.....2ND APPLICANT

DENNIS MATEYO OMAIYO.....3RD APPLICANT

On behalf of all inmates at Manyani Prison)

VERSUS

THE PS INTERIOR MINISTRY.....1ST RESPONDENT

THE COMMISSIONER GENERAL OF PRISONS.....2TH RESPONDENT

THE P.P.C COAST REGION.....3RD RESPONDENT

THE OFFICER IN CHARGE MANYANI PRISON.....4TH RESPONDENT

THE ATTORNEY GENERAL OF KENYA.....5TH RESPONDENT

AND

THE KENYA NATIONAL HUMAN RIGHTS COMMISSION

THE NATIONAL CHAIRMAN LAW SOCIETY OF KENYA

THE ETHICS AND ANTI-CORRUPTION COMMISSION

THE CIVIL SOCIETY OF KENYA

RULING

1. The Applicant’s Amended Notice of Motion application filed on 3rd May 2017 was brought pursuant to the provisions of Order 51 Rule 1of the Civil Procedure Act (**sic**), Rule 1A, 1B, 1C(**sic**)of the Civil Procedure Rules, Article 27, 28, 29 and 35 of the Constitution of Kenyaand all other enabling laws. The same was supported by the 1st Applicant’s Supporting Affidavit.

2. Prayer No (1) of the said application was spent. It sought the following remaining orders:-

a) Spent.

b) **We are seeking our constitutional rights under the above quoted laws due to the problems we are facing in Manyani prison.**

c) **We are humbly requesting the hon. Court to serve all the above named stakeholders with summons to personally attend court during the hearing of this matter.**

3. When the matter came up in court on the same day, Senior Litigation Counsel for the Attorney General filed a preliminary objection. The grounds of the said Preliminary Objection can be summarised as follows:-

a) **The said application was mischievous, made in bad faith and as the same lacked integrity and transparency contrary to Article 10 of the Constitution of Kenya, 2010 which could not be cured by an amendment and the same could not therefore proceed for hearing.**

b) **THAT the 2nd and 3rd Applicants were not parties to the suit herein at inception.**

4. The said Litigation Counsel argued that the said application was a conspiracy that was intended to bring the three (3) Applicants in one prison and that it ought to be rejected. The said Applicants denied that that was their intention. In addition, it argued that the 2nd and 3rd Applicants were not parties at the inception of the suit as they had not appended their signature to the same.

5. Notably, Article 22 (3) (b) (d) and Article 22(4) of the Constitution of Kenya provides as follows:-

The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

6. It is not always that procedural technicalities are cured by Article 159 (2)(d) of the Constitution of Kenya that mandates courts to administer justice without having due regard to procedural technicalities. Indeed, Applicant's pleadings as drawn would not have seen the light of day in formal civil proceedings.

7. However, it is evident from Article 22 (3)(d) of the Constitution that courts are mandated as much as possible to entertain proceedings on the basis of informal documentation. Appreciably, the Applicants are laymen and inmates in different prisons in the country.

8. Although the Senior Litigation Counsel had suggested that the suit was incurably defective *ab initio*, Article 22 (3)(b) of the Constitution of Kenya stipulates that the formalities relating to the commencement of suits must also be kept to a minimum. The key word is "**shall(emphasis court) if necessary, entertain proceedings on the basis of informal documentation**" connoting the mandatory nature of that provision.

9. This court noted that even if the 2nd and 3rd Applicants had not been parties to the suit herein at the inception, the 1st Applicant would still have had legal capacity to represent them by virtue of Article 22 (2)(a) and (b) of the Constitution of Kenya. The same provisions stipulate that a person can act on behalf of another who cannot act in his name or act as a member of, or in the interest of a group or class of persons.

10. Accordingly, having considered the Applicants and the Senior Litigation Counsel's submission, this court came to the conclusion that it could not uphold the said Preliminary Objection solely on the ground that the Constitution of Kenya gives room for informal documentation in any proceedings as Section 22 (2) of the Constitution envisages persons who are not lawyers instituting matters where fundamental rights are said to have been infringed upon or where the Constitution is likely to be contravened.

11. This court noted that it was not clear which of the parties filed the Preliminary Objection as there was no Notice of Appointment to show on whose behalf the Attorney General was appearing. However, in view of the informal nature of the proceedings under Article 22 and 23 of the Constitution of Kenya, this court assumed that the Attorney General was acting for all the parties who the Applicants had not indicated in the face of their application.

12. Notably, the Officer in Charge of Manyani Prison was indicated as the 4th Respondent. The Attorney General referred to the 2nd Respondent in its Preliminary Objection. For the same reason that this court found the informality of the proceedings to be of paramount importance, it could not condemn the Attorney General unheard for having failed to file a Notice of Appointment of Advocates.

13. Appreciably, the question of whether the Applicants' application is merited or not is a different issue and shall be dealt with when determining the substantive matter raised in the aforesaid application.

DISPOSITION

14. For the reasons foregoing, the Notice of Preliminary Objection that was filed on 3rd May 2017 by the Attorney General was not merited and the same is hereby dismissed with no order as to costs.

15. It is so ordered.

DATED and DELIVERED at VOI this 23rd day of October 2017

J. KAMAU

JUDGE

In the presence of:-

Thomas Morara Nyabenga -1st Applicant

Charles Okello Olala- 2nd Applicant

Dennis Mateyo Omaiyo-3rd Applicant

Sirima holding brief for Wachira for the Attorney General

Josephat Mavu– Court Clerk