



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 9 OF 2015

BASE TITANIUM LIMITEDPETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

1. The application that comes up for this Court's consideration is the Notice of Motion dated 19th May, 2016 and amended on 6th June, 2016. The amended application seeks the following orders:-

1. That the original Court file in this matter be deemed as lost;
2. That the Court file in this matter be reconstructed;
3. The case be heard afresh; and

3A) That alternatively and pending delivery of the Judgment herein, there be an interim injunction restraining the 1st respondent from enforcing, or a stay of enforcement, of the original impugned legislation passed by the 1st respondent, imposing tax or cess payable by the Petitioner or on tracks (sic) moving the Petitioner's goods across the boundaries of the first respondent.

4. Costs of the application.

2. The application was amended to include paragraph 3A. The initial application was brought under section 1A, 1B and 3A of the Civil Procedure Act Cap 21 and the inherent powers of the Court and all enabling provisions of the law. The amended Notice of Motion in addition to the foregoing provisions, was brought under article 23(3) of the Constitution. The application is supported by the affidavit of Joseph Schwarz, the General Manager, (External Affairs and Development) of the Petitioner, dated 19th May, 2016.

APPLICANT'S SUBMISSIONS

3. Mr. Oyatsi, Learned Counsel for the applicant, submitted that Honourable Justice Muriithi heard a Constitutional reference that sought protection against violation of the applicant's fundamental rights in

record time. The conclusion of the case coincided with the transfer of the Judge to Machakos and he undertook to deliver the Judgment. Counsel informed the Court that ten (10) months have gone by and no Judgment has been delivered. As a result, the violation of the applicant's rights continue due to lack of conservatory orders.

4. It was submitted that on 19th September, 2015, the 1st respondent passed legislation and the applicant moved to the High Court by way of Judicial Review on 20th March, 2016, to challenge the said legislation. The High Court delivered a ruling quashing the legislation in Mombasa Miscellaneous Civil Application No. 268 of 2015. It was argued that if the applicant sits back and hopes that Judgment will be delivered, the violation will continue indefinitely. He added that the amended application seeks temporary orders.

5. Mr. Oyatsi further submitted that although Learned Counsel for the 1st respondent has opposed the amended application for being filed without leave of the Court, under the Constitution once a party is aggrieved about a violation, the Court's interest is to protect the violation and not to emphasize on procedure. He stated that the 1st respondent has not shown what prejudice it will suffer if the application is amended. He sought leave to be heard and for the application to be determined.

6. It was submitted that if the Court disallows the amended application, nothing stops the court from granting a Conservatory order on the original application if the Court is satisfied that the rights of the applicant are being violated and that Courts should not compound an injustice by delaying in the delivery of a Judgment. With regard to the original file being deemed as lost thus being reconstructed, Counsel submitted that this was informed by the non-availability of the file and there was urgency to have the application heard. He prayed for the amended application to be allowed.

1ST RESPONDENT'S SUBMISSIONS

7. Mr. Kinyanjui Learned Counsel for the 1st respondent relied on the grounds of opposition filed on 3rd June, 2016 and the Notice of Preliminary Objection dated 9th June, 2016. He opted to argue both at the same time to oppose the application herein. Counsel submitted that if this Court finds that it has no jurisdiction to grant prayer 1, then it cannot grant prayer Nos. 2 and 3 and also leave to have the amended Notice of Motion heard. That by extension means that the Court cannot grant prayer No. 3A. He submitted that the applicant has not given sufficient material to this Court to enable it grant prayer No. 1. He added that this is a Court of concurrent jurisdiction to that of Justice Muriithi, thus it has no supervisory powers.

8. It was submitted that the applicant should have given adequate material to this Court to show that the only conclusion to be drawn from efforts made to have the original file availed have yielded nought. He stated that the ruling to be delivered by the said Judge is for determining the entire petition. He indicated that the Court was being invited to speculate that the file is lost, yet the 1st respondent is a victim of the delay, just as the applicant is.

9. On the failure of the applicant to seek leave to amend the Notice of Motion, Mr. Kinyanjui submitted that the applicant ought to have sought leave to amend the application and that article 159(2)(d) of the Constitution does not excuse technicalities of procedure. He submitted that if the Preliminary Objection is sustained, prayer No. 3 will not be granted and the entire application will fail. He prayed for the striking out of the application dated 6th June, 2016 and if the Court considers the initial Notice of Motion, it be dismissed for lack of merit.

APPLICANT'S REJOINDER.

10. Mr. Oyatsi in responded by submitting that he was not asking this Court to exercise supervisory powers over Justice Muriithi. He added that the High Court cannot close its eyes to a case of violation of rights under article 23 of the Constitution.

ANALYSIS AND DETERMINATION

11. The issues for determination are:-

- i. If an applicant can amend a Notice of motion without leave of the Court; and
- ii. Whether delay in delivery of a Judgment can lead to reconstitution of a Court file.

AMENDMENT OF THE NOTICE OF MOTION

12. Section 100 of the Civil Procedure Act provides as follows with regard to the Court's general powers to amend:-

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

13. In addition, Order 8, rule 5(1) of the Civil Procedure Rules is drafted on almost similar terms, it provides that:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

14. Order 8 rule 6 of the Civil procedure rules provides that:-

“Where the Court has made an order giving any party leave to amend, unless the party amends within the period specified or if no period is specified, within fourteen days the order shall cease to have effect, without prejudice to the power of the Court to extend the period.”

15. In this particular instance, the applicant's Counsel took the liberty to amend the Notice of Motion dated 19th May, 2016, without seeking leave of the Court to so amend. I find the actions of the applicant's Counsel irregular, unprocedural and being tantamount to an assumption that the Court would grant leave as a matter of course.

16. In the case of **Nathan Chesang Moson & 2 Others vs Community Uplift Ministries** [2013] eKLR, Maraga J.A cited the decision in the case of **Kenya Ports Authority vs E.A.P & Lighting Company Ltd.** [1982] KLR 40 where the Court held that applications to amend proceedings should be made at the earliest convenience. The Judge struck out and expunged from the record an amended Notice of Motion that was filed without leave of the Court.

17. Although article 159(2)(d) of the Constitution provides that justice shall be administered to all without undue regard to procedural technicalities, it is my considered view that the said provisions are not meant to throw the Civil Procedure Rules to the back burner or relegate them to the periphery whereby rules would exist in statutes with no compliance with the same thus leading to a haphazard manner of filing pleadings or proceedings in Court. The provisions of article 159(2)(d) is not a one size fits all provision as each case has to be determined in accordance with its own special circumstances. A Counsel who is well versed with the Civil Procedure Rules would be expected to pay heed to the said rules.

18. In the case of **Raila Odinga vs I.E.B.C & Others** [2013] eKLR the Supreme Court stated that:-

“Article 159(2)(d) of the Constitution simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek Justice from the Court.”

19. It is my finding that in the instant case the Learned Counsel for the applicant failed to follow the rules of procedure and in my view, the said failure is not curable under the provisions of section 159(2)(d) of the Constitution of Kenya. As a result of the foregoing, I hereby uphold the Notice of Preliminary Objection dated 9th June, 2016. Consequently, I hereby strike out the amended Notice of Motion dated 6th June, 2016 for want of compliance.

RECONSTRUCTION OF THE COURT FILE

20. The application dated 19th May, 2016 seeks orders to the effect that the original file in this matter be deemed as lost, for reconstruction of the Court file and for the case to be heard afresh as well as for costs of the application.

21. I find the application most unusual in that the affidavit in support of the application states in paragraphs 9, 10, 11 and 12 that the case the subject of this application was concluded on 29th July, 2015 and judgment was to be delivered on 10th September, 2015. That 10 months have elapsed and the judgment has not been delivered. The deponent avers that he believes that the judgment has not been delivered because the Judge who was transferred to Machakos took the file with him and he may have misplaced the file.

22. I have carefully considered the above reasoning and my finding is that delay in delivery of a judgment cannot be construed to mean that a Court file is either misplaced or lost. I am in agreement with learned Counsel for the 1st respondent that the application herein is speculative. The applicant's Counsel has not indicated if he followed administrative process to find out if the original file is lost or misplaced. If he did so, he did not avail any material before this Court to support the assertion.

23. This court has been requested to order that the case be heard afresh. I note that the grant of such an order would be counter productive as the petition was heard by a court of concurrent jurisdiction and grant of such orders would be contrary to the overriding objective of the Civil Procedure Act as espoused in section 1(B)(1)(c) on the efficient use of judicial and administrative resources.

24. I therefore find that the application before me is misconceived and not anchored on any solid ground. I decline to grant the orders sought. The application dated 19th May, 2016 is hereby dismissed with costs to the 1st respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of July, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

..... for the applicant/petitioner

..... for the respondent