



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
PETITION NO. 9 OF 2014

BENJAMIN K.KIPKULEI.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

R U L I N G

1. On 10/2/2016, the parties availed to court a consent letter on the letter heads of Oloo Chatur & Company Advocates whose contents were adopted as an order of the court. The said letter read:

“By consent the petition filed herein be heard and determined by way of affidavit evidence already filed on record. The said petition be argued by way of written submissions within 21 days from the date hereof.

The Respondent and interested party shall file their responses within 21 days of service. The petitioner be at liberty to file any further submissions in response within 7 days. Thereafter the matter be listed for mention on a date to be given by the court for purposes of highlighting the written submissions on record.”

2. Pursuant to that consent the court fixed a date for highlighting of the submissions on the 26.5.2016 but on that day the matter did not proceed because the interested party and the Respondent had not filed the written submissions. The petitioner counsel Mr.Khagram did not oppose an application by Mr.Oloo and Mr.Butu for adjournment and the matter was then adjourned to the 5.7.2016 with time being enlarged for the Respondent and interested party to file their respective submissions within 21 days from that date.

3. Yet again on the 5.7.2016, the parties by consent agreed that the matter be taken out of the day's cause list and slotted for 2.8.2016 for purposes of highlighting the filed submissions.

4. When this matter was today called out, Mr.Nowrojee, leading Mr.Oloo and appearing for the interested party, sought to argue a point in *limine* and attacking a portion of the petitioner's submissions at pages 15-17 of the submissions dated 31.3.2016. It was hinted that the submissions seeks that this court adopts and apply the findings and holdings of **Emukule J, in Mombasa H.C.J.R.No.11 of 2016** as the facts there are in all fours with the facts in this case. He submitted that it would be prejudicial as no two case would have similar facts and that it is undesirable and prejudicial to import the facts and evidence from another case into this matter. He added that the courts mind would likely prejudice unless that portion of the submissions are ordered expunged from the record.

5. He then pointed out that this objection had been raised in the interested party's own submissions at page 6 where the interested party submits that there is no legal basis for the submissions by the petitioner as there was already an appeal filed against the decision of **Emukule J** and that the question of whether or not Mr. Meenye advocate had been appointed by the defunct Municipal Council of Mombasa had been determined by Serگون J in Mombasa HCCA NO 178 of 2007.

6. In Response Mr. Buti for the Respondent opposed the objection and proposed that the issues having been raised in the interested party's submissions would conveniently be argued at the highlights and not by an objection in *limine* so that the court renders one single determination. He was however of the view that if it was to be argued separately then the court ought to be moved formally so that he prepares and responds.

7. On his side Mr. Khagram for the petitioner expressed displeasure at the approach by Mr. Norowjee and said that an opponent could not garg the other side by dictating to it what it could or could not say. He pointed out that to order the portion of the submissions expunged would be to ask the court to shut its eyes to the decisions cited. He went on to point out that the petitioners submissions were filed and served in April and that if the interested party had intended to challenge same, he ought to have filed an appropriate application in time and that the objection ought have been raised by a formal application.

8. Lastly Mr. Khagram reminded the court that the ruling by which the interested party was allowed to participate in this matter limited its rights to raise only issues of evidence, representation and submissions on the events and legal consequences and acts or omissions relating to the sale of the suit property and that it was not for the interested party to dictate to court what to consider or ignore but that it was the duty of the court after hearing all sides to the dispute.

9. In his rejoinder, Mr. Nowrojee denied asking the court to ignore the decision but to appreciate that the facts of one case cannot be imported wholesale into another case. His point was that the submissions have the potential to prejudice the mind of the court and therefore compromise the right to a fair hearing.

Determination

10. My analysis and understanding of the matter is that the court is being asked to isolate a portion of the submissions by the petitioner and to expunge same from the record as being prejudicial to the interested party as it is likely to unfairly and prejudicially influence the mind after the court.

11. I start from the point that the date today was taken by consent to enable the parties highlight the submissions filed. In my view an order of court recorded by a consent is in the nature of contract which can only be set aside or varied by another consent and short of that by a factor capable of vitiating a contract. On this point alone, the consents fixing this matter for highlighting the submissions entered by consent on at least two occasions is a contract of the parties and the interested party cannot seek to upset it unilaterally as sought here morning.

12. Secondly, timely disposal of court legal disputes is now a cardinal principle and norm of the Constitution of Kenya 2010. It is for that reason that, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Rule 20, is framed as to allow petitions of the nature before me be canvassed by affidavits or written submissions besides oral evidence and gives the court wide discretion in case management.

13. In the present matter, the court with the consent of the parties had plotted and chatted the course the hearing herein was to take. It is that course this court believes will help with timely disposal and must not be lost sight of. To the court it would be an abdication of duty to cede its duty to case manage this petition. It is the belief of this court that to allow the matter of the propriety of the petitioner's submissions to be accorded independent slot of judicial time as a resource outside the hearing to finally determine the petition would be to derail and detract the speed already set and momentum gathered.

14. In any event, this court as a practice peruses its files before hand and by the time the objection was

sought to be raised by Mr.Nowrojee, I had perused the respective submissions and picked what I thought was relevant to court. I doubt if by a stroke of my pen expunging any portion of the submissions would erase what I had gather from my perusal of the court file.

15. Importantly, the parties are coming to highlight the filed submission and it is at such highlight that they would be enjoined to persuade the court why to believe one set of the submissions over the others. The objection by Mr.Nowrojee has however served as a strong warning to this court, and the court further warns itself that it would be prejudicial to be unduly influenced by facts not pleaded in the matter. This matter will have to be decided, as agreed between the parties, on the affidavit evidence filed as supported by the law. The law here would include *stare decisis* but it is equally appreciated that Judge Emukule, is a judge of concurrent jurisdiction and his findings are not binding upon the court but may be persuasive. I will equally warn myself, if it reaches the time to determine the petition, that submissions are neither pleadings nor evidence but a summary of the party's evidence as aligned to law to support a party's position in the litigation. See DOUGLAS ODHIAMBO OPEL & ANOTHER -VS- TELKOM KENYA LTD. In which the court of appeal said:-

“The learned judge cannot therefore be faulted for rejecting the receipt for legal fees placed before him as annexure to the plaintiffs submissions.

Submissions as he correctly observed are not evidence.”

16. I have warned myself against the fears of the interested party even as I stand by the dictates of the constitution that justice should not be delayed.

17. I direct that, as directed earlier, the petition shall proceed by highlighting the submissions filed but each party shall be at liberty to challenge the propriety of the other's submissions to ensure that no breaches are countenanced.

18. It is so ordered.

Dated, signed and delivered at 2nd this day of August 2016.

Read in the presence of the advocates for the parties.

Court: By consent, parties to attend court on 16.9.2016 for purposes of highlighting the submissions filed.

P.J.O. OTIENO

JUDGE