



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. APP. 122 OF 2014.

JOHN WEKESA KHAOYA..... APPLICANT

=VERSUS=

THE AG. STATE LAW OFFICE..... RESPONDENT

R U L I N G.

JOHN WEKESA KHAOYA, the Applicant, through notice of motion under certificate of urgency dated 9th October, 2014 prays for the following orders;

“ 1. That this application be heard urgently and on priority basis.

2. That this Honourable court be pleased to grant orders for leave for exemption from paying court fees to petition a Constitutional Petition to protect Article 3 (1) of the C.O.K (Constitution of Kenya) 2010 pursuant to Article 73 (1) (a) and (b) of the C.O.K (Constitution of Kenya) 2010 as read with the registered Land Act (cap 300) LSK (Laws of Kenya).”

The application is based and supported by the affidavit of the Applicant, John Wekesa Khaoya sworn on 9th October, 2010 in which he among others depones to the following;

1. That he is the Chief Executive Officer with Centre For Human Rights which is a Community based organization registered with the Ministry of Gender, Children and Social Development. A copy of the certificate No. A12087 issued on 11th July, 2014 is annexed.
2. That the Applicant desires on behalf of Benjamin Omogil Omokola, who is the Defendant in Busia CMCC. No. 130 of 2014 and who has a hearing disability and in furtherance of the public interest to ensure that the said Defendant is accorded fair hearing as enshrined under Article 50 (1), 52 (1) and (2) of the Constitution of Kenya.
3. That the learned trial Magistrate’s courts order of 22nd August, 2014 in Busia CMCC. NO. 130 of 2014 requiring the Land Registrar and Surveyor to visit land parcel North Teso/Kamuriai/1326 and establish its boundary is an abuse of office and violation of Article order 73 (1) (a) and (b) of the Constitution 2010. That the order further violates the Environment and Land court Act, is an affront to the provisions of the Magistrates Act, contravenes the tenets of natural justice and is unreasonable.

When the matter was placed before the Deputy Registrar on 9th October, 2014, the same was certified urgent and directions given to the effect that it be placed before the judge for hearing on 14th October, 2014. On the 14th October, 2014, the Applicant was absent and the court directed that the Deputy Registrar do communicate with him to attend court the following day, 15th October, 2014.

The court has considered the Applicant's submissions and supporting affidavit and find as follows:

1. That considering this application is brought by the Applicant in person, it is important to set out the articles of the Constitution 2010 which he has made reference to in full. The articles are as follows;

“ 3 Defence of this constitution.

(1) Every person has an obligation to respect, uphold and defend this constitution.”

“ 50. Fair hearing.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

“ 52. Interpretation of part.

(1) This part elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons.

(2) This part shall not be construed as limiting or quantifying any right.”

“ 73. Responsibilities of Leadership.

(1) Authority assigned to a state officer –

(a) is a public trust to be exercised in a manner that –

- i. is consistent with the purposes and objects of this Constitution.***
- ii. demonstrates respect for the people;***
- iii. brings honour to the nation and dignity to the office; and***
- iv. promotes public confidence in the integrity of the office; and***

(b) vests in the state officer the responsibility to serve the people, rather than the power to rule them.”

2. That as discerned from the provisions of the articles of the Constitution cited by the Applicant in the application and supporting affidavit as set out in (1) above, there is none that deals with the applications to be exempted from paying court fees in filing court proceedings. The Applicant indicated in his application that he wanted the payment of court fees waived for the Constitutional Petition that he intended to file but the intended constitutional petition was not annexed to the application and the court is therefore unable to make a finding on its nature.
3. That the Applicant's affidavit especially at paragraphs 3 and 7 and the oral submissions suggests that the Applicant intends to either file a review application in Busia CMCC, NO, 130 of 2014 or an appeal to this court on the learned trial Magistrate's order of 22nd August, 2014 on behalf of the Defendant therein. However the court notes from the copy of the order annexed to the applicant's affidavit that the Defendant was represented by a learned counsel, one Mr. Ipapu advocate in the Lower court proceedings. In the absence of any representations from the named Defendant to the contrary, this court can only conclude that he was accorded fair hearing by the trial court. If the Defendant was aggrieved by the order of 22nd August, 2014 his counsel on record will ably advice him accordingly. The court does not see what interest of a public nature exists in the Lower courts proceedings that requires the Applicant herein to pursue.
4. That there is nothing presented before this court by the Applicant to show that the Defendant in

Busia CMCC. No. 130 of 2014 has requested for his assistance to appeal or apply for review of the learned Trial Magistrate's order of 22nd August, 2014. Had the Applicant received such a request and accepted the same, the application to be exempted from payment of fees would be to the court where the review or appeal would be filed. That such an application should be accompanied with draft pleadings to be filed and materials to confirm that the Applicant was a man of straw.

5. That application for a party to be allowed to sue or defend suit as a pauper are guided by Order 33 of the Civil Procedure Rules. Rule 1 describes who qualifies to be a pauper while Rule 2 set out the particulars to be contained in an application for permission to sue or defend suit as a pauper. The applications under Order 33 should be heard by the Deputy Registrar as confirmed in Order 49 Rule 7 (1) (b) (xi). As shown above, the Applicant has failed to comply with the requirements of Order 33 of the Civil Procedure Rules and the application is rejected under Rule 5 of the said Order. In case the application was to enable the Applicant file an appeal, then it should have been brought under Order 44 of the Civil Procedure Rules and again it has failed to comply with the said order.
6. That in the absence of the draft, pleadings that the Applicant intends to file if his application to waive court fees or to be allowed to file the pleadings as a pauper was allowed, the court is unable to establish whether such intended pleadings would fall under those envisaged under Article 22 of the Constitution. It was the duty of the Applicant to avail all such materials that would enable the court exercise its discretion one way or the other and failed to do so.
7. That having found as above, this court finds the application herein to be without merit and is dismissed.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 30th DAY OF OCTOBER, 2014.

IN THE PRESENCE OF; - NONE.

JUDGE.