



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HCCC NO. 105 OF 2001

MALINDI HOLDINGS & ESTATE AGENTS.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS

MONDO LIMITED

ALI OMAR SAID ALAMUDI

ALMA HOLDINGS LIMITED

MALINDI DISTRICT HEALTH MANAGEMENT BOARD

MALINDI DISTRICT HOSPITAL.....DEFENDANTS

RULING

1. The subject matter of the plaintiff's application filed on 23rd June, 2011 is the ruling of Ombija J., delivered on 19th May, 2008 by which he struck out the suit. The key reason given in the ruling is the plaintiff's stated breach of the mandatory provisions of Section 13A of the Government Proceedings Act. Ombija J. concluded that the said breach rendered the suit "incurably defective, bad in law and incapable of amendment".
2. Thus the provisions of section 13A Government Proceedings Act are the target of the first substantive prayer (b) of the Plaintiff's application, which, is expressed to be a chamber summons. The chamber summons cites several articles of the 2010 Constitution and the Rules made thereunder, namely the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High court Practice and Procedure Rules, 2006 commonly known as the Gicheru rules. Prayer (c) of the chamber summons seeks the setting aside of the striking out order and reinstatement of the suit.
3. The Attorney General on behalf of the 1st and 6th Defendants filed grounds of opposition. The 4th Defendant filed a replying affidavit and a preliminary objection. However, during the oral arguments only Mr. K'opere for the 4th Defendant and Mr. Kinyua for the Plaintiff/Applicant participated.
4. I have now reviewed the record of the oral arguments in light of the chamber summons and written replies thereto, in particular the objections raised concerning the procedure adopted by the Plaintiff/Applicant.

5. I note the following:

- a) The suit was struck out in May 2008 hence does not exist.
- b) The application before the court which is expressed to be a chamber summons, is in substance a constitutional petition.
- c) The provisions of the law sought to be impugned by the said chamber summons, is the very basis of the decision of Ombija J.
- d) The chamber summons cites provisions of the current constitution which had not been promulgated at the time of the ruling in the year 2008.
- e) The net result of the chamber summons succeeding would be that the ruling of Ombija J. would be set aside or at least its rationale demolished.

6. In my considered view this application as brought obfuscates the true intent and nature: A constitutional petition ought not to be raised within a matter that is struck out as this one.

7. Reading through the affidavit supporting the chamber summons it would seem that the applicant's ultimate desire is the mere setting aside of Ombija J's order. That remedy is available upon the procedure of appeal or review under the Civil Procedure Rules.

8. For the sake of good order, I uphold the 4th Defendant's technical objection. I direct that the Applicant determines whether he desires to move the court by way of a Constitutional Petition which, should be brought separately from this former suit, or to apply for review or setting aside in the usual manner, as the chamber summons leading to the striking out had itself been brought under the Civil Procedure Rules. For the purposes of this ruling the court's position is that the plaintiff's application cannot be entertained in this file. It is accordingly struck out with costs.

Delivered and signed at Malindi this **25th** day of **October, 2013** in the presence of Mr. Kinyua for the Plaintiff/Applicant.

Court clerk – Samwel

C. W. Meoli

JUDGE

MR. KINYUA – I seek uncertified copies of proceedings and ruling.

C. W. Meoli

JUDGE

COURT – Certified proceedings to be availed to the applicant.

C. W. Meoli

JUDGE