



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND 169 OF 2013

MICHAEL OTIENO NYAGUTI.....PLAINTIFF/APPLICANT

VERSUS

1. JACK RANGUMA
2. EVANS KIDERO
3. ALICE KAUDIA
4. DIRECTOR NEMA
5. PS MENWR.....RESPONDENTS/DEFENDANTS

R U L I N G

1. This ruling comes after hearing a preliminary objection brought here on 26/9/2013 and whose notice had been filed on 5/9/2013. The objection was a two – pronged attack on the suit on the grounds, first, that the jurisdiction of the court has not been invoked properly and, second, that the suit is bad in law, defective and fails to meet the required threshold.
2. When the objection came for hearing, M/s Githaiga for 4th defendant faulted the manner in which the suit is brought – that is, by way of plaint instead of petition – and seemed to take the position that it is the High Court, not this Court, that is mandated to handle all matters alleging violation of fundamental freedoms. Her further argument was that this is not a one – judge bench matter but a matter for a bench consisting of uneven number of judges.
3. Issue was also taken with the filing of the suit by the plaintiff as a pauper. It was stated that the provisions of Order 33 of civil Procedure Rules were not followed. The application for pauperism, it was argued, was filed in the lower Court and the order emanating from that Court cannot bind this Court or the High Court.
4. It was stated further that the respondents were not given a chance in the lower court to disprove pauperism.
5. The court was urged to strike out the suit and, while considering whether to do so, to bear in mind that there are the provisions of article 159 (a) of the Constitution, which enjoin that justice should be done to all irrespective of status.
6. In response, the plaintiff said he was relying on articles 50, 162, 165(3) (b) and (d), 22, 23(1) and (3), 42, and 70 of the Constitution. In brief, the plaintiff's position is that he is entitled to fair hearing (article 50) and was also entitled to come to this Court which is duly established by the Constitution (article 162) to handle Land and environmental issues. The plaintiff further said it was proper for him to come to the Court instead of the High Court since the High Court under article 165(5) (b) is divested of jurisdiction to handle matters relating to environment and Land.

And the matter, the plaintiff said, is not one raising a substantial point of law to warrant a more than one judge bench to be appointed.

7. The plaintiff asserted the right to a clean and healthy environment (article 42) and his right to enforce that right in a court of law (article 22) and seek the various appropriate remedies article 23(3). And the plaintiff came to the court instead of High Court because he is alleging that an environmental right has been denied (article 70) and that denial is in violation of article 42 of the Constitution.
8. But the plaintiff's averments were countered with the observation, inter alia, that Environment and Land Court and the High Court are two distinct and separate courts and it is the High Court that is mandated to deal with matters concerning violation of fundamental freedoms. So, this court was said to lack jurisdiction. According to counsel for 4th defendant, the proper forum for this matter is the constitutional court and the plaintiff should have filed a petition there.
9. I have carefully considered what was laid before me by both sides. I will start by saying that the spirit of our times requires a paradigm shift. There is need for pragmatism and flexibility in the way the courts approach matters in this day and age. I say so because at a glance, the objectors averments would have carried a lot of weight in the days of Yore. But this is no longer the case. There are various legal provisions – Some Constitutional, others statutory – urging a change in approach.
10. Article 159 of the Constitution urges for the need to deliver justice on the merits without undue embrace of procedural impediments. In matters of fundamental freedoms – this being one of them – article 22 of the constitution requires that formalities relating to proceedings be kept to the minimum. In fact (article 22 (3) (b)) and allows the Court to entertain proceedings on the basis of informal documentation. And no fee may be charged and there should not be unreasonable restrictions by procedure and technicalities (article 22(3) (c) and (d)). And from a statutory perspective, Section 19 of Environment and Land Court Act enjoins that this court conducts its proceedings expeditiously and without undue regard to technicalities of procedure or rules of evidence.
11. This highlight of the applicable legal provisions is enough to show the objector where this court is coming from and where it is going. The points raised by the objector are largely technical and procedural. The points ignore the spirit of the times. They serve as unnecessary impediments to ultimate justice. It really does not matter to this court whether the matter before it is brought by way of plaint or petition. It is enough that the issues are clear and can clearly be adjudicated upon.
12. I also don't agree that the issue of pauperism should weigh heavily on the case. In matters of fundamental freedoms, and particularly such of them as concern environmental matters, the approach is or should be to encourage public-spirited individuals or bodies to bring them to court, or other appropriate forum, where violation is detected. That is why the Constitution de-emphasizes insistence on fee payment. That is why too Section 3 of Environmental Management and Coordination Act, 1999, rules out condemnation of such party to pay costs unless his action is shown to be frivolous and vexatious. The plaintiff herein seems to be a public spirited individual. From pleadings, it does not appear that he has personal benefits to derive from this suit. It therefore does not really matter to me that he is before me as a pauper, the shortcomings of the process leading to such pauperism notwithstanding.
13. It has also been said that it is the High Court that has exclusive jurisdiction to handle matter concerning violation of fundamental freedoms. That is not the correct position in law. One only needs to look at Section 13 of Environment and Land Court Act. That is where the jurisdiction of this Court is spelt out. A clear and plain reading of that Section shows the Court is empowered to handle matters relating to environment under articles 42, 69 and 70 of the Constitution (See please

Section 13(3). And it is clear to me that these articles of the Constitution are only singled out for emphasis. The Court is not disallowed to handle any other matter concerning a fundamental freedom that has a bearing on environment and/or land. For instance, there is nothing that would dis-entitle this court from handling a matter concerning violation of article 40, which deals with protection of right to property.

14. And concerning how the bench should be empaneled, that is not for the plaintiff to decide and he should not be blamed for it. It is clearly a matter for the relevant court to decide under the direction of the Chief Justice or the Principal judge. For this Court, such court can be constituted under Section 20 of Environment and Land **COURT ACT**, provided issues involved meet the necessary requirements.

15. It is clear therefore, having regard to what is highlighted herein, that the preliminary objection raised is without merit. The interests of this Court is to hear and determine the matter on its merits.

The objection is therefore dismissed with costs.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Diang'a George – C/C

Parties absent

Interpretation – English/Kiswahili

Lore for 3rd defendant

Lore for Githaiga for 4th defendant

Other counsels absent.

Plaintiff has now come. He is marked present

COURT: Ruling on preliminary order heard on 26/9/2013 and whose notice is filed on 5/9/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013