



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL SUIT NO. 3 OF 2012

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR MANDAMUS BY WAY OF JUDICIAL REVIEW IN THE MATTER OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF OPORTIONALIZATION OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

-BETWEEN-

BENSON IRUNGU KAHURA.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

HON. THE CHIEF JUSTICE.....2ND
RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....3RD
RESPONDENT

RULING

Article 162 (2) provides that “parliament shall establish courts with the status of the High court to hear and determine disputes relating to-

(a)

(b) ***The environment and the use and occupation of, and title to, land.***”

The applicant has moved this court by way of Chamber summons dated 18th January 2012. By that Chamber summons the applicant seeks the following order:

“The applicants herein Benson Irungu Kahura a member of the Anglican Church of Kenya (ACK) Kisauni be granted leave to apply for:-

(a) *Mandamus: an order of mandamus do issue directing the Attorney General, The Chief Justice of the Republic of Kenya and The Judicial Service Commission to constitute and/or operationalize the Environment and Land Court Act 19 of 2011 pursuant to the provisions of Article 162 (2) of the*

constitution of the Republic of Kenya read together with Article 165 (5) of the Constitution to ensure access to justice by all persons.”

The matter was before court on 19th January 2012 when the Learned Judge, **Justice Mwangi** ordered that the above prayer be argued inter partes. The respondents were served and all parties submitted on the issue before court. The applicant argued that the High court by virtue of article 165 as read with article 162 (2) has no jurisdiction to hear matters relating to land, as at the time when the Constitution of Kenya 2010 was promulgated. Although the parties in submitting in the matter before court dwelled largely on the merits of the substantive matter, that is whether the order of mandamus should be granted, I will not make final determinations in that regard because the only task before me is to determine whether the applicant has shown probable cause why leave should be granted for him to seek for judicial review order. Suffice to say that in the substantive matter in my view the court will be called upon to determine whether the high court has jurisdiction to hear matters relating to land when one considers the provisions of article 165. As can be seen from the quotation above in this ruling, the constitution provided that parliament would establish a court that would hear matters relating to land. Parliament did in fact enact Environment and Land Court Act No. 19 of 2011. The court in hearing substantive matters will also determine whether parliament violated the constitution when it provided in that act the transitional clause under section 30 (1). Section 30 (1) is in the following terms:

“All proceedings relating to the Environment or the use and occupation and title to Land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar”.

At this point, I will not make a determination whether the constitution has been violated and I will certainly not make a determination whether orders of mandamus should be granted against the respondents. I do find that the applicant has shown sufficient and probable cause why leave should be granted for him to seek for judicial review orders. Accordingly leave as sought in prayer 2 (a) of the chamber summons dated 18th January 2012 is granted. The costs of the chamber summons shall be in the cause.

DATED and DELIVERED at MOMBASA this 15th day of March, 2012.

MARY KASANGO

JUDGE