



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISC. PETITION NO. 166 OF 2010

THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS IN THE BILL OF RIGHTS)

IN CHAPTER 4 ARTICLE 19, 20, 21, 22, 28, 42, 43, 46, 69, 70, AND 259 OF THE CONSTITUTION OF KENYA 27TH AUGUST, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS, FREEDOMS AND ENVIRONMENT UNDER

ARTICLES 19, 20, 21, 22, 23, 42, 46, 69, 70 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT AND OF A CLEAN AND HEALTH ENVIRONMENT.

THOMSON KERONGO Alias

OSORO.....PETITIONER

-VERSUS-

MINISTRY OF LOCAL GOVERNMENT.....1st

RESPONDENT

MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES.....2nd RESPONDENT

OGEMBO TOWN COUNCIL.....3rd

RESPONDENT

NATURAL ENVIRONMENT MANAGEMENT

RULING

By a petition dated 11th October, 2010 and filed by **Thomson Kerongo** Alias **Osoro** (the petitioner), he prayed that Ogembo Town Council, (3rd respondent) be restrained from ***“opening up Ogembo Bus Park scheduled for official opening any time now”***, that this court do ***“order the respondents jointly and severally to respect the fundamental rights of the citizens”***, an order for compensation and costs.

The facts informing the petition were that the petitioner had learnt that Ogembo bus park was due to be opened. Having read the constitution particularly on the bill of rights, he had formed an opinion that the fundamental rights of Kenya citizens had been manifestly and grossly contravened. Hence the petition and application for injunction.

In support of the application for interlocutory injunction, the petitioner advanced the grounds that the 3rd respondent in collusion and acquiescence of the other respondents had built a bus park without due regard to the environmental issues and impact as the discharge pipes for affluent had been placed up the hill facing river Gucha. The 4th respondent had failed to act or had breached its statutory duty regarding issues of environment involved. Similarly the 1st and 2nd respondents as overseers had reneged on their duty as well. That the affluent and waste due to be discharged in River Gucha far outweigh the opening of the Ogembo bus park. Finally, he stated that a clean and healthy environment far outweighs the benefits to be enjoyed by a few ***“compact majority”***

The affidavit in support of the application was to the effect that sometimes in the year 2005, the petitioner became aware that the 3rd respondent was constructing Ogembo bus park. The site is up the hill and 2 metres away from River Gucha. He suspected that the 1st and 2nd respondents were aware of the construction of the bus park which was now complete and was awaiting official opening. However there are discharge pipes facing river Gucha from the bus park which are likely to discharge affluent and waste into the said river. He was apprehensive that river Gucha being the source of water of the town residents, the discharge of affluent and waste therein will impact negatively on him and other residents who are likely to drink dirty water alongside their livestock. The bus park has been constructed on a major highway linking Ogembo, Kilgoris and Kisii. There was bound therefore to be a multiplicity of accidents. Finally he deponed that the opening of the bus park was bound to cause a lot of environmental problems beyond the residents of Ogembo as the river flows in to Lake Victoria.

When the application was served on 1st, 2nd and 5th respondents, they reacted through the 5th respondent by filing grounds of opposition in which they stated that the petitioner had not demonstrated sufficient grounds to warrant the grant of the orders sought. The environmental impact of the construction of the bus park was considered and an opinion formed that there were mitigating measures that could be taken to ameliorate its impact. Otherwise the application lacked merit as the petitioner had not demonstrated the likely adverse effects of the said park to the requisite standard.

On its part, the 3rd respondent through its clerk deponed that there was no legal entity known as Ogembo Town Council. Thus the council was not one and the same person as the 3rd respondent. The application was ambiguous, fatally defective and otherwise an abuse of the process of the court. The petitioner had not demonstrated a case for the grant of the orders sought and there were no plans to open up for operation of the bus park in Ogembo any time soon. Thus the application was founded on pure speculation.

On the same day of filing the replying affidavit aforesaid, the 3rd respondent also filed a notice of preliminary objection. It was to the effect that the 3rd respondent as sued does not constitute a legal entity capable of being sued. The petitioner too lacked *locus standi* to mount the action.

When the application came up for interpartes hearing before me on 2nd November, 2010, parties agreed to canvass the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

This application cannot see the light of day on four or so grounds. One, it is generally accepted that an injunction cannot issue against the government or its officers acting in their capacities as Government officers. This is a general proposition of law. The 1st, 2nd and 5th respondents are no doubt Government ministries and officers. An injunction such as sought by the applicant cannot therefore issue against them. No doubt the applicant was well aware of this fact. That may perhaps explain his decision to seek the temporary as well as permanent injunction against the 3rd respondent only. He was also well aware that such remedy was not again available to him as against the 4th respondent.

Secondly, as against the 3rd respondent, even if the injunction was to be granted, it would be an exercise in futility. Court orders are not issued in vain. Under section 28 of the **Local Government Act**, the 3rd respondent could only have been sued in the name of the town council of Ogembo. Indeed section 28(3) of the said **Act** is worded thus “...*Every county or town council shall, under the name of the “county*

council of” Or “The town council of” as the case may be, each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land ...”. From the wording of this section the 3rd respondent could only have been sued in the name of **“The town council of Ogembo”** and not otherwise. However the applicant sued Ogembo Town Council, which is a body, organization or entity unknown in law. It cannot be said that it is one and the same as town council of Ogembo as submitted by the applicant. In support of that submission, the applicant has annexed in his written submissions letters purportedly written by the town clerk of the 3rd respondent on the letter heads **“Ogembo Town Council”**. Those annexures have been improperly and irregularly tendered in evidence. It amounts to evidence from the bar which is inadmissible. If the applicant intended to use them to counter the submissions of the 3rd respondent, he could only have done so in a procedural manner by way of further or supplementary affidavit. In any event the law as set out herein above is clear and unambiguous. It matters not therefore that the letter heads read **“Ogembo Town Council”**. The body sued as the 3rd respondent being unrecognized in law, it follows that if the injunction was to issue, the same would be in vain as its enforcement will be practically impossible.

Thirdly, the prayer being canvassed in this application is **“...That this honourable court is pleased to issue a permanent injunction restraining the 3rd defendant (sic), her servant, workers, agents and or employees from opening up Ogembo bus park now or in the future ...”**. Prayers 1 and 2 of the application were dealt with on 12th October, 2010 when the application came up for hearing ex-parte before me. That above prayer is also the substantive prayer sought in the petition. This application is an interlocutory application meant to obtain interim relief pending the hearing and determination of the petition. If the court was to grant the same, it will have the effect of disposing off the petition completely for there will be left nothing to hear and determine in future. The court cannot determine the entire suit on an interlocutory application.

Fourthly, the petitioner deponed that the construction of the facility commenced in 2005 and has been completed under his watchful eyes. Yet he never took any steps to stop the construction until now. Colossal sums of public funds to the tune of Kshs. 37,000,000/= have been spent to construct the facility. If the applicant was acting bonafide and in good faith, the delay in mounting this petition and the application is inexcusable. Ofcourse the applicant has in his submissions annexed several communications involving Ogembo Town Council, the 4th respondent and office of the president over objections to the project. However, these annexures are again inadmissible as I have already ruled. The facility is for public use. It is meant to cater for public interest. It is a necessary part of any town for its organization and planning. As correctly submitted by **Mrs. Asati**, if the court stops the purported opening of the facility, what will be the alternative parking for public service vehicles. If the order sought was to be granted, the same will injure the public interest.

For all the foregoing reasons, I would dismiss the application with costs to the respondents.

Ruling dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE