



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

JUDICIAL REVIEW NO. 16 OF 2010

REPUBLIC.....APPLICANT

=VERSUS=

**1. THE CHAIRMAN, TREASURER OF
FUNYULA CONSTITUENCY DEV.**

.....RESPONDENTS

**FUND COMMITTEE
2. FUNYULA CONSTITUENCY DEV.
FUND MANAGER**

EX PARTE

- 1. GILBERT NABONGO**
- 2. BOAZ OCHIENG**
- 3. SOPHIA OKETCH**
- 4. MARY OJIAMBO**
- 5. FREDRICK KHADULI**
- 6. CLLR MOSES SIOKA**
- 7. CLLR EVANS PAMBA**
- 8. EDWIN ODEMBO**

R U L I N G

The application before the court is a Notice of Motion filed on 21.1.2011 by the Respondent. It was filed under a Judicial Review Notice of Motion dated 6.12.2010 and filed the same day by the Respondents/Ex Parte Applicants hereinafter called main "Notice of Motion". It is important to note that the said main notice of motion, was filed with leave of court granted to the Respondents herein on 17.12.2010 under an *ex parte* Chamber Summons dated 11.11.2010.

The said 'leave' was ordered by court to operate as a stay against the present applicants, the Chairman, Treasurer and Secretary of Funyula Constituency Development Fund Committee as well as the Fund Manager, in the meantime from converting the premises for the proposed Funyula Law Courts, into Funyula Constituency Development Fund offices. The leave was also ordered to stay further demolitions, renovations, and constructions on or in the said premises purporting to convert the said proposed Funyula Law Courts into the said Fund offices until the main Notice of Motion is heard and finally determined.

The above stay orders aggrieved the present applicants who as a result filed the present application dated 21.1.2011 (herein after called the "secondary application") seeking the following reliefs:-

- (b)&(c)(d) That the operation of the leave order as a stay be discharged or be set aside or be suspended.
- (e) That in the alternative, the court strikes out the Judicial Review proceedings herein with costs.
- (f) Costs be provided.

The grounds upon which this secondary application is based are summarized as follows:-

- 1) The Respondents/Applicants failed to disclose to this court that a dispute under the Constituency Development Fund (Amendment) Act 2007, Sections 52 (1) (2) & (3) cannot be referred to this court in the first instance.
- 2) The Respondents/Applicants dishonestly, mischievously and irregularly applied for the Judicial Review process to defeat the relevant Act.
- 3) The continued existence of the ex parte orders has and is grossly prejudicing and is unfair to, the people of Funyula Constituency who are tax-payers, as funds are being wasted in paying rents for the current offices elsewhere.
- 4) The Judicial Review proceedings herein are an abuse of due process of this honourable court.

This secondary application is supported by an affidavit sworn by one Fanuel Amollo who is the Secretary of the Funyula constituency Development Fund who is one of those against whom the main application was brought. The secretary does not declare that he has authority to swear the supporting affidavit on behalf of the others sued with him as well as on behalf of the Funyula constituency Development Fund Manager who is sued with the Chairman, the Secretary and the Treasurer. The court will hereafter revert to the competency of the supporting affidavit.

Meanwhile the summary of the said supporting affidavit's deponement is as follows:- That the applicant of the secondary application – the Funyula Constituency Development Fund Committee, has and is acting strictly in accordance with the Constituency Development Fund Act. That the leave to file the main application for the Judicial Orders and the order to make the leave operate as a stay were based on failure by the Respondents to disclose that this court does not have power to hear a dispute on Constituency Development Funds at the first instance. That the sole intention by the Respondent to apply for Judicial Review Orders was to frustrate the development projects in the Constituency which they have achieved.

The deponent of the supporting affidavit aforesaid also averred that the Development Funds Committee, rents offices to work from and continues to pay rent for as long as the Fund is prevented from taking over the premises originally intended for the Law courts. That Constituency Development Fund Committee is prevented from releasing funds to complete many intended Community Projects which will in turn adversely affect the people of Funyula Constituency.

The deponent also averred that the main application is not supported by sufficient material for a possible success which would be a good reason why the leave originally granted should not have been issued in the first instance and why the leave should not have been made to operate as stay.

The replying affidavit filed as defence to the application was sworn by one Gibert Nabongo who is shown to be one of the ex parte applicants/respondents in the main Notice of Motion for Judicial Review orders. He swore that has authority from the other applicants to swear the replying affidavit on their behalf. Indeed the court notes the written authority signed by the respondents dated 21.1.2011.

Gilbert Nabongo deponed that the applicants o the main application of whom is one, are persons who represent the majority of the people of Funyula Constituency and included elected Councillors of Local Councils, a former Constituency Development Fund Chairman, and former Councillors. Gilbert Nabong'o then referred to annexures 1&2 which are letters from some of the present and former elected

leaders explaining the origin, development and importance of Law Courts Community project.

Mr. Nabongo further deponed that the project was initiated by the people because of the necessity to have a Law Courts closer to the people of the Constituency and other constituencies and areas around the Constituency. That the Law Court Project was from the beginning, planned by the Ministry of Planning and National Development in consultation with the Ministry of Public Works and the Judiciary. He further deponed that the local heads of Departments of the government as led by District Commissioner knew and supported the project from inception to date. That on 25.10.2010 the local people and their leaders who got to know that the herein applicant, who are the present Fund Development Committee members and managers, have decided to alter the Law Courts project buildings to become the Fund premises, publicly protested under a licence from the police and the District Commissioner.

Mr. Nabongo further deponed that the current Fund Development Committee and Manager had no legal authority to pass and indeed passed no minutes for alteration. That they have always failed to produce such minutes showing any authority for conversion, despite demands, not only from the concerned constituents and leaders, but also from government leaders, inclusive of the District Commissioner.

The court among other exhibits, perused the protest from one John Cornel Makokha Obeko exh 1 and one Armstrong Fred Kasuku the former Chairman of the Fund Development committee Exh 2. There was also exh 3, a Memorandum of Protest to the District Commissioner dated 25.10.2010 and signed by the present Respondents before they presented the main application seeking Judicial Review Orders.

Exhibits 1 and 2 are protests addressed to the National Constituencies Development Fund Management Board. Exhibit 3 is the Memorandum of Protest to the District Commissioner Funyula. The protestations in the three documents can be summarized as follows:-

- 1) That the Funyula Law Courts Project was proposed and supported in all its stages by the Samia Residents before being approved by the National C.D.F. Management Board.
- 2) That public tendering for construction of the project buildings was properly done and a project sum of Kshs7.2 million approved and tendered. That the selected contractor was paid Kshs4.9 and other payment to make the sum of ksh5.382 million thereof and the Contractor had constructed the project up to the roofing stage.
- 3) That completion of the project requires payment or release of the contract balance from the original sum of Kshs7.2 million.
- 4) That the Law Court Project has been regularly and lawfully approved and sanctioned by the people of Funyula, the National C.D.F. Board, and the Government Ministries including the Judiciary, Public Works and National Planning. That alteration or conversion of the project requires not only the current Development Fund Committee but approval by all the other and relevant stake-holders aforementioned.
- 5) That the applicants/Respondents, instead of releasing only the balance of the original project contract sum to complete the project, have voted an extra Kshs8 million purporting it to be the sum required to complete the project. That the intention to inflate the project funds is without consultation of the stake holders and is in contravention of the Fund regulations, apart from being or amounting to fraud and/or insinuation of corruption or siphoning of Fund resources.
- 6) That the applicants/Respondents are unduly exaggerating project costs to give room for kick-backs contrary to rules and regulations of the Constituency Development Fund and that finished projects are poorly constructed and hardly meet the laid down standards.

The parties herein put in written submissions. The applicants in the secondary application now before the court merely tabulated and repeated the earlier grounds upon which their application is based. He cited several legal authorities.

The Respondents on the other hand made a co-ordinated submission, explaining in greater details why this court has jurisdiction to hear this matter and which are the reasons why the leave granted to file the Main application was properly granted; why the main application is valid for a full hearing and why the stay granted to the leave, should not at this stage, be discharged, set aside or suspended.

I have carefully perused the main application and this secondary application, the documents in support thereof, and the written arguments by either side. The only issue before me at this stage is:-

- a) Whether or not the operation of the leave granted on 17.12.2010, as a stay, should be discharged, set aside or suspended.
- b) Whether or not this court should strike out the main application seeking Judicial review orders.

The legal provision under which the first above relief was granted is Order 53 rule 4 and in my view, states the discretion of the court to order otherwise. It states:-

“The grant of leave under this rule to apply for an order of prohibition or an order of Certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the Judge orders otherwise...”

The record shows that the court presided by Muchemi, J. on 16.12.2010 granted the leave to file the main application for the Order of Prohibition after carefully reading the ex parte application before her. Even more importantly, the Honourable Judge in her discretion decided to make the leave she granted to operate as a stay, after being persuaded by the grounds given and advanced by the ex parte applicant on a prima facie basis, as the provisions of Order 53 allow.

However, in my understanding, the court which made the orders was aware that the orders it made were ex parte. That meant that the other side parties of the suit were not present and that were they present, they might give adequate reasons why the leave should not be granted or if granted, why it should not be made to operate as a stay. Put differently, that court was aware that the ex parte orders made then may be challenged if the other side so decided, as indeed it has now done.

It is however one thing for the other party to be at liberty to challenge such orders and another to successfully persuade the court to discharge or modify them. This is because the court needs to carefully examine and consider the reasons which influenced the earlier court to grant the ex parte orders and whether those reasons have changed to justify a modification or discharge of those orders. That also in my view, is the discretion given to this court in the last clause of Rule 4 of Order 53, cited hereinabove.

Turning now to the grounds which could have influenced Muchemi, J, the same are found on the face of the Chamber Summons heard by her ex parte, on 16.11.2010. They are as follows:-

1. That the present applicants have acted in extreme secrecy in converting the nearly complete Funyula Law Courts Project into CDF offices project without calling for views or hearing the constituents, including the applicants (respondents herein) who stand to benefit from the initial Law Courts Project.
2. That the respondents (applicants herein) had awarded a fresh contract of kshs8 million over and above the Kshs5.382 million already spent, in order to alter the project, which was argued to be a waste of public funds.
3. That the respondents (present applicants) have failed to observe the provisions of Public Procurement and Disposals Act and the tendering regulations in their decision to alter the Law Court Project to become CDF Offices Project.
4. That the respondents (present applicants) avoided the tendering procedures in order to keep in the dark, the conversion of the older project to the new one.

On reading the application and the above reasons seeking the leave to file the main application for prohibition order, Muchemi, J stated:-

“Upon hearing Mr. Wanyama for the ex parte applicants and perusing the application dated 11.12.2010, I hereby grant leave to operate as stay pending the filing and determination of the proceedings.....”

It seems to me proper, therefore, that the applicants in this application had the onus to persuade this court that the reasons above cited which persuaded Muchemi, J to make the targeted orders, were either untrue or there are now other better/or new reasons which should override the earlier reasons to enable this court to discharge or modify those orders. Those new grounds or facts or circumstances can only be looked for in the face of this application or in the supporting affidavit of the application.

Turning now to the face of the application, the grounds upon which the applicants herein have based their prayers are that:-

- a) The respondents obtained the targeted orders by failing to disclose to the court that this court has no jurisdiction over this matter in the first instance.
- b) The respondents applied for the orders, mischievously, dishonestly and irregularly with intention to defeat the relevant law.
- c) The continued existence of the said order is unfair because it is prejudicing the people of Funyula and is causing the Funyula CDF to continue paying rent for the premises it presently occupies.
- d) The Judicial Proceedings in the main application are an abuse of court process.

I have carefully considered the above points advanced by the applicants. First, the points have not been explained out even in the written submissions, in order to be understood. The applicants did not indicate sufficiently or even a little in what manner the respondents had failed to disclose that the court had no jurisdiction in the first instance.

Further more, the applicant did not explain to this court how the respondent’s application purported to and could defeat the relevant law. Does the filing of the main application in court alone exemplify mischief or dishonesty as the applicants state? They should have attempted to explain somehow, to persuade the court. Thirdly, the applicants aver that the orders made by the court have grossly prejudiced the people of Funyula Constituency, merely because the applicants continue to pay rents for the premises they presently occupy. In the court’s view, that has little to do with orders properly made by the court on reasons originally advanced even if such reasons were advanced ex parte.

Finally the applicants failed to explain how the main application pending for a hearing is an abuse of the court process. If such reasons were advanced to this court in an appropriate manner, this court hath power and discretion if persuaded, to strike the application out. No such reasons however, have been convincingly advanced.

On the other hand the court has considered the reasons for granting leave to file the Notice of Motion seeking the order of Prohibition. It has also looked at the reasons why the court agreed to make the leave to operate as a stay. The facts deponed and the reasons and arguments advanced by the respondents(original applicants) can be summarised as follows, to the extent this court understands them from the facts on the record:- That the people of Funyula Constituency through the then Constituency Development Fund Committee, consulted and agreed to start a Law Court’s Project. That they consulted with the Judiciary, Ministry of Public Works, Ministry of Planning and Development and the National Constituencies Development Fund Board. That they jointly and severally not only accepted the proposal, but also issued building plans, financial plans and all the relevant approvals to start and develop the Project.

That soon after, tenders were advertised by the local CDF Committee and a contract was awarded for Kshs7.2 million. That the contractors had constructed the project building to the roofing stage. That then, a new CDF Committee was selected. That instead of seeking to complete the project by applying some remaining balance of the contract funds, it probably decided that the Law Court Project building should be converted into CDF Committee Offices. That this conversion appears to be done quietly, without consultation of the electorate, without approval of National CDF Board, the Judiciary, Public works Ministry and other stake-holders. That no Committee minutes or records to support the conversion of the project has ever been produced by the Committee on demand, even to the District Commissioner who still is the head of development in the District.

On the other hand, it is added, the CDF Committee appears to hear or mind no one. It continues to convert the buildings to become its offices after voting a fresh Kshs8 million to that end which has alarmed a geater part of the Funyula Community.

It is to stop this conduct and to stop the total destruction of the Law Court Project that the Respondent's herein filed the main application seeking the order of Prohibition. In the meantime the court was persuaded to grant the leave to file such proceedings and stay and activity by the Funyula C.D.F. Committee from fully destroying the Funyula Law Court Project until the suit is heard and determined and also until the court determines whether the conduct of the present C.D.F. Committee is proper, legal or justified.

It is in the above circumstances, it appears to me and I so find, that the order making the leave granted operate as a stay was not only appropriate but also deserving. Indeed if it were to be discharged or set aside as sought, the present applicant in the secondary application will likely proceed to complete the conversion of the project into the CDF Committee Offices. In such a case, what will happen if in the end the herein respondents win the main suit and obtain a declaration that the intended conversion is ultra vires its powers? The victory will be empty, a situation the court should not allow to take place.

On the other hand the herein applicant failed to show persuasive grounds for seeking to discharge or modify the stay order. They also in my view failed to persuade the court that it has adequate reasons both in law and fact to strike out the main Notice of Motion without allowing the parties to fully canvass the issues involved through oral or other evidence in a full hearing.

For the above reasons, this preliminary application fails and is hereby dismissed with costs to the respondents in it. Orders accordingly.

Dated and delivered at Busia this 16th day of june 2011.

D.A. ONYANCHA
JUDGE.