



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Constitutional Application 1 of 2008

KENNETH NDUNG’U.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

KISHOR KUMAR DHANJI VARSANI.....2ND RESPONDENT

RULING

By an agreement dated 22nd October, 1988 Amolak Singh (the deceased) leased a portion of **Title No. Bahati/Kabatini/Block 1/2806** (Parcel No. 2806) from its owner-**Ndeffo Limited** (the Company) for 20 years for quarrying operations. It would appear that Kishor Kumar Khanji Varsani (Kishor) also leased another portion of the same piece of land from the Company and became competitor of deceased in the quarrying business. On 11th September, 2002 the Company transferred the whole of that piece land to Kishor who soon thereafter demanded possession of the portion the deceased was occupying. The deceased refused to vacate. Instead, to protect his interest, he filed Nakuru HCCC No. 247 of 2002 (the High Court suit) on 14th October, 2002 and sought a perpetual injunction to restrain the Company and Kishor from evicting him.

Along with the plaint the deceased filed an application for injunction and sought orders to restrain the Company and Kishor from evicting him or interfering with his occupation of Parcel No.2806 until the suit is heard and determined. Kishor filed a defence and a replying affidavit asserting that he is the owner of that land but denied having any intention to evict the deceased.

On 9th January, 2003 Kenneth Ndungu, Onesmus Matheri Ndegwa and Daniel Njoroge made an application in that suit and sought four orders - that they be joined in the suit as plaintiffs and the directors of the Company who sold the land to Kishor also be joined as defendants; that they be allowed to prosecute that case on their own behalf and on behalf of other members of the Company save for the joined defendants; that Nakuru HCCC 456 of 1998 and HCCC No.26 of 2000 be consolidated with HCCC No.247 of 2002 and that Kishor be restrained from selling Parcel No. 2806.

Both applications were seriously contested. On 17th February 2003, apparently due to lack of time, Visram J ordered that the status quo as at that date to be maintained.

On 14th April, 2004 the Plaintiff and the intended plaintiffs applied to restrain the Company and its agents from holding a General Meeting where it was feared that a resolution was going to be passed to wind-up the Company and to dispose the quarry leased to deceased and other pieces of land belonging to the Company. The application was heard ex-parte during the vacation on 16th April, 2004 by Kamau Ag. J.

who besides granting the injunction sought, joined the 3 intended plaintiffs as plaintiffs to that suit but said nothing about joinder of the directors who sold the land to Kishor as defendants although the joined plaintiffs' claim was against them.

It would appear that on 21st September, 2007 a portion comprising 17.3956 hectares and known as **Title No. Bahati/ Kabatini Block 1/ 10586** (Parcel No.10586) was carved out of Parcel No. 2806 and transferred to Kishor. It is not clear if Kishor retransferred back to the Company the rest of Parcel No. 2806.

Kishor claims that on 16th June, 2008 **Amolak Singh T/A Amolak Singh Isher Singh & Sons** purported to transfer the deceased's quarrying business and the lease of a portion of Parcel No. 2806, which he claimed was part of his Parcel No. 10586, to **Ramesh Naran Ragwani T/A Agro Industrial Tools**. To forestall that Kishor filed Nakuru CMCC No.583/2008 on 24th June, 2008 against **Amolak Singh T/A Amolak Singh Isher Singh & Sons** and **Ramesh Naran Ragwani T/A Agro Industrial Tools** and sought their eviction. Simultaneous with the filing of that suit, Kishor filed an application and on 18th August, 2008 and obtained an injunction restraining the quarrying operations on the portion leased to the deceased. That injunction order is the subject of this Constitutional Reference and two other applications herein.

This Constitutional Reference was filed by **Kenneth Ndungu** by way of Originating Notice of Motion under **Section 65(2) of the Constitution** and **Rules 2 and 29 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court (Practice & Procedure) Rules, 2006** (the Constitutional Rules). It seeks orders that this court do supervise the proceedings in **Nakuru CMCC No.583 of 2008, Kishor Kumar Dhanji Varsani Vs Amolak Singh T/A Amolak Singh Isher & Sons & Ramesh Ranan Raghwani T/A Agro Industrial Tools** (the lower court suit) and make such orders and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by the subordinate court in that suit. In this regard the Applicant seeks that this court do quash, lift or review and set aside the order made in the lower court suit on 18th August 2008 restraining the defendants in that suit from remaining on the three acres portion of the piece of land known as Title No. **Bahati/Kabatini Block 1/10586** or mining and/or excavating materials therefrom. In the alternative the Applicant seeks an order of prohibition directed to the Senior Resident Magistrate Nakuru prohibiting him and any other magistrate from further hearing the lower court suit. In the further alternative the Applicant prays that this court do strike out the lower court suit altogether with costs to him.

The Reference is based on the two grounds. The first one is that the lower court suit is fraudulent and was filed by the second Respondent, Kishor Kumar Dhanji Vasani (Kishor), to defeat an order made by this court on the 17th February 2003 in Nakuru HCCC No.247 of 2002 (the High Court suit) (in which Kishor is a defendant) for the maintenance for the status quo. The second ground is that the order made by the Ag. Principal Magistrate in the lower court suit on 18th August 2008 restraining the Applicant from running their business on Parcel No. 2806 has not only rendered ineffective the said High Court order and destroyed the substratum of the High Court suit but has also completely ruined the Applicant's business.

The second application, also filed by the said Kenneth Ndungu along with the Constitutional Reference, is a Notice of Motion brought under the same provisions which seeks a stay of all the proceedings in the lower court suit until this Reference is heard and determined. The third application seeks, inter alia, to join **Mrs Punny Balbir Kaur** as the second Applicant in this Reference.

The Reference and the second application are supported by the affidavits of Kenneth Ndungu, the applicant, while the third application is supported by the affidavit of the said Mrs. Punny Balbir Kaur.

Relying on the affidavits in support of the Reference and the two applications Dr. Kamau Kuria submitted that the filing of the lower court suit was a fraudulent trick by Kishor to circumvent the status quo order made in the High Court suit on 17th February 2003. While conceding that the late Amolak Singh's claim in the High Court suit abated after one year of his death, he dismissed the Respondent's contention that

the entire suit abated. He said that is not the position as there are other plaintiffs who are alive. He also dismissed as baseless the Respondent's contention that the order joining the other three plaintiffs in the High Court suit was irregular. He contended that the second Respondent having not set aside that order, he is enjoined to strictly observe its terms. He cited an extract from page 315 of the **Law of Contempt** by **Gordon Borrie** in support of that proposition and submitted that “**the simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper cause.... So long as it exists, the order must be obeyed and obeyed to the letter.**” He further contended that the High Court suit is alive and was partly heard last year without any objection from the second Respondent. He cited the cases of **Okello Vs Republic [2001] KLR 489** and **Theluji Dry Cleaners Ltd Vs Muchiri [2002] 2 KLR 704** as authority for the proposition that the subordinate courts have no jurisdiction to interfere with the High Court orders. He also cited the English case of **Clarke Vs Chadburn [1985] 1 WLR 78** in support of his contention that the second Respondent having fraudulently obtained an order from the subordinate court which in effect set aside the High Court order of 17th February 2003, **Title No. Bahati/Kabatini Block 5/10586** which he got transferred to himself pursuant to that order should be declared null and void and urged me to allow all the applications as prayed.

Though served, the Attorney General as the first Respondent has not come on record or filed any documents in opposition. The applications are however, strongly opposed by Kishor, the second Respondent. His advocates have filed notices of preliminary objection to the Constitutional Reference and the Notice of Motion seeking to join Mrs. Punny Balbir Kaur and Kishor has himself filed a replying affidavit.

Mr. Ojienda for the second Respondent, also relying on his client's replying affidavit and the notices of preliminary objection submitted that the application by Mrs. Punny Balbir Kaur to be joined in the Constitutional Reference is bad in law for three reasons. Firstly, that she thumb printed the affidavit in support of that application with her left instead of her right thumb print. Secondly, that the application flies in the face of the Constitutional Rules in that Rules 2 and 29 thereof talk of “a party” and yet Mrs. Kaur is neither a party to the High Court nor to lower court suits. In the circumstances he said she has no locus standi to seek the supervision of suits she is not party to. Thirdly, he cited the case of **Lawi Kinoti M'Magarin & 5 Others Vs The AG [2005] eKLR – Nairobi HCCC No. 145 of 2005** and submitted that Constitutional References brought under Rules 2 and 29 of the Constitutional Rules have no provision for joinder of parties or amendments.

On the merits of the Constitutional Reference Mr. Ojienda contended that there is in any case no community of interest between Mrs Kaur and Ndungu, the Applicant. Even if there was he said Ndungu is also not a party to either the High Court or lower court suits and has also therefore no locus standi to invoke this court's supervisory jurisdiction in suits that do not concern him. Besides that he further submitted that Kenneth Ndungu, the Applicant, has also no proprietary interest in the suit property capable of protection by law.

Mr. Ojienda further contended that though the re-survey of Parcel No. 2806 and the curving out of Title No. Bahati/Kabatini Block 5/10586 may, on the face of it, appear as a violation of the status quo order, that is however not the case. The position, he said, is that the High Court suit abated with the status quo order on 4th August 2006, one year after the death of the plaintiff in that case and the Company was therefore entitled to transfer that piece of land to Kishor. In his view, the late Justice Kamau's order joining three other plaintiffs to that suit was irregular and should be ignored. He said this is because the application for joinder was not before Justice Kamau when he made the order joining Kenneth Ndungu and others as plaintiffs in the High Court suit. He dismissed the Applicant's contention that the first plaintiff in the lower court case is deceased and referred me to the affidavits of Boaz Okello and Ramji Naran Patel which confirm that both the plaintiffs in that case are alive. Lastly Mr. Ojienda submitted that the estate of Amolak Singh (the deceased) has attempted to transfer the quarry business on a portion of his client's land and urged me to dismiss all the applications with costs.

In a riposte Dr. Kuria urged me to ignore Mrs. Kaur's execution of the affidavit in support by her left thumb print as a minor irregularity which in any case is discrimination against women. He referred me to

paragraph 27 of Mrs. Kaur's affidavit and submitted that Amolak Singh, the first defendant in the lower court suit, is not one of her children. In response to Mr. Ojienda's contention that both Kenneth Ndungu and Mrs. Kaur are not parties to the lower suit he submitted that the term "party" in Rules 2 and 29 of the Constitutional Rules should be interpreted to include any aggrieved party. Even if I overrule him on that he said this court has powers under **Section 65(2)** of the **Constitution** can act on its own motion and make the orders sought in the Constitutional Reference. He concluded that there has been no transfer of the deceased's lease of the suit property and that even if there was any such attempt that was an exercise in futility as no grant of letters of administration in respect of the deceased's estate had been issued to anybody.

I have considered these submissions and carefully read the pleadings in this Reference as well as those in both the High Court and Lower court suits. On the issue of the competence of the applications I disagree with Dr. Kuria that the term "party" in Rules 2 and 29 of the Constitutional Rules should be interpreted to include any aggrieved party. It is a cardinal principle of statutory interpretation that where words or phrases of a provision are clear and unambiguous they must be given their primary, ordinary and natural meaning. The language must be that which the words used ordinarily bore at the time when the statute was enacted. Bearing that principle in mind, I find no warrant to give the term "party" in Rules 2 and 29 of the Constitutional Rules the meaning ascribed to it by Dr. Kuria. The term "party" clearly refers to a party in the suit in respect of which the supervisory jurisdiction of the court is invoked. It will not only be absurd but also plainly wrong to accept Dr. Kuria's contention that any person feeling aggrieved by what is happening in a suit to which he is not a party can invoke the court's supervisory jurisdiction and seek reliefs. In the circumstances I agree with Mr. Ojienda that Mrs Kaur and Mr. Kenneth Ndungu not being parties to the lower court suit have no locus standi in making this Reference and on that score the Reference and the two applications before me are therefore incompetent.

Though I agree with Dr. Kuria that in exercise of its supervisory jurisdiction under Section 65 of the Constitution this court has powers to act on its own motion, I cannot grant applications, even on their own merits, for several reasons. First, as I have said this Constitutional Reference is mainly based on the ground that Amolak Singh T/A Amolak Singh Isher Singh & Sons, the first defendant in that suit is dead. There is nothing in the lower court suit to suggest that Amolak Singh T/A Amolak Singh Isher Singh & Sons, the first defendant in that suit is dead. To the contrary Ramji Naran Patel, who denied being the second defendant in that case but was served with the summons to enter appearance and an application for injunction, swore a replying affidavit stating that the first defendant in that case was alive and that he (Patel) was negotiating with him to buy his quarrying business. In the same suit appearance was entered for both the defendants and one Boaz Okello, describing himself as the engineering manager of the first defendant, swore an affidavit in support of an application to set aside the injunction order which had been issued in that case and stated that the first defendant was in UK attending to his sick child.

Whether or not the first defendant in the lower court suit is indeed dead that is an issue which, as is clear from the annexures to the affidavit in support of the Constitutional Reference, has been raised in the lower court suit but that court has not been given an opportunity to deal with it. Secondly from the facts as stated herein above I cannot appreciate what interest Kenneth Ndungu has in the deceased's quarrying business to file this Reference? I therefore agree with Ojienda that Ndungu has no proprietary interest in the matter to be protected.

As I have already stated this Reference filed by Kenneth Ndungu is fatally incompetent. And Mrs. Punny Kaur not being a party to either the High court or the lower court suits an amendment to join her will not thereby cure it. Even if it could for the reasons already stated the Reference would still be dismissed as being unmeritorious. That aside I do not think that the deceased's estate has come to court with clean hands. Annexed to Kishor's replying affidavit to the Constitutional Reference is correspondence to the effect that the deceased's quarrying business has been closed down and his employees fired. In his said affidavit Ramesh Naran Patel stated that he is in the process of purchasing the deceased's quarrying business. Apart from counsels statement from the bar those allegations have not been disputed in any of these applications. That is in itself a violation of the status quo order.

Lastly and most importantly, no cause has been shown for the invocation of this court's supervisory

jurisdiction over the proceedings in the lower court suit. This court's supervisory jurisdiction under Section 65(2) of the Constitution is not an appellate jurisdiction. It is not a jurisdiction to be invoked in respect of all and every manner of complaint against the conduct of proceedings in the subordinate courts. That supervisory jurisdiction is a jurisdiction which should be invoked when the subordinate court has gone out of its way and made a weird or illegal order or when it is intent on irregularly conducting its proceedings.

In this case, as I have already pointed out the allegation that the lower court suit is fraudulent on the grounds *inter-alia* that it was instituted against a deceased person has been raised in that case but the subordinate court has not been given an opportunity to deal with it. Besides that the order giving rise to this Constitutional Reference was ex-parte. As we all know ex-parte orders are provisional and the courts granting them have jurisdiction to set them aside. There is nothing in this Constitutional Reference to show that the subordinate court has refused to deal with the application to set aside the offending order as contended by Dr. Kuria. If this court were to allow applications like this to be made willy-nilly, we will not only stifle operations in the subordinate courts but we will also clog the entire judicial system. The Applicant and/or the deceased's estate should take their grievances to the subordinate court.

For these reasons I find no merit in these applications and I accordingly dismiss them with costs.

DATED and delivered this 17th day of December, 2008.

D.K. MARAGA

JUDGE