



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 15 of 2005

PASSAGLIA GIUSEPPE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL & 7 OTHERS.....DEFENDANT

RULING

On 12th July, 2005 when this matter was listed for hearing Mr.Bryant for the plaintiff drew the Court's attention to his application by way of Notice of Motion dated 5th July, 2005 brought under Sections 75 (2) (3) and 84 (2) of the Constitution of Kenya, Rule 10 (a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of Individual) Practice and Procedure Rules, 2001, Section 3A and subsection 63 (e) of the Civil Procedure Act and Section 50 rule 1 of the Civil Procedure Rules.

The application seeks, in brief, that proceedings in this suit be stayed pending the determination of the alleged violation of fundamental right to property.

It also seeks that this Court do issue a constitutional direction that the plaintiff's fundamental right to property has been violated by the actions of the Commissioner of Land and/or agents, employees or servants. The grounds as set out in the affidavit of the plaintiff are the same as those relied on in the suit herein. Only Mr.Kópere for the 4th, 5th & 6th defendants raised objection to this application. Both Mr.Okello for the 1st defendant and Mr.Mouko for the 2nd & 3rd defendants felt that the filing of the Notice of Motion would automatically stay the proceedings herein.

But Mr.Kópere had a different view. It was his view that the Court seized of an application brought under the rules now called the Chunga Rules, must determine whether there is or likely to be an violation of a party's fundamental rights. That there must be a prima facie right and violation under Sections 70-83 (inclusive) of the Constitution. In support of this proposition Mr.Kópere referred me to a case decided by Chief Justice B. Chunga (as he then was) – **George Ngothe Juma and two others V Attorney**, Misc.Criminal Appl. No. 345 of 2001.

The Chunga Rules were made pursuant to Section 84 of the Constitution.

Section 84 of the Constitution vests in the High Court jurisdiction to hear and determine any question which may arise in relation to the provisions of Sections 70 to 83 (inclusive) of the Constitution.

Section 84 provides two scenarios. First, the High Court has original jurisdiction to hear and determine an application by a person who alleges that his fundamental rights under the Constitution has been, is

being or is likely to be contravened. This is a case of a direct application to the High Court.

The second scenario is where proceedings in the subordinate Court a question arises as to the contravention of any of the provisions relating to the protection of fundamental rights and freedoms. In such a case, the matter will be referred to the High Court, **unless** the person presiding in the subordinate Court is of the opinion that the raising of the question is merely frivolous and vexatious.

The practice and the procedure to be adopted to operationalise Section 84 came into force in vide Legal Notice No. 133 of 21st September, 2001 – the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice & Procedure Rules. In consonance with the substantive provisions of Section 84, the rules in question categorizes the references to the High Court. The rules, however adds a third Scenario as follows:

-those references arising from the proceedings in the

subordinate Court.

-those arising in the course of proceedings in the High Court,

and

-those arising otherwise than in the course of proceedings

either in the subordinate Court or the High Court.

The following important point must be born in mind. The Constitution vests in the High Court the power to interpret it – See Section 67 of the Constitution.

It follows, therefore, that the High Court is **the** constitutional Court

Where a situation in any of the 3 categories enumerated above arises, there are three (3) steps to be followed;

- i) the Court where the question of violation is raised will first, of all satisfied itself, on a prima facie, basis that there is merit in the application seeking reference.
- ii) Once so satisfied that Court seized of the matter will refer the same to the Chief Justice.
- iii) The role of the Chief Justice as spelt out in Rule 6 of the Chunga Rules is purely administrative, ie to empanel the bench to hear the reference.

Note that this last step is not provided for in Section 84 of the

Constitution and is only introduced by the Rules. But clearly it is an answer to the requirement of Section 67 (3) of the Constitution which provides that in interpreting the Constitution, the High Court shall be composed of a uneven number of judges, not being less than three. It may further be observed that both Section 84 (3) of the Constitution and Rule 3 of the Chunga Rules provide that where the question of violation of fundamental rights is raised in the subordinate Court, the trial magistrate has the power to examine the application and satisfy himself in it and that it has not been made frivolously merely to delay the trial. There is no similar provision in respect of violations raised in the High Court. This omission in my view is deliberate. The High Court retains the ultimate power to determine questions of violation of fundamental right and it would have been superfluous to make a similar provision like that in respect of subordinate Court. The Legislature or the Rules Committee would not have intended to give the subordinate Court powers to sieve applications for breach of fundamental rights and expect the High Court to act mechanically.

It is my view that the High Court where violation of fundamental rights is raised has the power and jurisdiction to be satisfied that there is merit in the application, without, of course, deciding the issues, before referring the matter to the Chief Justice for directions on the bench to hear the application.

In the matter before me there is allegation that the plaintiff's fundamental rights under the Constitution have been violated by actions of the Commissioner of Lands and/or agents, employees and servants.

It is interesting to note that the suit herein was filed in February, 2005. While the suit was still pending and after the plaintiff had obtained interim orders, a Notice of Preliminary objection by counsel for the 4th & 5th defendants was argued and dismissed. It is only after this that the plaintiff suddenly brought the present application.

It may be necessary at this stage to state that the basis of the suit was that in 1996 the plaintiff purchased a parcel of land known as No. Chembe/Kibabamshe from one Robert Maitha. This was after conducting a search at the lands registry at Kilifi and confirming that the property was registered in the name of Robert Maitha. The plaintiff subsequently proceeded to obtain the necessary consent from the District Land Control Board and thereafter commenced development.

The plaintiff was, however, unable to effect registration of the transaction due to what he referred to as forgery at the lands registry resulting in numerous Certificates of title being issued in relation to the suit premises.

In his suit against the defendants the plaintiff has sought for orders of indemnity against the 1st defendant (special damages), general damages, injunction against the defendants or their agents employees or transferee, interest and costs.

To begin with it trite that where a party alleges that his rights under the Constitution is likely, or a being or is about to be violated, it is incumbent upon such party to disclose the right in issue. It is not enough simply to state, as herein, that the plaintiff's rights were violated by the 1st defendant for failing to register the suit property in the name of the plaintiff. I may also add that constitutional remedies should not be resorted to in all manner of breaches. Where a remedy is available to an applicant under some other legislation, the Court will usually decline to determine whether or not there has been violation of fundamental rights.

See the case of Ministry of Home Affairs V Bickle (1985) LRC 755.

The Privy council has similarly decried the numerous applications brought under the Constitution when indeed there are no Constitutional issues for interpretation. This was in the case of Harrison V Attorney General of Trinidad and Tobago. (1980).A.C 205, where the Court stated as follows:

**“The notion that whenever there is a
failure by any organ of a government
a public authority or a public officer to
comply with the law, this necessarily
entails the contravention of some human
rights or fundamental freedom guaranteed
to individual under Chapter 1 of the**

Constitution is fallacious.

The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental right or freedoms is or is likely to be contravened, is an important safeguard of those significant freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under Section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

These words are all embracing and perhaps provide the answer to most of the problems arising from the application of Section 84 of the Constitution and the Chunga Rules.

The Courts must give strict application to Section 84 (1) in order to avoid abuse of constitutional references. Returning to the present application and applying the foregoing, I find that the plaintiff has failed to bring himself within Section 75 of the Constitution and his remedy remains as outlined in the

plaint.

Consequently I find no merit in the Notice of Motion of 5th July, 2005 and dismiss the same with costs.

Dated and delivered at Malindi this 5th day of September 2005.

W.OUKO

JUDGE

5.9.2005

Coram

W.Ouko

Judge

Mr.Ole Kina for Mr.Kópere for 4th , 3rd & 6th defendant.

Mr.Bryant for Application.

Mr.Mouko for 2nd & 3rd respondent.

Mr.Mouko for Mr.Okello for A.G.

Ruling delivered.

W.OUKO

JUDGE