



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

PETITION NO. 5 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 163, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTERS OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 21, 40

AND 69 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MIKULO RANCHING (DIRECTED AGRICULTURAL) CO. LTD.....PETITIONER

AND

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

DAVID SHELDRIK FOUNDATION.....2ND RESPONDENT

BIGLIFE FOUNDATIONS.....3RD RESPONDENT

KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION...4TH RESPONDENT

RULING

1. The Petitioner/Applicants filed a Notice of Motion application dated 29th September, 2021 under certificate of urgency and sought for the following orders: -

a. That there be a stay of execution of the Judgment delivered by the honourable Court on 13th September, 2021 pending the hearing of this application.

b. That there be a stay of execution of the Judgment delivered by this Honourable Court on 13th September 2021 pending the hearing of the intended appeal before the Court of appeal.

c. That the costs of the application be in the cause.

2. The Court proceeded to grant prayer 2 in the interim and set the hearing of the application for 14th October 2021.

3. Before the said application could be heard, the 4th Respondent filed a Notice of a Preliminary Objection dated 29th September, 2021 seeking to strike out the application dated 29th September, 2021 on the grounds that: -

The notice of motion is misconceived and unfounded in law, fatally defective, blatant abuse of the process of this honourable Court and does not lie in law and is therefore for dismissal in limine with costs given the clear and undisputed circumstances of this matter.

4. Before the hearing of the application, the Court proceeded to hear the preliminary objection.

5. Mr Oluoch for the 4th Respondent, submitted that the application was grossly incompetent, misconceived, fatally defective, and unfounded in law. He submitted that the Petition having been dismissed with costs to the Respondents, there was nothing capable of being enforced against the Petitioners by way of execution as it was a negative order. He submitted that it was trite law that a negative order is incapable of execution except for the issue of costs.

6. He further submitted that as the petition was dismissed with costs, any execution can only be in respect to costs. He relied on the 2nd Respondent's list and bundle of authorities dated 13th October, 2021.

7. He further submitted that the Petition was filed pursuant to Article 22 of the Constitution, which is governed by the Constitution of Kenya Practice and Procedure Rules 3, which state that the rules shall apply to all proceedings under Article 22 of the Constitution. He contends that the application was filed under Order 42 rule 6 of the Civil Procedure Code, which renders it incompetent as Rule 3 (3) provides that applications for a stay should be made within 14 days after judgment. He argues that the Notice of Motion was filed out of the mandatory stipulated period. He urged the Court to strike out the notice of motion.

8. Mr. Kere for the 2nd Respondent, associated himself with the submissions of the 4th Respondent. He relied on the replying affidavit and list of authorities. He submitted that if the Petitioner's application were to be allowed, it would amount to allowing the petition that was dismissed.

9. Mr. Muumbi in response to the Preliminary Objection, submitted that the dismissal of the Petition led to the Respondents issuing a notice of closure hence the judgment was not negative. He submitted that it would be prejudicial to close the road before the appeal was heard. As regards the Practice Rules, he submitted that the dispute was civil in nature and the applicable time is 30 days. He urged the Court to maintain the *status quo*.

10. The law on Preliminary Objection is settled. A Preliminary Objection must be on a pure point of law.

11. In Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. Further on Sir Charlse Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

13. In Oraro Vs Mbaja 2005 eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

14. I have looked at the judgment delivered on the 13th of September, 2021 and the Petition filed in Court on the 26th of June, 2013 and I find that the Petitioners sought for the following orders against the Respondents: -

a. This Honourable Court do make a declaration that the planned erecting of a live electric fence by the Respondent s without allowing the Petitioner’s members access road to their property was illegal, unconstitutional and tantamount to an infringement of the Petitioner’s right to use its property as enshrined in Article 40 of the constitution and contravened the Petitioner’s right to fair administrative action that is lawful and procedurally fair as enshrined in Article 47 (1) of the Constitution.

b. An order by way of review to call before the court and quash the decisions issued by the 1st and the 4th Respondent s to grant authority for the construction of the said electric fence which would otherwise limit the Petitioner’s access to its land.

c. A permanent injunction do issue restraining the Respondent s from proceeding with the erection of the electric fence until the electric fence is redesigned to allow the Petitioner’s members and all other affected stakeholders access roads to their property.

d. This Honourable court do order that the costs of this petition be borne by the Respondents in any event.

15. The petition was dismissed on the 13th of September, 2021 with costs to the Respondents.

16. The issue for determination is whether a negative order can be stayed.

17. The Respondent submitted that a negative order cannot be stayed and relied on the following authorities where the Court of Appeal held that a negative order is incapable of execution.

a. Mombasa Seaport Duty Free Ltd v Kenya Ports Authority (2006) eklr.

b. William Wambugu Wahome v Registrar of Trade unions & Another (2006) eklr.

c. Obadiah Muruja Mugendi v Charlse Kibiti Japhet & 3 others (2020) eklr.

d. Micheal Mwangi Guchura v Martin Wambua Kitavi Legal Representative of Kambua Kitavi (Deceased) (2021) eklr.

18. In the case of **Western College Farts and Applied Sciences Vs Oranga & Others (1976) KLR 63**, the Court whilst considering whether an order for stay can be granted in respect of a negative order stated as follows;

“But what is there to be executed under the judgment, the subject of the intended appeal the high court has merely dismissed the suit with costs. An execution can only lie in respect of costs.....”

19. Similarly, in the case of **Kaushik Panchamatia & 3 others Vs Prime Bank** the court stated and I fully adopt;

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed by the applicants”. The Court of appeal made it clear that a negative order is not capable of being stayed for costs.”

20. This Court notes that the order sought to be stayed is a decision that dismissed the Petition. It is therefore a negative order. As rightly submitted by the Respondents, a negative order is incapable of being stayed. Accordingly, there is nothing to stay in the present Petition. The only execution that can flow from the said judgment is costs since the Court did not order any of the parties to do anything or refrain from doing anything or from paying any sum.

21. On the issue on whether the provisions of the Civil Procedure Act are applicable in Constitutional Petitions, Mr Oluoch argued that Constitutional Petitions are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure rules 2013. He submitted that the application was brought under the Civil Procedure Rules was fatal as the same is governed by the constitution of Kenya (Protection and Fundamental Freedoms Practice Rules).

22. The Applicant’s application is brought pursuant to Section 36(1) High Court Organization and Administration Act no 27 of 2015, Section 5 of the Judicature Act, Order 51 Rule 1 of the Civil Procedure Rules, Section IA, 1B of the Civil Procedure Act and Order 40 Rule 3 (1) of the Civil Procedure Act and all other enabling provisions of the Law. The Applicant has not cited any single provision from the Constitution of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013. Under Article 159(d) and (e) of the Constitution, this court is enjoined to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.

23. Similarly, in the case of **Kitty Njiru Vs Nature & Style Fun Day Events & Another, Rebecca Muriuki t/a Kahaari (Proposed third Party) (2020) Eklr** the court held that;

“...I find that the provisions of the civil procedure rules are applicable to constitutional petitions where such provisions gives the court power to make such orders as may be necessary for ends of justice.”

24. In **Nicholas Hendrick Classen Vs Commissioner of Lands & 4 Others (2016) Eklr** the court held that;

“.....i don’t think that an application can be defeated just because it has cited the wrong provisions of the law. The main concern of the court is to do substantive justice as opposed to technical justice. This is why even the Mutunga Rules provide that the courts should give an interpretation of the rules in a manner which furthers the overriding of the court with regard to Article 259(1) of the Constitution. I therefore find that there is nothing wrong in the applicant citing the provisions of the Civil Procedure Rules and Act.”

25. I therefore find that failure to cite the correct provisions of the law cannot by itself defeat the present application.

26. In the end, I uphold the preliminary objection that the application is incompetent and an abuse of the court process as it is trite law that a negative order cannot be stayed. The Notice of Motion dated 29th September, 2021 is hereby struck out with costs to the Respondents.

RULING DATED, READ AND DELIVERED VIRTUALLY AT MAKUENI THIS 27TH DAY OF OCTOBER, 2021

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF

Court Assistant – Kwemboi

Mr. Oluoch for the 4th Respondent

Mr. Kere for the 2nd Respondent

Mr. Muumbi for the Applicant.