



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CIVIL DIVISION

JUDICIAL REVIEW CASE NO. 2 OF 2019

IN THE MATTER OF AN APPLICATION BY

JOHN KIPKORE KOMEN.....APPLICANT

VERSUS

CHIEF MAGISTRATES COURT KITALE.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Introduction

1. The application before me is the Notice of Motion dated 21st February 2019. The application, which was filed under certificate of urgency and brought under *sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order III (sic) rule 1 of the Civil Procedure Rules* prays for orders THAT

1. This application be certified urgent and the same be heard forthwith exparte.

2. Pending the hearing interpartes of this application and pending the hearing of the application for leave dated 12.2.2019, there [be issued] a temporary order restraining the 3rd respondent from disposing of by any means, tampering with, destroying or damaging or otherwise dealing with the forest produce/timber or any part thereof pursuant to a forfeiture order made by the Senior Resident Magistrate on 21.1.2019 in Kitale Chief Magistrate Court Criminal Case number 241 of 2019.

3. Costs be in the cause.

2. The application is supported by the grounds set out on the face thereof and is also anchored in the supporting affidavit sworn on 21st day of February by the applicant. The major ground in support of the application is that after being served with the application dated 12.2.2019, the 3rd respondent, at whom the order sought herein is directed, swore an affidavit stating that the exhibits had been disposed [of]. The applicant thus contends that junior officers of the 3rd respondent had mischievously moved the exhibits to another location with a view to hoodwinking the court that the same had been disposed of.

Responses to the application

3. The 1st, 3rd and 4th respondents filed joint grounds of opposition to the application namely:-

1. The Notice of Motion is incurably defective, incompetent, untenable, frivolous, scandalous, vexatious and devoid of substance while the Supporting Affidavit is full of falsehoods and misrepresentations of facts and law, inconsistent and unsupported conclusions and tailored and stage-managed to unfairly and improperly hoodwink this court.

2. That Order 53 of the Civil Procedure Rules under which the application for leave pending herein was commenced is self-executing provision and does not contemplate an application for injunction and the instant Notice of Motion is merely a grope in the dark.

3. That the instant Notice of Motion fails the test for grant interlocutory injunction as were set out in the case of *Giella versus Cassman Brown Co. Limited (1930) EA 358*: there is no pending prima facie suit with probability of success, no irreparable loss has been demonstrated and balance of convenience tilts against the orders sought.

4. That under the said Order 53 this court is statutorily estopped from entertaining the instant application or applications of this nature as application for leave, which sieves genuine from frivolous claims, remains pending and stay, under the rules, can only be entertained upon grant of leave.

5. That Notice of Motion and order of injunction being sought herein, if they were grantable, cannot be granted in the circumstances herein as injunction is not the most efficacious relief and was overtaken by events as forest produce was disposed on 10.2.2019 and 11.2.2019 by a court order forfeiting the produce to the state.

6. Order 53 is clearly substantive and procedural provision and the instant Notice of Motion is clearly unknown in law, an abuse of court process and flies in the face the Oxygen Principle and cannot be wished away as merely procedural technicality.

4. Though the 2nd Respondent did not file any replying papers, he made an appearance at the hearing of the application and made submissions on points of law. None of the respondents filed replying affidavits.

Background

5. From the supporting affidavit sworn on 21st day of February 2019, the applicant herein filed an application dated 12.2.2019 seeking leave of the court to institute judicial review proceedings in the nature of an order for certiorari to call into the High Court and quash the proceedings and order of the Senior Resident Magistrate made on 21.1.2019 in *Kitale Chief Magistrates Court Criminal Case number 241 of 2019* forfeiting timber/forest produce valued at Kshs.400,000/- belonging to the Exparte Applicant to the state. In that application, the applicant also sought to have the leave granted to operate as a stay of execution of the order of disposal/forfeiture of the said timber/forest produce made in *Kitale Chief Magistrate's court criminal case number 241 of 2019*.

6. On receipt of the application this court ordered the applicant to serve the respondents forthwith for hearing interpartes on 25.3.2019 before Chemitei J, at Kitale High court. The instant application as filed is a reaction to an apparent admission by the 3rd respondent that the timber which had been ordered forfeited to the state had in fact been removed and sold.

Submissions

7. Parties appeared before me on 27th February 2019 and made their oral submissions. Mr. Wanyonyi for the applicant submitted that all that the applicant seeks from this court is a conservatory order aimed at ensuring that the subject matter is preserved pending the hearing of the application dated 12.2.2019. Counsel urged the court to note that the grounds of opposition filed on behalf of the 1st, 3rd and 4th respondents and adopted by the 2nd respondent are misplaced because the application is not seeking an injunctive order against the 3rd respondent. He prayed for the orders.

8. Mr. Odongo, counsel for the 1st, 3rd and 4th respondents vehemently opposed the application. Mr. Omooria, for 2nd respondent supported Mr. Odongo's case and also added that it was needless for the applicant to enjoin the 2nd respondent in this matter.

9. The respondent submitted that the application as filed is not only incompetent but is also incurably defective as the same is unknown under *order 53 of the Civil Procedure Rules*. Reliance in this regard was placed on *Nairobi ELC Miscellaneous Application No. 110 of 2013 Leah Wanjiru Mburu versus The County Government of Kajiado & 2 others*. Counsel also submitted that the instant application is hanging in the air, since admittedly, leave is yet to be granted to the applicant and as such there is no suit in which the application is anchored. Finally, counsel submitted that even if the application were to be seen as an application for injunction, the same cannot succeed because the applicant has not met the conditions for the granting of an interlocutory injunction as set out in the renowned case of *Giella versus Cassman Brown Co. Ltd*. Counsel urged the court to dismiss the application with cost to the respondents.

Issues, Analysis and Determination

10. I have now carefully read and considered the pleadings and the law. The issue that arises for determination is whether the application as filed is merited or not, and in this regard, this court has to consider whether the applicant is seeking an injunctive or conservatory order, and either way whether the order sought can be made in an intended application for judicial review. I say intended because the applicant has admitted that his application for leave to commence judicial review proceedings is yet to be heard and determined.

11. Taking the totality of this case into consideration, I am in agreement with the respondents counsel that the applicant's application is a non-starter, it is incompetent and, in my humble view, an abuse of the court process. I have no doubt in my mind that the applicant has drawn his prayer number 2 in such a way that it does not appear like a prayer for injunction, but it is. The legal position is clear that judicial review proceedings as provided under *Order 53 of the Civil Procedure Rules* belong to a class of their own and do not countenance applications brought under other provisions of the Civil Procedure Act such as *Section 1A, 1B, 3 and 3A*. The case of *Leah Wanjiru Mburu (above)* cited by the respondents' counsel is right on point on this issue.

12. Secondly, even if this application were to be considered as a proper application for injunction, it cannot see the light of day for two reasons: The first reason is that there is no existing suit upon which the application is anchored, and secondly, the applicant has not met the conditions for the granting of interlocutory injunctions as set out in the *Giella versus Cassman Brown Case* (above). Further, the subject matter which the applicant seeks to conserve is admittedly not there, and it being accepted that courts do not issue orders in vain, an order of injunction would serve no purpose in this case.

Conclusion

13. For the foregoing reasons, the applicant's Notice of Motion dated 21st February 2019 has no merit and is accordingly dismissed with costs to the respondents.

14. Orders accordingly.

Ruling delivered, dated and signed in open court here at Kapenguria on this 7th day of March 2019.

RUTH N. SITATI

JUDGE

In the Presence of

M/S Chebet for Wanyonyi for applicant

M/S Kiptoo for Odongo for 1st, 3rd and 4th respondents

M/S Kiptoo for Omooria for 2nd respondent

Mr. W. Juma Court Assistant