REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CIVIL APPLICATION NO. 22 OF 2019

(CORAM: R. E. ABURILI - J.)

JEREMIAH OMOLLO...APPLICANT

VERSUS

KENYA WILDLIFE SERVICE...........................RESPONDENT

RULING

1. This Ruling determines the applicant's application dated 1/10/2019 filed under certificate of urgency by Jeremiah Omollo seeking for orders:

> ***a. Spent;***
>
> ***b. That upon hearing of this application interpates, the learned Honourable Judge be pleased to invoke its inherent powers under Article 165(3) (a)(b)(c)(d) and (6) and (7) of the Constitution of Kenya and direct that the applicants be allowed to file a statement of address to the Hon. Court in Civil Case No. 83 of 2018 at Bondo Law Courts and the Respondent be also allowed to reply to the same within the day of service in confirming to Order 18 Rule 2(3);***
>
> ***c. Costs of this application be in the cause.***

2. The application is predicated on the grounds: That the In charge of the Civil Registry, Bondo Law Courts disallowed the applicant's application and or refused to accept the filing of the same and that such refusal violated the applicant's right to access justice and the right to fair administrative action, and access to justice, right to fair trial, fair hearing and Rule of Natural Justice.

3. That such refusal also violates the applicant's right to participate in his case which was closed in the absence of both parties on 1/8/2019 and is pending judgment on 17/10/2019.

4. That the orders sought are merited and will not in any way embarrass, harass and or prejudice the respondents' interests in the said case as ***they are designed to fill the gaps in the plaintiff's case*** and finally, that he filing of a statement of address will not abuse the process of justice in any way as it will assist the court to dispense with the case expeditiously as required by the Civil Procedure Act.

5. The application is supported by the affidavit sworn by Jeremiah Omollo on 1/10/2019 wherein the applicant narrates by deposing that he is the Plaintiff in Bondo PM CC 83/2018 suing the Defendant **Kenya Wildlife Service** in his capacity as the administrator of the estate of his deceased brother **Richard Anyango Onyango** as per the annexed portion of the plaint dated 27/8/2018.

6. That he testified in the said case which was closed on 23/5/2019 and the same was fixed for defence hearing on 1/8/2019 but that during the said period, he had travelled to Madagascar on 7/7/2019 and on reaching at Antananarivo, he was diagnosed with swine flu and had to be restricted to a Section of **Joseph Ravaohangy Andrianavalova Hospital** between 19th July and 10th August 2019 as shown by his certification annexed.

7. That while in Madagascar, the applicant send a message to counsel for the defendant and called their office to inform them of his predicament so that they could have the case adjourned.

8. That when the applicant returned into the country on 13/8/2019, he called the Civil registry at Bondo Law Courts where he was informed that his case had been closed after both parties failed to attend court on 1/8/2019 and that the same had been fixed for submissions on 30/8/2019.

9. That the applicant made an application for leave to file a statement of address to court as stipulated in **Order 18 Rule 2(3) of the Civil**

procedure Rules on 14/8/2019 but that the Registry declined to accept citing that directions in the file was only for the parties to file submissions which he did file and serve.

10. That on 30/8/2019, the matter came up but he was in hospital for review of his condition hence he approached the court vide an exparte application dated 3/9/2019 which was dismissed. The application annexed sought for orders that the Hon. Magistrate orders the Executive Officer or the Incharge of the Civil Registry Bondo Law Courts to accept the applicant's applicant dated 3/9/2019 to be filed in the matter, be placed before the Duty Magistrate to act on the same but that the said application was dismissed.

11. That the applicant had issues to address the court on hence the refusal to allow his address to the court denied him an opportunity to participate in his case. He therefore pleads with this court to allow him to file his statement of address to the court in accordance with **Order 18 Rule 2(3) of the Civil Procedure Rules** as that will in no way prejudice the Defendant/Respondent's interest.

12. The application which was not opposed by the Respondent despite service of the same upon the Respondent's counsel was argued orally on 15/10/2019. Initially, when the application came up for certification of the urgency on 7/10/2019, I directed the applicant to address the court on 8/10/2019 which he did and he sought and obtained leave of this court to file to this court the order from Bondo PM's court, dismissing his application. I set the application for hearing on 15/10/2019 and directed the applicant to serve the Respondent with the application.

13. When the application came up for hearing interpartes yesterday, the applicant informed this court that he did not obtain the orders dismissing his application before the trial court. He had, however, filed an affidavit of service showing that on 9/10/2019 he served the Respondent's counsel Ms. Siganga & Co. Advocates, with the application dated 1/10/2019 hence I allowed him to proceed with his application.

14. In his oral submissions, the applicant reiterated his prayers sought in the application, his grounds in support and the depositions in his affidavit and urged this court to allow his application to address the subordinate court trying his case, generally, or that the trial court be directed to reopen his said case for him to address the court orally. He also reiterated that judgment in the said case is due on 17/10/2019. There was no prayer for stay of delivery of the judgment as scheduled.

DETERMINATION

15. I have carefully considered the application as presented, the grounds and affidavit in support thereof and the oral submissions in favour of the application dated 1/10/2019.

16. The application's main complaint is that the Registry staff more particularly the Executive Officer and Civil Registry Clerks at Bondo PM's court refused to allow him to file his statement of address generally to the court after his case was closed in his absence and he has explained, quite satisfactorily, the reasons for his failure to attend court on the date when the defence case was scheduled for hearing. However, he states in his affidavit in support of his application that the defendant did not tender any evidence or call any witness on the said hearing date and so the trial court closed the defence case and directed that parties do file written submissions.

17. The applicant also confirms to this court by his own deposition that he filed his written submissions after his bid to file a statement of address under **Order 18 Rule 2(3) of the Civil Procedure Rules** was rejected by the Registry clerks and the Executive Officer and further that despite his efforts to file an application seeking the trial court to compel the Registry to accept his application for leave to address the court generally on his case, that application was dismissed.

18. This court granted the applicant leave to file copy of that Order dismissing his application but as at the time of hearing this application, no such order was forthcoming.

19. **Order 18 Rule 2(3) of the Civil Procedure Rules** stipulates: -

> ***"18 (2) unless the court otherwise orders: -***
>
> ***(1) ………….***
>
> ***(2) ………….***
>
> ***(3) After the party beginning has produced his evidence then, if the other party has not produced and announced that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if the course of his address he cites case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited."***
>
> ***(4) The court may in the discretion limit the time allowed for addresses by the parties or their advocates.***

20. Although the applicant claims that his right to participate in his case, right to access justice, to fair administrative action and fair hearing was violated, I have examined the provisions of **Order 18 Rule 2(3) of the Civil Procedure Rules** and I find the said provisions to be very permissive. The opening statement in **Order 18 Rule (2)(2)** is "*unless the court otherwise orders*". In other words, the court may order that such statement of address to the court generally which amounts to closing speech in **Rule 2(3) of the said Order 18** is not necessary. This is so because an address to the court generally after a party has testified, called all the witnesses that they intended to call and even closed their case, is not another avenue open to a party to adduce additional evidence or to reopen their cases to fill the gaps which may have been left by

the evidence already adduced.

21. The address or speech generally is to tell the court that you have presented your case and evidence, that you have been able to prove that the defendant is liable and that this is the law and if applied to the facts of your case then the law should support your case. The address is intended to generally reconcile the facts, the law and past decisions that support your case, to aid the court in reaching a decision.

22. In other words, an address to the court generally is an oral submission made on the facts and the law. This submission can either be done at the commencement of the hearing by way of opening statement or at the close of one's case especially where the defendant does not tender any evidence, as stipulated in **Order 18 Rule 2(3) of the CPR**.

23. There is no mandatory requirement that a party must make such a statement and for proper case management and expeditious disposal of cases, the court may direct that such address be undertaken by way final submissions at the close of the parties' case.

24. In the instant case, the applicant/plaintiff did not intimate to the court at the close of his case that in the event that the defendant does not tender any evidence, then he wished to address the court generally on his case before the final submissions.

25. Albeit he laments that the defence case was closed in his absence, he also deposes that the defendant never called any witness to testify.

26. That being the case, there is no prejudice occasioned to the applicant since he was accorded an opportunity to file written submissions to reconcile facts of his case and the law to enable the court make a decision.

27. I reiterate that an address generally to the court about one's case is nothing but a submission and not a testimony before the court. Such address does not in any way influence the outcome of one's case. The law is clear that submissions are not a substitute for evidence however well choreographed they may be. The Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> ***"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."***

35. Similarly in **Ngang'a & Another** vs. **Owiti & Another** [**2008] 1KLR (EP) 749**, the Court held that:

> ***"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."***

36. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

37. Similarly in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** the learned Judge-Mwera J expressed himself as follows and I concur:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

28. Thus, where a party has lost out on an opportunity to address the court under **Order 18 Rule 2(3) of the CPR**, the person can still make his final submission at the close of the defence case and in this case, the applicant was accorded such an opportunity and he did file those submissions by his own deposition.

29. The subject suit is due for judgment delivery on 17/10/2019, which is tomorrow. In my humble view, a procedural lapse like the one claimed by the applicant herein cannot and does not amount to breach of or violation of the constitutional provisions or one's fundamental rights guaranteed in **Articles 47, 48 and 50 of the Constitution** on fair administrative action, access to justice and or fair hearing. It would be stretching the Constitution and the rights guaranteed in the Bill of Rights too far if the court were to make such a determination and invoke its constitutional supervisory jurisdiction espoused in **Articles 165 (3) a, b, c, d, (6) and (7) of the Constitution** to interfere with the independence of decision making by subordinate courts in their exercise of their judicial functions.

30. There are situations when this court may call for the trial court's records for examination to satisfy itself as to the propriety of the proceedings thereof but that power which includes the power of judicial review should never be invoked for purposes of policing and or monitoring the proceedings in the magistrate's courts, or interfering with exercise of judicial discretion of the subordinate courts, where such discretion is not proved to have been exercised injudiciously.

31. The words, "***unless the court otherwise orders",*** give discretion to the trial court in proceedings to either allow the general address to the court on the case or not and where such failure to allow the address would not prejudice the party especially where the party has an opportunity as was the applicant herein, to file written submissions and quantify his claim for general damages, I find no prejudice or miscarriage of justice occasioned to the applicant.

32. The applicant's right to be heard had been exercised through evidence that he tendered, which are not to be substituted with an address under **Order 18 Rule 2(3) of the CPR**. Furthermore, the intention of **Order 18 of the Civil Procedure Rules** was not to upset the natural order of things. The principle is still the same that he who alleges merit must prove. (Section 107 of the Evidence Act). The fact that a party has not addressed the court generally on their case does not prejudice them as the applicant would wish this court to believe since his right to be heard had been exercised and he even had the opportunity to wrap up his case by way of written submissions before the case was reserved for judgment which is due for 17/10/2019.

33. This court is therefore unable to recall the judgment reserved by the subordinate court as that would in essence be tantamount to interfering with the judicial independence of the subordinate court.

34. Furthermore, as the case was heard by way of viva voce evidence, the trial court is under a duty to render a judgment based on the evidence adduced and not on addresses generally or on submissions. Even where submission are filed in a case, the court is duty bound to assess the evidence, look out for the law applicable, apply it and reach a determination and give reasons for such determination.

35. One's case should never be dismissed merely because they failed to file final submissions or to address the court.

36. In addition, the applicant claims that the court dismissed his application to direct the Executive Officer or Registry to admit his application to seek leave to address the court under Order 18 Rule 2(3). This court gave the applicant an opportunity to annex such order of dismissal but he never availed it.

37. Even if he were to avail such order, the question is why he did not challenge such order on appeal and instead filed this application? Unless reversed, that order of dismissal still stands although this court was not informed of the reasons for such dismissal.

38. Further, albeit the defendants in the lower court are named as Respondents herein in a matter which is not an appeal, in my view, the right party in these proceedings would have been the applicant versus the magistrate's court or Executive Officer, Bondo Law Courts and not the Respondent herein as there is no cause of action disclosed in these proceedings against the Respondents to warrant invocation of **Article 165(3), (6) and (7) of the Constitution** against the Respondent/ defendant in the subordinate court.

39. For all the above reasons, I find and hold that this application is an abuse of court process, is frivolous, vexatious and waste of precious judicial time. The same is hereby dismissed.

40. The Respondents did not bother to challenge this frivolous application; I make no orders as to costs. This file is closed.

Dated, signed and Delivered at Siaya this 16th day of October, 2019

R.E. ABURILI

JUDGE

Delivered in open court in the absence of the applicant.

CA: Brenda and Modestar