



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 184 OF 2019

WYCLIFFE INDALU.....1ST PLAINTIFF/APPLICANT

JAIRO WILLIS.....2ND PLAINTIFF/APPLICANT

CAMP TOYOYO P.M.C.....3RD PLAINTIFF/APPLICANT

VERSUS

DIRECTORATE OF

CRIMINAL INVESTIGATIONS.....1ST DEFENDANT/RESPONDENT

NAIROBI COUNTY GOVERNMENT.....2ND DEFENDANT/RESPONDENT

RULING

1. The Amended Notice of the Preliminary Objection dated 4th September, 2019 objects to the Notice of Motion dated 28th August, 2019 on the following grounds:

“(a) This Honourable Court being a Civil Division Court has no jurisdiction to adjudicate on any aspect of the claim of, or concerning land known as Jericho Sports Grounds AKA Camp Toyoyo by operation of Article 162(2) (b) of the Constitution of Kenya, as read with Section 13 of the Environment and Land Court Act, 2012 in respect of its occupation as now claimed.

(b) The alleged Camp Toyoyo P.M.C. (Plaintiff) does not exist, and no evidence of its existence under the Societies Act Cap 108 has been demonstrated.

(c) Notwithstanding the foregoing Objection, this suit is barred by operation of Section 6 of the Civil Procedure Act on account of HCJR No. 176 of 2018.”

2. The Notice of Preliminary Objection by the 1st Respondent dated 18th September, 2019 raises the following grounds:

“1.This court has no jurisdiction to issue orders restraining the 1st Respondent in exercise of its statutory duties of summoning the Plaintiffs for purposes of investigations into alleged criminal offences, as stipulated in Section 16 of the Government Proceedings Act and Article 245 (4) (a) of the Constitution of Kenya, 2010.

2. That the Plaintiffs’ suit against the 1st Respondent is a non-starter noting that the 1st Respondent performs public duties and the Plaintiffs ought to have applied for judicial review orders rather than moving the court under its civil jurisdiction.

3. The allegations leveled against the 1st Respondent of intimidating, harassing or interfering with the Plaintiffs and members of the management of Camp Toyoyo Stadium are vague.

4. That the Plaintiffs’ suit is an abuse of court process and ought to be dismissed.”

3. The background to the Preliminary Objections is the application dated 28th August, 2019 which essentially seeks orders restraining the 1 and 2nd Respondents from summoning, intimidating, harassing or interfering with the Applicants and members of the management of Camp Toyoyo Stadium pending the hearing of the suit herein. Secondly, that the Respondents be restrained from interfering with the 3rd Applicant's possession and management of Jericho Sports Ground pending the hearing and determination of the suit. The application is anchored on the plaint herein dated 28th August, 2019 which seeks similar orders on a permanent basis.

4. I have considered the rival submissions by counsel for the respective parties.

5. I will deal first with the issue whether this court has the jurisdiction to entertain the suit herein. As encapsulated in the case of **The Owners of Motor Vessel "Lillian s" v Caltex Oil Kenya Ltd [1989] KLR 1** thus:-

"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

6. The plaint clearly states that the dispute involves the management and leadership of the 3rd Plaintiff which is described as a Community Based Organization registered under the Societies Act, Cap 108 Laws of Kenya and charged with the management of Camp Toyoyo Stadium. This is not a dispute in relation to the environment, use, and occupation of and title to land as envisaged under Article 162(2)(b) of the Constitution of Kenya. This court is therefore clothed with the requisite jurisdiction to hear this case.

7. On whether the 3rd Plaintiff has the legal capacity to sue, it is noted that the 3rd Plaintiff is described in the plaint as a Community Based Organization duly registered under the Societies Act Cap 108 of the Law of Kenya.

8. The 3rd Plaintiff Society is not incorporated and has no powers to sue or be sued in it's names and this can only be done through it's registered officials or trustees (See for example case of **Phares Omondi Okech & 3 others (suing for and on behalf of Kasgam Community – Wadhari Clan) v Victory Construction Co. Ltd & Kisumu Water & another [2015] eKLR.**)

9. It has been argued that this case is *res judicata*. That is not the correct position. As encapsulated in the case of **Republic v Commissioner of Mines & Geology Exparte Kutima Investments Limited & 2 Others [2013]eKLR:**

"...whether or not the doctrine of *res judicata* applies to judicial review is moot. *Res Judicata*, strictly speaking is provided under section 7 of the Civil Procedure Act which in the preamble to the Act is "An Act of Parliament to make provision for procedure in civil courts". However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See Commissioner of Lands v Kunste Hotels Ltd (1995-1998) 1 EA 1. In the Commissioner of Lands v Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation prison [2007] 1 EA 354 it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Therefore strictly speaking section 7 of the Civil Procedure Act does not apply to judicial review proceedings. In fact in Republic v Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that *res judicata* does not apply to judicial review. See also Re: National Hospital Insurance Fund Act and Central Organization of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47."

10. Section 16 (1)(i)of the Government Proceedings Act Cap 40 Laws of Kenya provides as follows:

(1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that

(i) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;

11. The 1st Defendant is an officer of the Government while the 2nd Defendant is the County Government. It therefore follows that no order of injunction can issue against the Defendants.

12. Article 245 (4)(a) of the Constitution of Kenya.

"The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-

(a) The investigation of any particular offence or offences;"

Consequently, the 1st Defendant has the power to lawfully carry out investigations without interference.

13. In the upshot, the holding of this court is that the Preliminary Objections have merits. Consequently, the application dated 28th August, 2019 is hereby struck out with costs.

Dated, signed and delivered at Nairobi this 5th day of Nov., 2019

B.THURANIRA JADEN

JUDGE