



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE JR NO. 7 OF 2019**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION CERTIORARI**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE NOTICE TO CLOSE HOSPITAL CANTEEN DATED 15<sup>TH</sup> JANUARY, 2019**

**BY THE CHIEF ADMINISTRATOR COAST PROVINCE GENERAL HOSPITAL**

**AND**

**IN THE MATTER OF: ARTICLE 10, 40 AND 47 OF CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: COUNTY GOVERNMENT OF MOMBASA, MINISTRY OF HEALTH**

**AND**

**IN THE MATTER OF: A JUDICIAL REVIEW APPLICATION BY**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**- VERSUS -**

**CHIEF ADMINISTRATOR COAST PROVINCE GENERAL HOSPITAL.....RESPONDENT**

**AND**

**BILLY WANJALA AND ELIZABETH WANJALA BOTH T/A**

**BLUEWAVE INVESTMENTS..... EX-PARTE APPLICANT**

**RULING**

1. The Respondent herein raised a Preliminary Objection dated 26<sup>th</sup> June 2019 stating that;

**a. That the honourable Court lacks jurisdiction to entertain the notice of motion dated 28/3/2019.**

2. Mr. Tajbhai learned Counsel for the Respondent submitted that the substantive motion was filed in the High Court while the Applicant

was aware that this matter had been transferred to the Environment and Land Court. He contends that this court lacks jurisdiction to entertain the substantive motion as it would make the Court look awkward if it gave the orders being sought. He relied on the following decisions;

**i. Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 others (2013) eKLR.**

**ii. R Vs Public Procurement Administrative Review Board & Ano exparte MER Security and Communications Systems Ltd/Megason Electronics & Control 1978 (JV) & Ano, NBI HCJR Application no 180 of 2018**

3. Miss Murage learned Counsel for the Applicant opposed the preliminary objection by stating that although the substantive motion was filed in the High Court, it had been placed in this file and given same number. That the objection is more of a procedural technicality curable by Article 159 (2) (d) of the Constitution. Miss Murage submitted that the Respondent has not stated what prejudice it will suffer. It is her further submission that the Case of Nicholas Kiptoo *supra* at page 4 supports their Case while the MER Security Case is totally irrelevant. She urged the Court to dismiss the objection.

4. In reply, Mr. Tajbhai submitted that pg 4 of the Nicholas Kiptoo Case is just a preview and he referred the Court to pg 11 of the same Case. In the MER Security Case, he stressed the holding at pg 9. Lastly Mr. Tajbhai cited provision of Order 3 r.3(1) of the Civil Procedure Act in urging the Court to strike out the motion.

5. The suit herein was initially filed in the High Court. On 28/3/2019, the High Court transferred the file to the Environment and Land Court which on the same date I granted the Applicant leave *exparte* to file a substantive motion seeking the judicial review orders. Subsequently, the Applicant prepared the substantive application which was headed and stamped **"H.C. Constitutional and Judicial Review Division"** on 16<sup>th</sup> April 2019. The application was however placed in the present file after filing. It is this manner of heading and where the application was received as filed that the Respondent took issue with.

6. The Respondent referred this Court to page 11 of the Nicholas Kiptoo Case where the Court of Appeal stated thus;

**"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

AND page 9 of MER security Case where Mativo observed thus, **"58. Article 159(2) (d) of the Constitution of Kenya 2010 enjoins Courts to determine cases without undue regard to technicalities. I must however point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010 are couched in Mandatory terms. The Applicant cannot seek refuge under Article 159 (2) (d) of the Constitution under the present circumstances in view of the mandatory and express provisions cited above."**

7. Although the Applicant extracted the order under the Environment and Land Court, they still proceeded to prepare their pleadings heading it as the High Court. There is no file existing in the High Court Constitutional and Judicial Review division between the same parties as the High Court file has been transferred to this Court. Similarly, although the substantive application is headed **"High Court"**, it has been placed in the file (Environment and Land Court) and the Respondent has replied to it by filing grounds of opposition. In my view, the confusion may have been occasioned due to the fact the first filing was done in the High Court before the transfer to this Court.

8. In the **Nicholas Kiptoo Case**, the fault concerned the issue service of notice of appeal while in the **MER Security Case**, the Applicant filed the substantive notice of motion 5 days after the expiry of the 21 days. In my opinion and I so hold, the omission in the two cited Cases were quite grave in light of the provisions of the applicable rules and cannot be compared to the omission in this matter which can be corrected by amendment. Thus I find no basis to strike out the application as I am being urged to.

9. In light of the fact that the error can be cured by amendment if deemed necessary and that no prejudice will be occasioned to the Respondent, I find no merit in the preliminary objection dated 26/6/2019. It is hereby dismissed with no order on costs.

**Dated, signed and delivered at BUSIA this 12<sup>th</sup> day of May, 2020.**

**A. OMOLLO**

**JUDGE**

**Judgment delivered electronically through mail this 12<sup>th</sup> Day of May, 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**