



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISC. APPLICATION NO. 13 OF 2019

JOSEPH KARIMI MURIUKI.....APPLICANT

VERSUS

STEPHEN AURELIUS GACHUA.....1ST RESPONDENT

MARTIN KANGI GACITUA.....2ND RESPONDENT

GILLIAN WANJA NGARI.....3RD RESPONDENT

FAMILY BANK MANAGER, MURANGA BRANCH.....4TH RESPONDENT

RULING

This is a ruling on a Preliminary Objection dated 21st January 2020 which reads as follows:

“TAKE NOTICE that the 2nd and 3rd respondents shall at the earliest opportunity before the hearing of this matter raise a Preliminary Objection to the hearing of the Chamber Summons filed under certificate of urgency dated 12th November 2019 by this Honourable Court on the following grounds:

- 1. That the applicant’s Chamber Summons is a non-starter, incompetent and improperly before the Court.***
- 2. The applicant’s Chamber Summons is a sham, bad in law and the orders sought therein are incapable of being granted by this Honourable Court.***
- 3. That the Honourable Court lacks in locus to entertain this matter as filed”.***

The gist of this case is that by a Notice of Motion dated 11th September 2019 brought under certificate of urgency which sought the following orders:

- (1) This Honourable Court may be pleased to call the case file No. ELC No. 39 of 2018 at Kerugoya Law Courts being handled by magistrates who have been issuing contradictory orders to the effect that those orders are aimed at undermining justice on the part of the applicant.***
- (2) That this Honourable Court may be pleased to hear and/or supervise this case under Article 165 (6) of the Constitution of Kenya and the magistrate to be stopped from issuing those contradictory orders that are adversely affecting the properties and life of the applicant on the parcel No. MWERUA/MUKURE/2130 which is subject matter in the said case.***
- (3) The costs of this application be provided for.***

When the matter came up for hearing, the parties agreed to have the Preliminary Objection heard first by way of written submissions.

RESPONDENTS SUBMISSIONS

The respondents did not file submissions within the time lines given by the Court.

APPLICANT'S SUBMISSIONS

The applicant who is acting in person stated that in dealing with the Preliminary Objection raised by the respondents, the Court ought to consider the drastic nature before accepting the said Preliminary Objections. He stated that while enforcing rules of procedure, the Court ought to consider doing substantive justice to the parties and not lose sight of the bigger picture which is to render justice without undue regard to procedural technicalities. The applicant further stated that even though procedural rules are tools designed to facilitate adjudication of disputes, they ensure orderly management of cases that the Court in some instances may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances.

ANALYSIS AND DISPOSITION

I have considered the Notice of Preliminary Objection dated 21st January 2020 and the submissions by the applicant. I have also considered the applicable law. The law provides only three ways in which person can institute a claim, that is to wit:-

(a) A plaint.

(b) Originating Summons (O.S)

(c) Notice of Motion and

(d) Petition.

The applicant has commenced this suit by way of Miscellaneous application seeking the following orders:-

1. This Honourable Court may be pleased to call the case file No. ELC No. 39 of 2018 at Kerugoya Law Courts being handled by magistrates who have been issuing contradicting orders to the effect that those orders are aimed at undermining justice on the part of the applicant.

2. That this Honourable Court may be pleased to hear and/or supervise this case under Article 165 (6) of the Constitution of Kenya and the magistrate to be stopped from issuing those contradicting orders that are adversely affecting the properties and life of the applicant on the parcel No. MWERUA/MUKURE/2130 which is subject matter in the said case.

3. The cost of this application be provided for.

The applicant has not cited the provisions of the law under which the orders can be granted. The applicant has annexed numerous proceedings and orders in respect of cases pending other Courts being CMCC No. 39 of 2018 (Kerugoya) ELC Case No. 312 of 2011 (Milimani) and Criminal Case No. 372/2018 (Kerugoya). The applicant in his application is seeking an order to call a file which is pending before the Magistrate's Court being CMCC No. 39/2018 for hearing and/or supervising under *Article 165(6) of the Constitution of Kenya 2010. Article 165(6) of the Constitution* provides as follows:

"The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a Judicial or Quasi-Judicial function, but not over a superior Court".

The supervisory function contemplated by the Constitution over the subordinate Courts is not the nature of policing them in the performance of their duties. The supervisory power given to the High Court and Courts of equal status under **Article 165 (6)** is in the nature of Appeal under **Section 78 CPA**. An appellate Court has no juridical power to either reverse or vary or even remand a decree on account of any misjoinder of parties or any error, defect or irregularity in any proceedings in the suit as provided for under **Section 79A** which states as follows:

"No decree shall be reversed or substantially varied, nor shall any cause be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defeat or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Courts".

Again **Section 79B of the Civil Procedure** provides as follows:

"Before an appeal from a subordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding Section 79C, reject the appeal summarily".

The procedural aspect of the law is found in **Order 42 CPR** which provides as follows:

"(1) Every appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleader.

(2) The Memorandum of Appeal shall at forth concisely and under distinct head the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively".

The law provides appeal as the only avenue where a party who is aggrieved by a decree and/or order in the subordinate Court may challenge in the High Court. If I understand the orders sought by the applicant properly, he is seeking revision orders akin to **Section 362 of the Criminal Procedure Code** which provides as follows

“The High Court may call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court”.

This Court has no such juridical powers as donated to the High Court determining criminal cases. It is therefore clear in my mind that the powers of revision under **Section 362 of the Criminal Procedure Code** are not available in the High Court and Courts of equal status determining civil cases. For all the reasons given, I find the Preliminary Objection merited and the same is hereby upheld. The upshot of my finding is that the Chamber Summons dated 12th November 2019 is incompetent and improperly before the Court and the same is hereby struck out with no order as to costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 12th day of June, 2020.

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E.C. CHERONO

ELC COURT

In the presence of:

1. Plaintiff/Applicant – present
2. Ms Wambui holding brief for Mr. Muchira for Respondents
3. Mbogo – Court clerk.