



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW MISC. NO. 27 OF 2014

REPUBLIC.....APPLICANT

VERSUS

ABDULLAHI JALDESA BAN.....1ST RESPONDENT

HASSAN GONJOBE.....2ND RESPONDENT

FATUMA HALAKE.....3RD RESPONDENT

STANLEY RATANYA.....4TH RESPONDENT

BEN MACHARI.....5TH RESPONDENT

CONSTITUENCY DEVELOPMENT FUND BOARD...6TH RESPONDENT

ADAN TURO.....EXPARTE APPLICANT

RULING

1. The ex parte applicant through chamber summons dated 25th August, 2014 brought pursuant to Order 53 Rule 1(I) and (2) of Civil Procedure Rules sought leave to apply for Judicial Review for orders of Certiorari to remove to this court and quash the decision of the Constituency Development Fund Committee removing the applicant as chairman of the said committee. The applicant sought leave granted to operate as stay. The court granted leave to apply for Judicial Review orders of Certiorari on 27/08/2014 but directed that the application to operate as stay be served for hearing on 3rd September, 2014. The court further directed the substantive notice of motion be filed within 21 days from 27th August, 2014.
2. The respondents were served with the application on undisclosed dated. They immediately filed notice of appointment of advocate through the firm of M/S Basilio Gitonga Advocates and Associates on 28th August, 2014 and filed notice of preliminary objection dated 28th August, 2014. The court record does not show what happened on 3rd September, 2014 but the matter was on 9th September, 2014 set down for hearing of the preliminary objection on 16th October, 2014.
3. The Notice of Preliminary Objection raises four grounds as follows:-
 1. ***The application as presented violates the express provisions of Order 53 Rule 7 (I) of the Civil Procedure Rules 2010.***

2. ***The application is wrongly titled.***
3. ***The application as presented contravenes the express provisions of Section 49 (I) & (3) of the Constituency Development Fund Act 2013.***
4. ***The Honourable Court lacks jurisdiction to entertain the application as a forum of first instance.***

When the matter came for hearing the counsel for the respondents Mr. Murithi argued all the four(4) grounds whereas Mr. Muthomi holding brief for Mr. Baithambu, Advocate stated his instructions were limited to seeking adjournment and as such he was not in a position to submit on the preliminary objection.

4. The issue for consideration is whether the preliminary objection is merited. I have very carefully considered the pleadings before the court in light of the preliminary objection. It should be noted under Order 53 Rule 3(I) of Civil Procedure Rules it is provided:-

1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

The ex parte applicant obtained leave on 27/08/2014 and the Notice of Motion ought to have been filed by 17th September, 2014. The Notice of Motion has not been filed to date and as such there is no matter pending before this court for consideration however, it should be noted that the preliminary objection was filed before the expiry of 21 days period as the ex-parte applicant did not during the pending period of 21 days seek to have the intended motion marked as abandoned forcing the preliminary objection to be set down for hearing. The issues raised in the preliminary objection are weighty however in view of there being no Notice of Motion filed to date and the application dated 25th August, 2014 having been spent; I need not go to the merits and demerits of the preliminary objection as it would only be an academic exercise. In view of there being no Notice of Motion, the preliminary objection was necessitated by ex-parte applicant's insistence on leave so granted to operate as stay and I find it was merited to be filed but as I have stated I won't go into its merit. It can safely be said the ex-parte applicant has abandoned filing of the substantive motion and he is the one who caused the respondents to file their preliminary objection and as such I find that they are entitled to costs in pursuing the ex-parte applicant's aborted application.

5. In view of the foregoing and in absence of the substantive motion, the preliminary objection is termed as pre-mature but justified and for those reasons the respondents shall get half cost of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2014

J. A. MAKAU

JUDGE

Delivered in open court in presence of:-

1. Mr. Baithambu for ex-parte applicant
2. Mr. Murithi for the Respondents

J. A. MAKAU

JUDGE