



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTIONAL APPLICATION NO. 10 OF 2010

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(6) & (7) OF THE
CONSTITUTION OF KENYA, 2010**

BETWEEN

HON. ERASTUS KIHARA

MUREITHI.....APPLICANT

VERSUS

JOSPHAT NJOROGE RAGI.....1ST RESPONDENT

**LUCY WAMUYU KIBOI.....2ND
RESPONDENT**

**VERONICAH WAITHIRA THUO.....3RD
RESPONDENT**

***(In their capacity as Chairman, Secretary and Treasurer respectively of THE CHAMUKA
DISPENSARY)***

RULING

By an Originating Notice of Motion dated and filed on the 14th October 2010 the Applicant sought four

orders, namely -

- (a) that this court do call for the record of proceedings in civil case No. 117 of 2010 pending before the Principal Magistrate's Court at Nyahururu.*
- (b) that the court do set aside, vary, vacate and/or wholly discharge the orders given on 14th September 2010 by the Principal Magistrate's Court at Nyahururu in Civil Case No. 117 of 2010.*
- (c) any order that this court considers appropriate to ensure the fair administration of justice in the adjudication of the dispute in Civil Case No. 117 of 2010 pending before the Principal Magistrate's Court at Nyahururu.*

The Motion was supported by the Affidavit of the Hon. Erastus Kihara Mureithi, sworn on the 14th day of October 2010 and the following grounds -

- (a) It is essential and necessary to conserve the subject matter of these proceedings, pending the exercise of the supervisory jurisdiction of this Honourable Court.
- (b) the proceedings in the subordinate court are scheduled to resume on 26th October 2010.
- (c) the Applicant is apprehensive of being accused of being in contempt of court for failure to comply with an order which is incapable of being complied with by the Applicant in his personal capacity.
- (d) the subordinate court lacks jurisdiction to punish for contempt of court.
- (e) the subordinate court disregarded mandatory provisions of the Constituencies Development Fund Act ("the CDF Act") regarding resolution of disputes and complaints.
- (e) the subordinate court disregarded mandatory provisions of the CDF Act governing administration and disbursement of Constituency Development Fund and management of CDF Projects by Project Committees.
- (g) the subordinate court issued orders which were not sought either in the main suit or any of the interlocutory applications.
- (h) the subordinate court issued final orders at an interlocutory stage.
- (i) the subordinate court compromised and subverted the fair administration of justice by ignoring written laws governing the subject matter.
- (j) the conduct of the proceedings by the subordinate court calls for the invocation of the supervisory jurisdiction of this Honourable Court to ensure fair dispensation and administration of justice in accordance with the law and not personal whims or idiosyncrasies.

The grounds, and the matters set out in the Supporting Affidavit of the Applicant were reiterated by Mr. Kilukumi learned counsel for the Applicant when this matter was heard before me on 2nd December, 2010. Mr. Kilukumi also relied on the various cases to which I shall make reference in the course of this Ruling.

The Applicant's case is that the learned trial magistrate erred in its Ruling of 14th September 2010 directing the Applicant **"to give funds required to complete the project in question on priority basis from the Constituency Development kitty"** so that **"the plaintiff committee continues with their work to conclusion."** To appreciate the origin of both the application herein and the orders of the lower court it is necessary to give some background to both the lower court's ruling, and therefore this application herein.

The Facts

The Applicant herein is the Hon. Member of Parliament for O'IKalou Constituency. He was sued in that capacity in Civil Suit No. 117 of 2010 in the Principal Magistrate's Court at Nyahururu. The Plaintiffs in that suit were, the CHAMUKA DISPENSARY suing members of its Executive Committee JOSPHAT NJOROGI RAGI - Chairman, LUCY WAMUYU KIBOI - Secretary, and VERONICA WAITHIRA THUO - Treasurer (*hereinafter collectively referred to as the Respondents*). In their suit, the Respondent's prayers for the following orders -

(a) *A declaration that the Plaintiff's Committee members elected in the year 2006 are validly and legally in office unless otherwise removed through due process of the law;*

(b) *that a permanent order of injunction do issue restraining the Respondent (the Applicant now), the Hon. Erastus Kihara Mureithi who is the Member of Parliament of O'IKalou Constituency by himself, his agents, servants, employees or anybody claiming in or under his name from in whatever manner interfering, with the applicant's work, management and development within Plot No. 8 O'ljoro-orok Township unless otherwise decided by the concerned communities of Weru Ol joro-orok, Gathanji and Gatimu Locations (Wards) who put them into office,*

(c) *Costs of the suit and interest,*

(d) *any other or further relief that the court may deem fit and just to grant.*

Together with the plaint, the Respondents also filed a Chamber Summons dated 3rd May 2010 seeking temporary orders, in terms of prayer (b) of the Plaint, to restrain the Applicant from interfering in any manner whatsoever, whether by himself or his agents, with the Respondents project - pending the determination of their suit.

Ex parte orders were issued on 4th May 2010 restraining the Applicant from interfering with the Respondents office work, management and development under the said Plot No. 81, Ol joro-orok Township, and the matter was set for hearing inter partes on 11th May 2010.

However on the 7th May 2010, a further motion was filed by the Applicants Counsel, Mr. Ndegwa Wahome under a Certificate of Urgency for committal of the Applicant to jail for 6 months allegedly for breaching the restraining orders issued on 4th May 2010, on the ground that the Applicant's agents had on 5th May 2010 taken over the Management of the Chamka Dispensary with aid of the Provincial Administration.

That application was heard inter partes on 20th and 21st May 2010, and orders for contempt of court were made against the Applicant, to purge the contempt by "**removing the padlocks which he had put in the suit premises**", and further orders were granted -

Ø *that defendant/respondent gives the funds to complete the project in question on priority basis from the Constituency Development Fund;*

Ø *that the Committee continues in office with their work until completion;*

Ø *the court order was consequential that the Defendant/Respondent pays the costs of the application.*

The above orders were issued on 27th September 2010, with a penal notice, and since the Applicant was represented through the firm of Kabiru & Co. Advocates, the Applicant was made aware of the orders, as there is no indication that the Applicant was personally served as these (*contempt of court proceedings*), are quasi-criminal in nature. However be it as it may the matter was overtaken by the Applicant's filing the Motion - the subject of this Ruling, and the grant of conservatory orders on 15th October 2010, and by the purported purging of the contempt on 15th May 2010 by the District Commissioner and the return of the Respondents as committee members of Chamuka Dispensary.

The first question to be determined is whether the Applicant was in contempt of any order issued by the lower court.

From the above analysis of facts, the Applicant was not in contempt of any court order. I say so because the take over of the Chamuka Dispensary was done by duly elected officials of the Community - **Josphat Itaba Chege**, (Chairman), **Tamaru Wanjiku Gachegu** (Treasurer), and **Simon Macharia** Location CFF-Secretary) which took over the facility on 5th May 2010. There is no evidence on record that either these officials, or others - Teresia Nzioki - CDF Secretary Francis Ndungu - member, Leah Muriuki - Member, or members of the security, or the Chief of Oljoro-orok Location or the DO Oljoro-orok Division are servants or agents of the Applicant. There was no basis for attributing their acts or takeover of the project to the Applicant. In any event, this group was elected on 29th March 2010, a matter the respondents throughout the proceedings in the lower court, refused to disclose. Again there is no basis for suggesting these members were or are agents or servants of the Applicant. The Applicant depones in his Affidavit of 12th May 2010, in support of the Chamber Summons of 17th May 2010 to vary and/or set aside the order of 4th May 2010, depones in para. 9(1) thereof -

9(1) "that due to the public outcry and disaffection by the community around where the Chamuka Dispensary is situate, the community elected a new project management committee."

There is no answer or reply to this contention by the Respondents in all their subsequent affidavits particularly those of their leader Mr. Josphat N. Ragi.

The answer to the above question must be that the Applicant was not in contempt of any order of 4th May 2010, and the orders of contempt issued against him on 14th September 2010 had no basis either in law or fact.

The second question is whether the applicant can be compelled to give funds required to complete the project in question on priority basis (*or otherwise*) from the Constituency Development Fund.

There are two answers to this question. The simple answer is that the Applicant cannot be compelled to give funds on priority or otherwise to the project. This is because he does not control or dish out Constituency Development Funds as he wishes. He too must follow procedure or process of obtaining those funds, and even when those funds are within the Constituency he cannot write a cheque or order the CDF Development Committee to issue a cheque for Chamuka Dispensary Project. Procedure must be followed. That procedure is laid down in Section 23(1) of the Constituency Development Fund Act (the CDF Act). This section provides for the convening and constitution of the Constituency Development Fund Committee (CDFC) by the sitting Member of Parliament who is its chair unless he opts out. A member of Parliament is not the CDFC and cannot in my opinion be sued on its behalf nor be expected to perform the functions of the CDFC.

Further, Section 23(4) gives the Constituency Development Fund Committee (CDFC) or (the Committee), the mandate of annually identifying and prioritizing proposals for funding within the Constituency and forwarding them to the CDF Board for consideration and approval. Section 17 of the Act further expressly gives the Constituency Development Fund Committee the responsibility and sole discretion of allocating funds to the projects once the project proposals have been approved by the Constituency Development Fund Board - established under Section 5 of the CDF Act.

Section 30 of the CDF Act establishes the Project Management Committee which is charged with project implementation. The Act empowers the community, which is not enjoined in this suit, to elect the Project Management Committee officials to manage their project or projects. Section 35 provides that projects instituted by the community shall be eligible for support under the Act provided such projects are submitted with other projects in conformity with the requirements of the Act.

Section 6 of the Act requires that all project proposals be forwarded to the CDF Board for consideration and approval. It is only after the Board has approved proposals for funding, that project funds can be disbursed to the projects through the CDFC and the project funding is limited to the amount approved by the Board. When considering a project proposal, the Board looks at various issues including compliance with the provisions of the Act and any pending audit queries. In this particular case, there was a pending query by the **Kenya National Audit Office (KENAO)**.

In summary the identification of project proposals for funding is vested in the Constituency Development Fund Committee (CDFC), while approval of the project and disbursement of funds is the mandate of the CDF Board. Neither the CDF Board nor the Constituency Development Committee, are parties to the suit. The court order seeks to compel the Applicant to do what he has no authority to do, especially the order the applicant **gives funds required to complete the project on priority basis from the Constituency Development Fund Board.**"

This I regret to say shows abysmal lack of knowledge and disinterest among the Respondents and their advisers on the requirements and procedures of the CDF Act. It also shows reckless abandon on the part of the lower court to make orders without proper inquiry into the law applicable and requirements of that law.

The second answer to the question whether the applicant can be compelled to give funds to the Chamuka Dispensary on priority, lies in the fact that this order did not constitute part of the prayers for contempt of court. Under Order 39 rule 2A (1)(2) and 3 of the Civil Procedure Rules and sought in the Notice of Motion of 7th May 2010. It is an elementary rule of both substantive and procedural law that only prayers sought may be granted or as the case may be, denied. This prayer was not sought or prayed for in the

Notice of Motion, and could not be conjured up by the court. This observation equally applies to the order that the "**plaintiff committee continues in office with their work to conclusion**". There was no basis for this prayer too. The new committee under Joseph Ikabu Chege and his team elected on 29/03/2010 well before the orders of 4th May 2010 were granted, were deliberately, I think, not enjoined in the suit. They and not the Respondents are the proper representatives of the project communities until their election is set aside by further election. I think they cannot be removed by the court's sneaking its orders which were not sought and canvassed.

Having come to the conclusion that the learned trial Senior Resident Magistrate had no basis for making the orders of 14th September 2010, I refrain from commenting further or discussing the larger question of contempt of court, except to say that jurisdiction for contempt is to be exercised solely by the High Court under Section 5 of the Judicature Act - as it provides for **upholding the authority and dignity of the subordinate courts.**"

Lastly is the question of what orders I should make in this matter. The Originating Notice of Motion is founded upon the provisions of Article 165 (6) & (7) of the Constitution of the Second Republic, Article 19 of the Sixth Schedule thereof read together with Rule 2 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual)** High Court Practice and Procedure Rules, (*the Gicheru Rules*) the inherent jurisdiction and all other enabling powers and provisions of the law.

Article 19 of the Sixth Schedule of the Constitution is a procedural provision which re-enacts the provisions of Section 84(6) of the repealed Constitution and reiterates the application of the "**Gicheru Rules**" on the procedure for instituting applications on supervisory jurisdiction and enforcement of fundamental rights and freedoms.

Article 165 (6) and (7) of the Constitution reiterates but expands Section 65(2), (*High Court's Supervisory jurisdiction over subordinate courts*) and Section 84(2) (*enforcement of protective provisions - fundamental rights and freedoms*) of the repealed Constitution. Article 165 of the new Constitution confers upon the High Court supervisory jurisdiction over subordinate courts and **over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

And Article 165(7) provides that for purposes of sub-article 6, the High Court is conferred with power to call for the record of any proceedings before any subordinate court or person, body or authority, referred to in sub-article (6), and make any order or give any direction it considers appropriate to ensure administration of justice.

I have examined the record of proceedings in Nyahururu Principal Magistrate's Court Civil Case Number 117 of 2010. I have also as outlined above examined the orders made by the learned Senior Resident Magistrate, and as I have stated in the earlier passages of this Ruling stated and reiterate that it is a cardinal rule of procedural law that a court of law may only grant orders prayed in the pleadings before it.

In the case of **KAMLESH MANSUKHLAL DAMJI PATTNI VS. NASIR IBRAHIM ALI DINKY INTERNATIONAL S.A., WORLD DUTY FREE COMPANY LTD and KENYA DUTY FREE COMPLEX** (Civil Application No. NAI. 5 OF 1999) - the TUNOI J.A. said -

"In the motion the Respondents only prayed that the court appointed receiver be removed. The learned Judge was in error in making the order or the return of the company's management to the first respondent when this remedy was not prayed for in the application nor could it possibly be a consequential or ancillary relief. A party should not be granted a relief which is not claimed.."

In this case there was no basis for granting orders (b) & (c) of the Motion dated 7th May 2010 as the said Motion prayed for none of those orders but for an order of detention for 6 months, the attachment of the Applicant's property, and sale thereof to compensate the applicants. Those were the specific remedies sought. The court could only grant those prayers, and no other prayers not prayed for.

I have also stated in the earlier passages of this Ruling that the Applicant did not disobey any order, and had no contempt to purge. It is the new elected project committee which sought and got assistance for security through the Provincial Administration and gained access to the project works - Contempt proceedings are by their nature quasi-criminal, and although the proof thereof is not beyond reasonable doubt, but should be of such a degree to show that the contemnor is guilty of the contempt. There is no attempt in this case to show that the Applicant herein "**nominated**" or "**selected**" and "**appointed**" the new project committee, or that the Applicant herein was even near the project site when the new committee with the assistance of the Provincial Administration and their security detail gained access to the project site. There is therefore no basis for the finding of contempt of court found against the Applicant.

For those reasons, and in exercise of the powers conferred upon this court by Section 165(6) and (7) of the Constitution of Kenya 2010, the orders of given on 14th September 2010 in the Nyahururu Principal Magistrate's Court in Civil Case No. 117 of 2010 are hereby set aside, vacated and wholly discharged.

I also direct that the Respondents herein pay the costs of the application herein.

Dated, signed and delivered at Nakuru this 4th day of March 2011

M. J. ANYARA EMUKULE

JUDGE