



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CONSTITUTIONAL APPLICATION 1 OF 2009

RAMESH NARAN PATEL.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

KISHOR KUMAR DHANJI VARSANI.....2ND RESPONDENT

RULING

On 8th January 2009 the applicant herein Ramesh Naran Patel, filed an originating notice of motion against the Attorney General and Kishor Kumar Dhanji Varsani seeking the following orders:

1. That this court be pleased to supervise the proceedings in Nakuru CMCC No. 583 of 2008 filed by 2nd respondent against Amolok Singh t/a Amolok Singh Isher Singh & Sons and Ramesh Naran Ragwani t/a AGRO Industrial Tools
2. That Nakuru CMCC No. 583 of 2008 be struck out with costs (*as against the applicant?*)
3. That alternatively, this court be pleased to direct that;
 - i) The said suit RMCC No. 583 be disposed off with deliberate speed or on a priority basis.
 - ii) That the trial magistrate in CMCC 583 of 2008 do hear only such applications as are shown to have been served on all parties.
 - iii) That the trial court do hear (the) pending applications without taking into account the time table for disposal by the High Court of any pending applications in HCCC No. 247 of 2002.
 - iv) That the trial court do desist from delivering rulings on the basis of its perusal of the court file and without hearing counsel.
 - v) That the trial court do hear only such applications as have been set down for hearing (on a particular day).
 - vi) That the Chief Magistrate do ensure that the pending application (sic) are listed before the

magistrate required (sic) by the law to hear the particular applications.

4. That this court be pleased to to discharge the interim orders made in CMCC No. 583 of 2008 on 25th June 2008, 21st July 2008 and extended for 14 days on 7th and 21st July 2008 and 4th August 2008 respectively.
5. That this court be pleased to review and set aside the restraining order made on 18th August 2008 in CMCC No. 583 of 2008.
6. That this court be pleased to declare that no judgment has been entered against the defendants in CMCC No. 583 of 2008 and in the alternative this court do set aside any judgment as may have been entered against the applicant in CMCC No. 583 of 2008.
7. That the order made on 18th August 2008 in CMCC No. 583 of 2008 be quashed or lifted.
8. That the orders made on 24th June 2008 and 18th August 2008 be stayed until further orders.
9. That costs of the application be provided for.

(all the underlining above by this court)

The Originating Notice of Motion is brought under the provisions of **Section 65(2)** of the **Constitution of Kenya** and **Rules 2 and 29** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court (Practice and Procedure Rules)** and is premised mainly on the grounds that:

- a) This court is vested with power to supervise civil and criminal proceedings before any subordinate court and make such directions as it might consider appropriate.
- b) That this is a case suitable for supervision in that the proceedings in CMCC No. 583 of 2008 offend section 77(9) of the Constitution, the Rule of Law doctrine and the Rules of Natural Justice.
- c) That the business which the applicant was managing was shut down on 18th August, 2008 through an order made in his absence.
- d) That the trial magistrate has on two occasions undermined the authority of this court by making orders which contradict those of this court and has disobeyed orders made by this court on 17th December 2008.
- e) That CMCC 583 of 2008 is fraudulent having been filed by the plaintiff to defeat an order for the maintenance of status quo made on 17th February 2003 where he is the 2nd defendant.
- f) That the plaintiff in CMCC No. 583 of 2008 is guilty of non-disclosure of material facts namely, the existence of the status quo order in Nairobi HCCC No. 247 of 2002 and that the 1st defendant in CMCC No. 583 of 2008 was dead, thus obtaining orders by deception.
- g) That the orders made on 18th August 2008 in the absence of the applicant are prejudicial to him.
- h) That the 2nd defendant/Respondent has obtained orders through misrepresentation.
- i) That the proceedings of 18th August 2008 are illegal, null and void.
- j) That the management of the proceedings in CMCC No. 583 of 2008 have been such that the applicant cannot get any relief from the subordinate court.

To support the application the applicant has sworn and filed a supporting affidavit of 25 paragraphs in which he deposes that he is the 2nd defendant in CMCC No. 583 of 2008 albeit sued in the wrong name and that he was the manager of the business of the 1st defendant in CMCC No. 583 of 2008.

On 19th January 2009 the 2nd respondent filed a Notice of Preliminary Objection dated 15th January 2009, challenging the Originating Notice of Motion on the grounds that:

- (a) The application undermines the ruling of this court in Constitutional Application No. 1 of 2008 wherein this court ordered that the question of the prosecution of CMCC No. 583 of 2008 be undertaken before the Chief Magistrate's Court.
- (b) That there are no constitutional issues arising from the prosecution of CMCC No. 583 of 2008 that warrant the supervision of this court.
- (c) That the applicant herein has no proprietary interest in the suit property and was not party to any of the applications listed for hearing on 2nd January, 2009 before the Honourable Wendy Kagendo, Senior Resident Magistrate.
- (d) That this application is an appeal against the Ruling of the Hon. Wendy Kagendo, Magistrate delivered on the 2nd January, 2009 as no constitutional issues arise for supervision.
- (e) That the Chief Magistrate's Court is seized with requisite judicial discretion and authority to deal with all matters before it without fear or favour and without reference to the desires of a party.

It is in respect of the said preliminary objection that this ruling is delivered.

Submitting for the 2nd respondent, learned counsel Mr. Ojienda told this court that the issues raised in the reference were raised and considered in another constitutional reference no. 1 of 2008 preferred by the applicant herein, also arising out of CMCC No. 583 of 2008. That the said constitutional reference was struck out on 17th December 2008, by the Hon. Mr. Justice Maraga, his Lordship having found that no cause had been shown to invoke the High Court supervisory powers under **section 65(2)** of the Constitution and the rules related thereto. That being the case counsel submitted that the present applicant ought not to have been filed. He submitted also that the reference, which clearly questions the manner in which courts, generally, should determine matters before them and issue orders, undermines the provisions of section 6 of the Judicature Act (Cap 8 of the Laws of Kenya). Counsel submitted further that the application was clearly in the nature of an appeal. To support that submission Mr. Ojienda cited the case of **Mburu Thuku vs. Muthanga Thuku Misc. Application No. 87 of 2004**. He pointed out that the speedy trial of the suit was not at all threatened since the matter had been allocated a hearing for the 28th of February 2009. Additionally Mr. Ojienda submitted that the filing of the reference, seeking various orders, where alternative provision for seeking such orders does exist, is a clear abuse of the provisions of **section 65(2)** of the Constitution and the rules made thereunder, the sole purpose of which is to enable the High Court to supervise the lower court in order to ensure that the ends of justice are met. Finally counsel submitted that the applicant had no proprietary interest the subject matter in CMCC NO. 583 of 2008 and is therefore not entitled to file a reference in respect thereof.

In reply to the objection the learned Counsel Mr. Kamau Kuria submitted that the preliminary objection itself is not properly brought since, according to him, it is based on disputed facts contrary to the requirements of the leading authority of **Mukisa Biscuits Company vs. West End Distributors [1966] EA 696**. Counsel pointed out that there was a clear dispute of the facts as appearing in the supporting affidavit. I have not been able to see any dispute as regards the events that have taken place in the course of the prosecution of CMCC No. 583 of 2008. The parties herein are in total agreement as to what has transpired before the lower court. The only thing in dispute is that the applicant herein complains about the manner in which the lower court has handled the matters before it while the Respondent is of the view that the applicant is not entitled to challenge the proceedings before the learned trial magistrate in the way he is doing – by filing a constitutional reference. What the **Mukisa Biscuit**

Co's authority says in regard to a preliminary objection is that:

“It raises a pure point of law which is argued on the basis that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

With due respect to the learned Senior Counsel, I am of the view that there is a problem of interpretation of the above holding in that in counsel's mind a preliminary objection ought not to be raised where there are disputed issues rather than facts, which can never be the case in an adversarial system of justice. Clearly several issues are disputed, hence the filing of the suit, but the facts as regards the process in CMCC No. 583 of 2008 are clearly not in dispute. I therefore find that the preliminary objection is properly brought.

Having said as much, the next question this court must answer is whether the preliminary objection has merit. I need not go into the genesis of the dispute herein, being of the view that the same is not disputed. The main object of the suit sought to be supervised is to obtain a permanent injunction against the applicant and the 2nd Respondent from excavating materials, mining, trespassing onto or, in any other way, interfering with 3 acres of BAHATI/KABATINI BLOCK 1/10586 (*measuring 17.3956 ha in total*). A temporary injunction was granted along those terms on 18th August 2008. Subsequent thereto, the present applicant filed an almost identical Constitutional Reference No. 1 of 2008 seeking, *inter alia*, the same orders sought herein. A substantive Ruling in the reference was delivered by the Hon. Mr. Justice Maraga on 17th December, 2008. The temporary injunction, alongside two other applications formed the subject matter of the Constitutional Reference and were well considered and findings in regard to the applicant's complaints exhaustively addressed in the Ruling of 17th December 2008. The same grounds as are raised in the present reference had been raised and similar arguments for and against advanced.

I find that in as far as the applicant seeks orders to discharge interim orders of 18th August 2008, review and set aside the same restraining orders, declare that no judgment has been passed in CMCC No. 583 of 2008, to set aside any such judgment, quash the interim orders, stay those orders alongside others made on 24th June 2008, the applicant is well outside the purview of **Section 65(2)** of the constitution. The complaints raised in the reference are all in the nature of appeal. I agree entirely with the Honourable Justice Maraga that the court's supervisory jurisdiction under **Section 65(2)** of the Constitution is not an appellate jurisdiction and:

“is not to be invoked in respect of all and every manner of complaint against the conduct of proceedings in the subordinate courts”.

The learned Judge saw nothing irregular the lower court's management of CMCC No. 583 of 2008. Even now before me, no such irregularity appears. That besides, I do not consider this court to be the right forum to reconsider the issues argued before my brother Judge.

If the Applicant or his advocates are of the view that the Honourable Mr. Justice Maraga was wrong in his findings then they ought to have appealed to the Court of Appeal.

In addition to repeating the allegation that the suit in the lower court is fraudulent, the applicant now complains further that the trial magistrate Honourable Kagendo has disobeyed the orders of the High Court requiring her to deal with the matters before her with speed. There is no such direction issued by the court in its Ruling of 17th December, 2008. Furthermore, it would be quite absurd for a Judge of the High Court to issue such an order, this court not being the manager of the lower courts diary or calendar. Clearly such is not the intention of the supervisory jurisdiction of the High Court.

Clearly the applicant has himself to blame for the delay herein which delay I find to be unduly prejudicial to the fair determination of the issues in dispute. The above considered I find that the reference before me is not only mischievous, frivolous, incompetent, lacking in merit but clearly an abuse of the process of the court. In the premises, I have no hesitation in upholding the preliminary objection

and dismissing the reference, which I hereby do, with costs to the Respondents.

Orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2009

M. G. MUGO

JUDGE

In the Presence of:

Mr. Kipkoech for the 2nd Respondent

N/A for the Applicant