



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MAKUENI

ELC NO. 73 OF 2017

FORMERLY MACHAKOS ELC 9A OF 2015

CAPE TO CAIRO LOGISTICS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

THE GOVERNMENT OF

MAKUENI COUNTY.....DEFENDANT/RESPONDENT

RULING

1) This is a ruling on the defendant's notice of preliminary objection, whose grounds are :-

1. The application and the plaint are frivolous, defective, bad in law and an abuse of the court process.

2. The plaint and the plaintiff application herein offend the provisions of section 16 of the Government Proceedings Act, Cap 40 of the laws of Kenya.

3. The application and/or the Plaint herein are fatally defective and ought to be struck out.

2) The preliminary objection was slated for hearing on **18/6/2015** when the court file was placed before the Deputy Registrar who directed that the file be forwarded to the Environment and Land Court, **Nairobi** for directions. On the **25th June, 2015** parties were required to appear in court for directions on the **15th July, 2015**. They did not appear and the matter was stood over generally until the **14th March, 2017** when this file was transferred to this court.

3) On the **27th July, 2017**, **Mr. Mutune** holding brief for **Mr. Nyamu** for the Defendant informed the court that parties had taken directions to canvass the application as well as the preliminary objection by way of written submissions. However the record herein clearly shows that no such directions were ever issued by the court. The orders of **5th May, 2015** are clear on the directions that were issued on the material day. Be that as it may, the defendant/respondent has since then filed its submissions even though there is no evidence of it having served the applicant with the mention notice for **30th October, 2017**. I will however proceed to make a determination on the preliminary objection since the respondents' submissions are limited only to the objection.

4) According to the respondents counsel the issues for determination on the preliminary objection are:-

1. Whether the defendant's notice of Preliminary Objection qualifies as a Preliminary Objection

2. Whether this Honourable Court can issue the orders sought in the Plaintiff's application and Plaint

5) Regarding the first issue the counsel cited the case of Mukisa Biscuits Manufacturing co. Ltd Vs West End Distributors [1969] EA 696 and submitted that the preliminary objection satisfies the criteria for a preliminary objection.

6) I have looked at the pleadings herein and I do note that the facts pleaded by the plaintiff in his plaint are denied by the respondent. Those facts will have to be ascertained upon trial.

7) On whether or not this court can issue the orders sought in the application and the plaint, the respondent's counsel cited **Article 1(4)** **Article 6(2)** and **Article 189(1)** of the constitution **2010** and submitted that there are two levels of government which are distinct and interdependent and as such the respondent is a government for all intents and purposes. The counsel referred the court to the case of Kilimanjaro Safari Club Limited Vs Governor Kajiado County in place County Council of Kajiado [2014] eKLR which held that the draftsman in coming up with the Government proceedings Act had in mind the interest of government as a whole. The counsel went on to refer the court to the case of Samuel Kerosi Ondieki & Company Advocates Vs Narok County Government [2015] EKLR which cited with approval the **Kilimanjaro case** (supra) and submitted that the prayers sought in the notice of motion are not specific and nor has the plaintiff sought for a permanent injunction or only injunctive order in the main suit and, therefore, cannot seek interim injunctive orders at the interlocutory stage. The counsel therefore urged the court to dismiss the notice of motion application and the entire suit.

8) I wish to fully associate myself with the holdings in the two authorities that the respondents counsel referred to me. I have looked at the plaint dated **15th January, 2015** and filed in court on even date. It is clear that the plaintiff is seeking for a declaratory relief envisaged on **proviso (i) of section 16(1)** of the Government proceedings Act, **chapter 46** of the Laws of Kenya. Arising from the above what was the plaintiff expected to do with respect to his allegation that the defendant was unlawfully harassing him and arbitrary impounding his machines and vehicles pending the hearing of the main suit? Would it have been fair for it to wait for the determination of the main suit and thereby suffer economic harm without seeking a restraining order from the court? In my view the plaintiff was right to approach the court for the injunction to restrain breach of injury under **order 40 rule 2(1)** of the Civil Procedure Rule for what he perceived to be infringement of his right to carry out his economic activity pending the hearing of this suit. It cannot therefore be said that the both the notice of motion application and the suit are defective and as such I hold that the preliminary objection must fail. Since the plaintiff has not filed any submissions regarding the preliminary objection. I hold that each party herein shall bear its own costs. In the circumstances the preliminary objection dated **4th May, 2015** and filed in court on even date is dismissed.

Signed, Dated and Delivered this 21st day of November, 2017

MBOGO C.G

JUDGE

In the presence of ;

Mr. Kwemboi Court Assistant

No representation for the plaintiff and the defendant

Even though they had notice of today's date

MBOGO C.G

JUDGE