



Omari v Registered Trustees Muslim Association Mosque Committee Eldoret & 8 others (Petition E017 of 2021) [2022] KEHC 12010 (KLR) (21 April 2022) (Ruling)

Neutral citation: [2022] KEHC 12010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E017 OF 2021**

OA SEWE, J

APRIL 21, 2022

**IN THE MATTER OF ARTICLES 32(1), (2), (3) AND (4); AND
ARTICLE 35 (1), AND ARTICLE 36(1), (2) AND (3), AND
ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT
TO ACCESS TO INFORMATION, FREEDOM OF CONSCIENCE,
RELIGION, BELIEF AND OPINION, AND FREEDOM OF
ASSOCIATION AND PROTECTION OF RIGHT TO PROPERTY**

BETWEEN

JAMAL DIRIWO OMARI PETITIONER

AND

**REGISTERED TRUSTEES MUSLIM ASSOCIATION MOSQUE COMMITTEE
ELDORET 1ST RESPONDENT**

MAHMUD JAMA 2ND RESPONDENT

MOHAMED ALI 3RD RESPONDENT

MOHAMED HAJJ ISAACK 4TH RESPONDENT

IDRIS SALIM KEITANY 5TH RESPONDENT

SWALEH CHEPKEITANY 6TH RESPONDENT

MOHAMED GHANI 7TH RESPONDENT

ABDULAI JAMA 8TH RESPONDENT

ABDI OMAR 9TH RESPONDENT



RULING

1. This ruling is in respect of two applications. The first application is that of the petitioner, dated May 31, 2021. The said application was filed under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, for orders that the court be pleased to issue an interim injunction directing that the interim caretaker committee be appointed to hold office for the 1st respondent pending the hearing and determination of this application *inter partes*; and that the court be pleased to appoint an auditor to conduct audit of the respondent's financial statement and report to the court pending the hearing and determination of the application *inter partes*.
2. The petitioner complained that the 2nd to 9th respondents have failed, ignored, refused and/or declined to re-register the 1st respondent with the registrar of societies; and therefore that the 1st respondent is on the verge of extinction. He further complained that the 2nd to 9th respondents have misappropriated the properties, finances, funds, wealth and/or failed to account for the properties of the 1st respondent to the members; to the detriment of the poor, orphans, widows and madrasa teachers. Also, it was alleged that the respondents have failed to conduct elections or annual general meetings of the association as by law expected; and therefore that it was necessary for the applicants to file the instant application.
3. In opposition to the application, the respondents relied on the affidavit of Mohamed Kipkosgei Chumo, sworn on August 23, 2021. He averred therein that the 1st respondent is guided by its own constitution, which provides, *inter alia*, that an annual general meeting be held every two years; and that the meeting for 2020 was postponed because of the global Covid-19 pandemic. It was further averred that, in spite of the pandemic, the 1st respondent held elections for new committee officials on April 10, 2021; as well as an annual general meeting for the year 2021. Hence, Mr Chumo averred that the current officials of the 1st respondent were duly elected in accordance with the Constitution and are therefore lawfully in office. He denied the allegations of misappropriation of funds and consequently urged for the dismissal of the petitioner's application with costs. Mr Chumo annexed to his affidavit copies of the documents to confirm that elections were called for and conducted in line with the 1st defendant's constitution; and that the accounts were duly audited and no anomaly detected.
4. The 2nd application is dated August 23, 2021. It was filed by the respondents pursuant to sections 1, 1A and 1B of the Civil Procedure Act, order 45 rules 1 and 2 of the Civil Procedure Rules, among other provisions of the law, for the following orders:
 - (a) That the court be pleased to vacate, set aside, vary and/or discharge the orders issued on July 27, 2021;
 - (b) That the petitioner/respondent's petition dated May 31, 2021 be fixed for *inter partes* hearing forthwith;
 - (c) That the applicants be granted leave to respond to the petitioner's application dated May 31, 2021;
 - (d) The applicants' replying affidavit be validated and be deemed as properly filed;
 - (e) The costs of the application be borne by the petitioner.
5. The application was premised on the grounds that the applicants have never been served or properly served with the petition and the documents filed therewith. The applicants contend that the petitioner left the petition at the gate of the 1st applicant, contrary to the provisions of order 5 rule 3 of the Civil



- Procedure Rules; and that there was no indication as to which court would handle the matter, as the same was not cause listed at all. It was further asserted that the 2nd to 9th applicants were never served; and hence did not appear on July 27, 2021. Hence, the applicants asserted that it is in the interest of justice for the orders of July 27, 2021 to be vacated, set aside, varied and/or discharged, so that the petition dated May 31, 2021 can be heard *inter partes*.
6. The application was supported by the affidavit of Mohamed Kipkosgei Chumo, sworn on August 23, 2021 to which was annexed a copy of the cause list for July 27, 2021 to buttress the assertion that the suit was not in the cause list for July 27, 2021. The applicants accused the petitioner of engaging in illegalities and violations of the Constitution and the laws governing registration of societies. At paragraph 11 of his supporting affidavit, the petitioner averred that he duly served the petition as well as the subject application on the respondents; and that the applicants refused, ignored and abused the court summons by failing to appear before court No 3 for the hearing. He accordingly posited that the instant application is devoid of merit and ought to be dismissed with costs.
 7. The two applications were canvassed by way of written submissions, pursuant to the directions of the court dated September 7, 2021. The petitioner relied on his written submissions filed on August 12, 2021 to urge his application dated May 31, 2021. He stressed that he has come to court in the public interest and relied on Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR to justify his petition and to demonstrate that he has the requisite *locus standi* to question the affairs of the respondents and to make a case for the appointment of a caretaker committee pending the hearing and determination of the petition.
 8. In respect of the 2nd application, the petitioner filed written submissions dated September 13, 2021 contending that the said application is incompetent; and ought therefore to be dismissed accordingly. He argued that the respondents have purported to file a response to the petition in the name of a stranger, namely Muslim Association Mosque Committee, instead of Muslim Association Mosque Committee, Eldoret; and therefore by allowing their application, the court would be admitting strangers to these proceedings. He relied on Tang Gas Distributors Ltd v Said & Others [2014] EA 448 to support the argument that, although the court has a wide discretion to allow joinder of parties, it should take care not to bring on board impersonators; such as the respondents.
 9. On whether or not the respondents were served with the application, the petitioner submitted that the averments in the supporting affidavit sworn by Mr Chumo cannot be true. He asserted that he engaged the services of a court process server, one George Ochieng, who effected service on each of the respondents and thereafter filed an affidavit of service to that effect, in accordance with order 10 rule 2 of the Civil Procedure Rules. He cited MB Automobile v Kampala Bus Service [1966] EA 480 and Joseph Nathaniel Kipruto Arap Ngok & Another v EABS Bank Limited [2014] eKLR to support his assertion that there is a qualified presumption in favour of the process server; and that the burden lies on the party questioning service to prove otherwise; including applying for the cross-examination of the process server.
 10. Accordingly, the petitioner urged the court to find that the orders issued herein on July 27, 2021 are sound and in accordance with the law; and therefore should not be vacated, set aside or varied, as sought by the respondents. The petitioner also alleged that the 2nd application was brought after inordinate delay; and should therefore not be entertained. He relied on Allen v Sir Alfred McAlphine & Sons for proposition that prolonged inexcusable delay amounts to a denial of justice.
 11. On behalf of the respondents, two sets of submissions were filed by Mr Yego on September 21, 2021. In respect of the petitioner's application dated May 31, 2021, Mr Yego proposed one issue for determination, namely, whether the application is merited. He then went on to argue that that



application had been overtaken by events as the order seeking that an interim caretaker committee be appointed to hold office has no basis. He pointed out that there is already a leadership in place that was rightfully elected by members of the Eldoret Jamia Mosque in an election held on April 10, 2021. He also mentioned that there is an audit report for the years 2018-2019; and therefore that to invite the court to supervise another audit of the association's financial reports would be ill-advised and baseless.

11. Counsel relied on *Giella v Cassman Brown & Co. Ltd* [1973] EA 538, *Mrao v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR and *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR to support his argument that a person seeking interim relief must demonstrate a clear and unmistakable right to be protected as well as the likelihood of irreparable harm ensuing unless the orders sought are granted. He submitted that the petitioner has not satisfied these well-established conditions and prayed for the dismissal of his application.
13. Regarding the 2nd application, Mr Yego proposed the following issues for determination:
 - (a) Whether there was proper service of the petition dated May 31, 2021; and whether the matter was cause-listed on July 27, 2021;
 - (b) Whether the order issued on July 27, 2021 should be set aside; and
 - (c) Who should bear the costs of the application.
14. It was the submission of Mr Yego that service on the 1st respondent ought to have been effected in the manner set out in order 5 rule 3 of the *Civil Procedure Rules*; and therefore that it was improper for the process server to leave the court documents at the gate of the 1st respondent. On that account, he urged the court to conclude that service was not effected as by law required. He also submitted that since the matter was not cause-listed for July 27, 2021, confusion ensued as the respondents were at a loss as to which court to attend. He therefore posited that the *ex parte* order of July 27, 2021 are irregular and ought to be set aside as they have the effect of denying the respondents an opportunity of being heard; and therefore in contravention of articles 50 and 159 of the *Constitution*. He relied on *PMM v JNW* [2020] eKLR; *CMC Holding Ltd v James Mumo Nzioki* [2004] eKLR and *Wachira Karani v Bildad Wachira* [2016] eKLR and prayed that the application be allowed with costs.
15. I have given due consideration to the applications and taken into account the submissions and authorities cited by and on behalf of the parties. I note that the petitioner's application dated May 31, 2021 was filed under order rules 4(1) and 10(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. Prayers (a) and (b) of the said application are spent. In prayer (b), the petitioner had asked that:

“The honourable court be pleased to issue an interim injunction directing that an interim caretaker committee be appointed/elected on hold office [sic] for the 1st respondent pending the hearing and determination of this application *inter partes*.”
16. The record shows that, although the petitioner attended court on July 27, 2021, he did not raise the issue of that prayer with the court (Hon Githinji, J) who then proceeded to issue directions that the application be canvassed by way of written submissions. Prayer [b] is therefore spent. Moreover, it is noteworthy, that although the petition and the application were dated May 31, 2021, they were not filed until July 21, 2021. It has emerged from the replying affidavit of Mohamed Kipkosgei Chumo that the annual general meeting of the 1st respondent was held on April 10, 2021 and that new committee members for the period 2021-2023 were duly elected in accordance with the 1st respondent's constitution. In the premises, it would be unseemly for the court to put into place a



caretaker committee before hearing the parties on the matter. For those two reasons, prayer [b] of the application dated May 31, 2021 is untenable.

17. In prayer [c] of his application, the petitioner likewise sought that the court be pleased to appoint an auditor to conduct audit of the 1st respondent's financial statements and report to the court, pending the hearing and determination of the application *inter partes*. For the same reasons as observed above, this prayer is also spent. In addition, the respondents availed detailed financial statements as annexures to the replying affidavit of Mr Chumo. No response was filed by the petitioner challenging the contents or pointing out any deficiencies that would warrant the intervention by the court in the interim. It is therefore my considered finding that on both scores, the petitioner's application is spent, save for the question of costs; in respect of which it is hereby ordered that the costs of that application be in the cause.
18. In respect of the respondent's application dated August 23, 2021, which was filed under sections 1, 1A and 1B of the *Civil Procedure Act*, order 45 rules 1 and 2 of the *Civil Procedure Rules*, I note that they prayed for the following orders:
 - (a) That the court be pleased to vacate, set aside, vary and/or discharge the orders issued on July 27, 2021;
 - (b) That the petitioner/respondent's petition dated May 31, 2021 be fixed for *inter partes* hearing forthwith;
 - (c) That the applicants be granted leave to respond to the petitioner's application dated May 31, 2021;
 - (d) The applicants' replying affidavit be validated and be deemed as properly filed;
 - (e) The costs of the application be borne by the petitioner.
19. As far as the record goes, the matter came up for directions on July 27, 2021; and at the first instance the parties were absent; whereupon the court (Hon Githinji, J) made an order for mention on December 7, 2021. Later at 1:10 pm on the same day, the record shows that the applicant was present when an order was made as follows:

“I have gone through the application. It is not responded to though there is an affidavit of service. Today it was for directions. The same be canvassed by way of written submissions. Submissions be filed within 14 days. Mention – October 16, 2021.”
20. The respondents therefore seemingly had no window for filing their own submissions in respect of the 1st application. However, when the matter came up before the court on September 7, 2021, directions were given for the disposal of the two applications simultaneously by way of written submissions. Accordingly, the crux of the 2nd application has, likewise, dissipated as prayers [a] and [b] of the application are now spent. As no orders were made on July 27, 2021 that would preclude the respondents from defending the petition, it would be superfluous to consider prayers [c] or [d] of the 2nd application; seeing as a response to the petition has already been filed. As for costs, it would be fair in the circumstances to order that costs of the 2nd application dated August 23, 2021 be in the cause.
21. In the light of my conclusions hereinabove that both applications are spent, it is hereby ordered that this file be and is hereby returned to the High Court at Eldoret for the hearing and determination of the petition itself.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF APRIL 2022.

OLGA SEWE

JUDGE

