



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 149 OF 2016

THE REGISTERED TRUSTEES MUSLIM ASSOCIATION

JAMIA MOSQUE COMMITTEE – ELDORET.....1ST APPELLANT

ABDULAI JAMA.....2ND APPELLANT

ABDI OMAR.....3RD APPELLANT

IDRIS KAITTANY.....4TH APPELLANT

VERSUS

SULEIMAN ABDALLA EWATON.....RESPONDENT

(An appeal from the ruling by H. Barasa (PM) in Eld CMCC No 252 of 2016 delivered on 24th Oct 2016)

JUDGMENT

1. On 26.05.2015 the respondent (**SULEIMAN ABDALLA EWATON**) filed an Originating Summons dated 16.09.2014 seeking an injunction against THE REGISTERED TRUSTEES MUSLIM ASSOCIATION JAMIA MOSQUE COMMITTEE ELDORET (1ST APPELLANT), ABDULAI JAMA (2ND APPELLANT) ABDI OMAR (3RD APPELLANT), IDRIS KAITTANY (4TH APPELLANT) the appellants, and for creation of an interim committee of the 1st respondent, further, he sought orders that the offices held by the 2nd to 4th appellants be declared vacant and a forensic audit of all the accounts held by the 1st appellant be conducted by an external auditor. He also sought orders that the 2nd to 4th appellants be ordered to furnish bi-annual accounts and declare all the assets held by the 1st appellant.

2. The respondent simultaneously filed a Notice of Motion dated 19.02.2015 seeking injunction orders against the 2nd-4th appellants and an order for a special general meeting to be held for the election of an interim steering committee of the 1st respondent. On 17.03.2016 the matter was transferred to the Chief Magistrate's Court *suo moto*. The magistrate heard the matter and granted the orders of stay and that a special general meeting be held to elect an interim committee. This was to be done within 21 days of the ruling. The 1st appellant sought an extension of time to comply with the order as it was involved in Ramadan at the time. The court granted an order for stay on the orders and a 60 days extension.

3. The respondent made an application dated 21.07.2016 seeking to take over the office within 3 days and was granted the same. The appellants filed an application dated 27.7.2016 to seek stay/review of the orders made on 21.7.2016 and reinstatement orders made on 3.6.2016 which the court had vacated. The court dismissed the application dated 27.07.2016 - this was the reason for the present appeal.

APPELLANT'S CASE

4. The appellants submitted that the respondent held a madrassa and used the attendance list from that function as proof that an election had been conducted in order to make the application to take over the office in 3 days.

5. The appellant reported this matter to the DCIO who conducted an investigation and found that there was an election of the steering committee conducted. The court then vacated the orders of stay and extension of time. Upon further investigation however, the DCIO found that the election as not done on 27.04.2016 as per the 1st letter. The DCIO requested for more time to make further investigations and it is on the against above background that the appellants filed the application dated 27.7.2016 which was dismissed.

6. The appellants submitted that **section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules 2010** allows them to seek review in the high court and they are therefore in the right forum.

7. The letter from the CCIO office written by a senior officer there, is a clear indication that the court ought to have granted the orders sought. The observation of the court that it was not satisfied with the explanation given by the CCIO was not enough and was wrong as the court was by making such an observation relying on unfounded reasons in law.

The court is urged to allow the appeal.

RESPONDENT'S CASE

8. The respondent contends that the appeal has been pending for 4 years because of the reluctance of the appellants to move the wheels of justice for speedy conclusion thereof. That they failed to prosecute their appeal because of the stay orders issued in their favour on 9th February 2017. The stay which was conditional and which the appellant frustrated required;

a) Appellant shall file and serve the record of appeal.

b) Appellant shall cause the appeal to be admitted.]

c) ...and set it down for direction within 90 days of the ruling date I which lapsed on 11th May 2017).

9. The appellants are accused of seeking to introduce new evidence and there was no mistake or error on the face of the record hence their application for review was dismissed by the trial court. He cited **Civil Appeal No. 2111 of 1996, National Bank of Kenya v Ndung'u Njau** to submit that since the review dismissed by the trial magistrate did not meet the threshold established it is clear that a review should not be used as an opportunity to introduce new evidence as was the case for the respondents.

10. As regards ground 4 and 5 of the memorandum of appeal the appellants are faulted as appealing on evidence yet to be adduced in the trial court for determination of the main suit. That it is of paramount importance to note that the orders appealed against are interim orders delivered on 24th October 2016.

11. It is pointed out that the 1st appellant's association which has suffered irreparable loss since the interim committee which was to be elected within the 21 days to run the affairs of the association has not been elected due to the appeal herein. The election as insinuated by the appellants is not tenable, until the suit in the lower court, which its ruling of 27.10.2016 resulted in the appeal herein, is determined to its logical conclusion. He urges for the dismissal of the appeal.

ISSUES FOR DETERMINATION

Whether the trial court erred in dismissing the application dated 27.07.2016

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE APPLICATION DATED 27.07.2016

12. The application dated 27.07.2016 sought for a review of the orders made on 21.7.2016 and reinstatement of the orders dated 3.06.2016.

The application was dismissed as the letter written by the SCCIO Eldoret that stated that the elections were not held after the initial letter stating that they had been held did not convince the court. The court was of the opinion that the investigations were still ongoing and therefore the letter did not contain important information as envisaged under **Order 45 rule 1**.

Order 45, rule 1 provides;

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The letter that was received on 25th July 2015 was seeking for more time to investigate further. I am in agreement with the trial court that this was not important as it was not a concluded investigation. I need not delve deeper that, as in my view the writing is clearly on the wall, and I hold and find that the trial court did not err in its dismissal of the application. Consequently, the appeal has no leg on which to stand and is dismissed with costs to the respondent

Delivered and dated this 29th day of May 2020

H.A. OMONDI

JUDGE