REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 3 OF 2015

SERVE IN LOVE AFRICA TRUST (SILA TRUST) ……..…… PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU ……..…. RESPONDENT

AND

DAVID K. CHEMWOREM ……...……. 1ST INTERESTED PARTY

PROF. AMBROSE KIPROP ……...…….. 2ND INTERESTED PARTY

MOSES KIPKULEI ……...…….. 3RD INTERESTED PARTY

SAMSON KIBII ……..…….. 4TH INTERESTED PARTY

KIPTUM TEIMUGE ……...……. 5TH INTERESTED PARTY

PATRICK KIPKOGEI KIBET ….....……..... 6TH INTERESTED PARTY

RULING

1. By a Notice of Motion dated 29th June, 2016, the Respondent, the County Government of Uasin Gishu moved this court seeking the following substantive order;

> "***That the consent order granted by this Honorable court on the 2nd day of June 2016 in favour of the 6th interested party herein be discharged and/or vacated or varied or set aside pending the hearing and determination of the main petition No. 3 of 2015 between Serve in Love Africa (Sila Trust) and the County government of Uasin Gishu".***

The applicant also prayed for costs of the suit.

2. The application is supported by grounds stated on its face and by two affidavits sworn by Mr. *Peter Leley*, the County Secretary of the County Government of Uasin Gishu.

3. On 13th July, 2016 when the application was scheduled for hearing, it was agreed by consent of the parties that in order to save judicial time, the application should be heard together with an application filed in HCC NO. 8 of 2014 dated 29th June, 2016 as the two cases involved more or less the same parties and the applications had a common prayer seeking that consents recorded by the parties in the two cases

be set aside and or discharged. The consents related to the management of Sila Trust and the Eldoret Educational Centre, a school ran by the trust. It was also agreed that proceedings in the two applications be recorded in Petition No. 3 of 2015 and that one ruling be delivered in respect of the two applications.

4. In the Notice of Motion filed on 29th June, 2016 in HCC NO. 8 of 2014, the applicants who described themselves as the interested parties/Applicants (hereinafter the applicants) sought the following orders;

1. ***Service of the application herein be dispensed with in the 1st instance.***

2. ***There be an order of injunction to restrain David Kipsang Kipyego, Patrick Kipkogei Kibet and Abraham Kiptarus Kiptoo be restrained from interfering with the interested parties management of the trust, Eldoret Educational Resource Centre and Uzima Drilling Services Limited, pending the hearing interpartes and the determination of the application.***

3. ***The consent order dated 23/5/2016 and the resultant orders be set aside.***

4. ***Costs of the application be provided for.***

5. The application is premised on grounds stated on its face. It is supported by affidavits sworn by each of the five applicants and learned counsel *Mr. Elijah Momanyi Moguna* on 29th June, 2016.

6. Both applications were canvassed by way of written submissions which were highlighted before me on 3rd August, 2016.

7. I choose to start with a consideration of the application filed in HCC NO. 8 of 2014 after which I shall proceed to determine the Notice of Motion filed in the instant petition.

8. I wish to start by observing that though the parties spent considerable time and effort submitting on the prayer for an order of injunction as sought in prayer 2, it is clear from the application that the said prayer is already spent as the order of injunction was being sought pending the hearing and determination of the application. It therefore follows that the only prayer which remains for my determination is prayer 3 which seeks that the consent order dated 23rd May, 2016 and the resultant orders be set aside as well as the prayer for costs of the application.

9. The application is opposed by both the plaintiff Mr. *Patrick Kibet Kipkogei* and both defendants Mr. *Abraham Kiptarus Kiptoo and* Mr. *David Kipyego Kipsang.* The plaintiff opposed the motion through a replying affidavit sworn on 18th July, 2016. In his affidavit, the plaintiff urged the court to strike out the application for being scandalous, frivolous, vexatious or an abuse of the due process of the court. He deposed that the applicants were not entitled to the orders sought as they were not properly enjoined in the suit and they therefore lacked locus standi in the matter.

10. The defendants' opposition to the application was two pronged. They opposed it through a preliminary objection dated 15th July, 2016 and a replying affidavit sworn by the 1st defendant on even date. The replying affidavit incorporated the points taken in the Notice of Preliminary objection. The same were set out as follows;

1. ***The applicants christened interested parties are strangers to the current proceedings.***

2. ***That no leave has been sought or obtained to enjoin the applicants either as pleaded or at all.***

3. ***The applicant lack locus standi to institute the application before court.***

4. ***The application as drawn is incurably defective and it incapable of sustaining the orders sought.***

5. The application is misconceived, bad in law and is an abuse of the court process.

11. In their further affidavits, the applicants did not dispute the defendants claim that they never sought or obtained leave to be enjoined as interested parties in the suit. I have also thoroughly scrutinized the court record and I have not come across any application in which the applicants sought to be enjoined in the suit as interested parties.

12. In the circumstances, do the applicants qualify to be parties to the suit who would have capacity to move the court for grant of any relief? In my considered view, the answer to this question is in the negative. A proper party is one who is either impleaded in the suit as the plaintiff or a defendant or as an interested party whose presence is necessary for the just and conclusive determination of the mattes in controversy. A person or entity not originally named in the pleadings and who for some reason wishes to participate in the hearing of a suit can only do so with leave of the court. *Order 1 Rule 10 (2)* of the *Civil Procedure Rules* makes it clear that such a party can only be added to the suit by an order of the court either on its own motion or upon application of either party on such terms as the court deems just.

13. In this case, the applicants claim that together with the plaintiff, they are the registered trustees of Sila Trust and that they have a major stake in the running of the school and business operated by the trust; that they are members of the Board of Management and signatories of the school; that they are thus affected by the terms of the impugned consent and that they ought to be heard on merit. The defendants and the plaintiff on their part claimed that the applicants had themselves fraudulently registered as trustee of the Trust.

14. In my view, whether the applicants were lawfully or fraudulently registered as such trustees is not an issue for determination in this application. What is in issue is whether they are proper parties who are entitled to move the court to set aside the impugned consent.

It may well be the case that the applicants have a major interest in the outcome of the suit. But the mere fact that they have an interest to defend in the suit does not automatically make them parties thereto. As they are not the primary parties in the suit and they were not named in the pleadings as interested parties, the applicants ought to have followed the procedure prescribed by the law in *Order 1 Rule 10 (2)* of the *Civil Procedure Rules* and had themselves formally added as parties to the suit before attempting to participate in the proceedings.

15. The applicants have argued that in filing the notice of preliminary objection, the defendants were intent on frustrating their quest for justice. But justice must be administered in a structured way which is regulated by rules of procedure. A person cannot appear from the blues, fix himself in a case filed by other parties and purport to move the court for substantive orders against the primary parties to the suit without seeking leave of the court. Allowing such a scenario would be to encourage disorder and confusion in the justice system which must be avoided at all costs.

16. I wholly agree with *Gikonyo J* when he stated as follows when considering a similar preliminary objection in ***Zephir Holdings Limited V Mimosa Plantations limited & 2 others (2014) eKLR***

> ***"Any party, who comes in a proceeding after pleadings have been closed, will only join on application except where the court makes the joinder suo moto or the party comes as an objector to attachment of the suit property. A proceeding is not jumped into in a haphazard manner. Equally, except a proceeding in the nature of objection to attachment or any other instance provided in law, a party does not become a party until there is an order of joinder whether on application or suo moto by the court. I should state here that even amicus curiae will join on the order of the court. See the practice in constitutional petitions for example. Therefore, in ordinary circumstances, admission to a judicial proceeding especially where you are not the primary party is an important aspect in adjudication of cases which follows after the principle that "presence of proper parties before the court is sine qua non exercise jurisdiction by the court", and that principle will be defeated if parties were to enter existing proceeding without permission of the court or anyhow.."***

17. In view of the foregoing, it is my finding that the applicants are not parties to the suit and they therefore lack legal capacity to present the instant application without first seeking and obtaining court orders enjoining them in the suit as interested parties. The application is thus incompetent and is for striking out. I consequently uphold the defendants' preliminary objection and strike out the application dated 29th June, 2016 with no orders as to costs.

18. Turning now to the motion filed in Petition No. 3 of 2015, as stated earlier, the application seeks only one substantive prayer which I reproduced at the beginning of this ruling. It basically seeks that the consent order granted by this Court on the 2nd day of June, 2016 in favour of the 6th Interested Party be discharged, and or be vacated, varied or set aside pending the hearing and determination of the instant petition. The application is expressed to be brought under *Section 3, 3A* and *Section 63 (e)* of the *Civil Procedure Act* and all other enabling provisions of the Law.

19. The application is premised on the grounds stated on its face which are in the main replicated in the supporting affidavit sworn on behalf of the respondent by its County Secretary *Mr. Peter Leley* on 29th June 2016. It is also supported by a supplementary affidavit sworn by the same deponent on 20th July 2016 and written submissions dated 25th July 2016.

20. The respondent (hereinafter the applicant) contends that in a separate petition namely Eldoret Petition No. 9 of 2014 where it was not a party, the petitioners therein *Mr. David Kipyego Kipsang* and *Abraham Kiptarus Kiptoo* who described themselves as registered trustees of Sila Trust and the 6th interested party *Patrick Kipkegoi Kibet* (the respondent in Petition No.9 of 2014 and one of the defendants in HCC NO. 8 of 2014) colluded with other parties and recorded a consent on the 2nd June, 2016 without it's knowledge or involvement yet the consent adversely affected it; that the consent in Petition No 9 of 2014 had the effect of disposing off the instant petition before it was heard thus denying the County Government, the only respondent in the petition, an opportunity to be heard; that in the premises, the consent violated the rules of natural justice and ought to be set aside or discharged so that the petition can be heard on merit to its logical conclusion.

21. It is also the applicant's case that the said consent was unlawful since it was only endorsed by the Deputy Registrar who has no power to execute any consent in a petition involving violation of human rights; that it is only a judge in the presence of all parties who can issue such conclusive orders.

22. The 1st to 5th interested parties supported the application through the replying affidavit sworn by the 1st interested party on 20th July 1016. Most of the depositions in the affidavit dealt with assertions regarding claims of who among the petitioners in Petition No. 9 of 2014 and the interested parties in the instant petition were the bonafide trustees of Sila Trust and the alleged supervisory role of the applicant in regulating educational institutions in the county.

23. What was of relevance to the current application in my view were the depositions challenging the legality of the impugned consent on grounds that it was a nullity as no notice of the consent was given to all the parties involved in the dispute subject matter of the petition as required by the law; that the consent was not approved by the court and that the advocate who executed the consent on behalf of the sixth interested party was not properly on record.

24. The application is opposed by the petitioners in both petitions (No. 3 of 2015 and No. 9 of 2014) and the 6th and 7th interested parties. The Petitioner opposed the application vide a Preliminary Objection dated 15th day of July 2016, a replying affidavit sworn on even date by Mr. *David Kipsang Kipyego* who claimed to be one of the petitioner's trustees and the written submissions dated 27th July 2016.

25. In the preliminary objection, the petitioner mainly challenged the competence of the application on grounds that it failed to invoke the court's jurisdiction under *Rules 23 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* (the *Mutunga Rules*).

26. The other matters raised in the preliminary objection were allegations of fact and not points of law. They were duplicated in the replying affidavit sworn on behalf of the petitioner. It is the petitioner's case that the consent entered into between the petitioner and the 6th interested party was proper and well within the law as under *Rule 27(1)* of the *Mutunga Rules*, the petitioner had the option of applying to withdraw the petition with notice to the court and the respondent or to discontinue the proceedings with leave of the court; that the petitioner and the 6th Interested Party were within their right to record amicable settlement of the petition as provided for under *Rule 29* of the *Mutunga Rules.*

27. The petitioner further contended that the consent did not require the court's approval or the applicant's sanction; that the petition between the petitioner and the applicant remains intact despite the consent and can be ventilated to the full; that the consent was in tandem with the trust deed and registration of the Eldoret Educational Centre as a private school.

It was also claimed on behalf of the petitioner that the applicant did not have any legal mandate to interfere with the running and management of the trust and the school which was a private entity as it had allegedly done by imposing the interested parties as trustees of the petitioner.

28. On his part, the 6th interested party opposed the application through his replying affidavit sworn on 18th July 2016. In the affidavit, he supported the petitioner's position that the consent was lawful as the petitioner was at liberty to wholly or partly discontinue its claim against any party to the proceedings at any time it deemed fit without the sanction of the applicant; that the application was fatally defective, incompetent, scandalous and an abuse of the court process; that the petitioner's claim against the applicant had not been withdrawn and that it will have an opportunity to present its case at an appropriate time.

29. The 7th interested party joined the proceedings quite late in the day and only asked for time to file written submissions in opposition to the application. The 7th interested party is a welfare association which represented members of the community in which the Education Resource Centre (the school) which was managed by the petitioner was located. Its submissions centered on the alleged illegal take over of the trust, its properties and the school by the applicant and who among the parties were in its view the lawfully registered trustees of the petitioner.

30. I have carefully considered the application, all the affidavits on record, the submissions made by learned Counsel for each of the parties both written and oral and the authorities cited. Having done so, I find that though the parties dealt extensively on matters pertaining to the management of the trust and the school and the alleged illegal interference or intermeddling with the affairs of the trust and the school by the respondent, these are matters which are not relevant to the determination of the application now before the court. They are matters which ought to be canvassed in the hearing of the petition.

31. In my view, only two key issues arise for my determination in this application. They are as follows;

i) Whether the application is fatally defective or incompetent.

ii) Whether the impugned consent should be set aside as prayed.

32. Starting with the first issue, the petitioner submitted that the application was fatally defective for having invoked the wrong procedural law; that as the application was filed in proceedings instituted through a constitutional petition, the applicable procedural law was the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013* and not the *Civil Procedure Act* which was invoked by the applicant.

33. whilst I agree with the petitioner that the *Mutunga Rules* constitute the procedural law that governs the format and content of constitutional petitions instituted under *Article 22* of the Constitution such as the instant petition and that the Rules regulate the procedure to be followed in the withdrawal or discontinuation of such proceedings, I am unable to agree with the petitioner's submission that the citing

of the *Civil Procedure Act* in the application and the applicant's failure to specifically invoke the *Mutunga Rules* made the application fatally defective or incompetent.

34. A close look at the application shows that it was made under some provisions of the *Civil Procedure Act* and all enabling provisions of the law which includes the Constitution and the Rules made thereunder. In any event, it is my view that the failure to expressly cite the correct provisions of the law in the title of an application is an irregularity that does not go to the substance of an application. It only goes to the form of an application. It is basically a procedural technicality which this court should not elevate to a fetish at the expense of administering substantive justice. *Article 159* of the Constitution enjoins this court to determine disputes between parties before it without undue regard to procedural technicalities. The petitioner did not claim or demonstrate that it had suffered any prejudice as a result of the applicant's failure to cite the said Rules. In my view, no prejudice could have been suffered since the prayer in the application was very clear and there is no possibility that the petitioner could have been misled as to the order sought in the application.

35. In view of the foregoing, I have come to the conclusion that the applicant's failure to explicitly invoke the *Mutunga Rules* in the application did not render the application incurably defective or incompetent. It is my finding that the application is properly before the court. I thus do not find merit in the petitioner's preliminary objection and it is hereby dismissed.

36. Regarding the second issue, considering the positions taken by the parties, I think that it is necessary to reproduce the said consent in full in order to understand its true import. The consent which as stated earlier was recorded in petition No. 9 of 2014 reads as follows;

> **1.** *"**By consent, this Petition be marked as settled between the Petitioners and Respondent.***
>
> ***2. By consent all the parties herein that is to say both Petitioners and Respondent are the co-founders and trustees of Serve in Love Africa (SILA TRUST) and signatories of the accounts of Eldoret Educational Resource Center - School be and are hereby authorized to operate the accounts of the school at African Banking Corporation (ABC) Bank Ltd and Boresha Sacco Ltd. Eldoret Branches.***
>
> ***3. A declaration that only the founders of Serve in Love Africa Trust (SILA TRUST) can appoint trustees and without their (all trustees) approval no other trustees can be appointed into the trust.***
>
> ***4. That this consent do apply to the proceedings in Eldoret HCCC No. 8 of 2014 between Patrick K. Kipkogei vs. Abraham K. Kiptoo & Others and Eldoret H.C Pet. No 3 of 2015 between Serve in Love Africa Trust (SILA TRUST) vs. The County Government of Uasin Gishu & 6 Others."***

37. It is important to note that the consent was recorded in Petition No 9 of 2014 in which the applicant and the 1st to 5th interested parties (the interested parties) were not parties. That explains why the applicant and the interested parties were not parties to the consent but clause 4 thereof was made to apply to the instant petition in which they were parties.

38. Though the consent did not seek to expressly terminate or to discontinue the instant petition, it sought to partially compromise the petition without involving the applicant and the 1st to 5th interested parties who were adversely affected by its terms considering their claim that they were at the time the registered trustees of the petitioner.

39. I wholly agree with the petitioner and the 6th interested party's submissions that they had a right to record a consent withdrawing or discontinuing their claims against the applicant or the other parties at any time. However, for the consents to be valid, they must be recorded in accordance with the procedure prescribed by the law and they must involve all parties to the dispute.

40. As stated earlier, the procedure required to be followed in the filing and conduct of constitutional petitions is prescribed by the *Mutunga Rules*. *Rule 27* and *Rule 29* thereof provides for the procedure to be followed when parties wish to withdraw, discontinue or compromise petitions. And unlike in conventional civil suits where parties are at liberty to compromise suits without involving the court, consents in constitutional petitions filed under *Article 22* which have the effect of partially or wholly compromising a petition can only be entered into with leave of the court. *Rule 29* of the *Mutunga Rules* is very clear on this requirement. It states as follows;

> ***"The parties may, with leave of the court, record an amicable settlement reached by the parties in partial or final determination of the case".***

41. In this case, the applicant and the interested parties were not parties to the consent and it is not disputed that they did not have any notice of the same. The parties to the consent did not seek or obtain the court's leave either before or after filing the consent. In addition, the consent was not validated by the court as it was only endorsed by the Deputy Registrar of the court.

42. Such an endorsement in my view was inconsequential as in my view, a reading of *Rule 27* and *Rule 29* of the *Mutunga Rules* leaves no doubt that the court contemplated therein was a court presided over by a judge of any of the superior courts since only judges have jurisdiction to hear and determine constitutional petitions and are the only ones who can exercise their discretion under *Rule 27* and *29* of the *Mutunga Rules* to decide whether or not to allow the withdrawal, discontinuation or compromise of a petition. This is why under *Rule 27 (3),* the court can overrule the parties for reasons to be recorded and proceed to hear a petition inspite of the petitioner's wish to withdraw or discontinue the proceedings. And this also explains why the *Rules* includes a definition of the Supreme Court, the Court of Appeal and the High Court to make the point that these are the courts that are envisaged in the Rules.

43 The Deputy Registrar has no jurisdiction to hear constitutional petitions and cannot therefore have jurisdiction to exercise judicial discretion in determining whether or not to grant leave to discontinue or compromise constitutional petitions. A Deputy Registrar's role in administratively endorsing written consents on behalf of the court is purely ministerial. It is not a judicial function.

44. In the premises, it is evident that unlike in conventional civil suits where written consents filed by the parties can be administratively ratified by the Deputy Registrar under powers donated by *Order 49* of the *Civil Procedure Rules,* consents in constitutional petitions must be approved by the court. And as it is not disputed that in this case no leave was sought or granted to partially compromise Petition No. 3 of 2015, it follows that the consent was entered into without following the procedure prescribed by the law and was not approved by the court. The consent is for that reason invalid and cannot therefore be sustained.

45. In the end, it is my finding that the instant application is merited. It is consequently allowed on terms that the consent filed in Petition No. 9 of 2014 dated 19th May, 2016 and issued on 2nd June, 2016 is hereby set aside in so far as it affects the parties in Petition No. 3 of 2015.

46. The costs of the application shall abide the outcome of the petition.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 12th day of October 2016

In the presence of:

Mr. Mbugua for the petitioner/ Respondent

Mr. Mitei for the Respondent /applicant

Mr. Momanyi for the 1st to 5th Interested Parties and holding brief for Mr. Nyabegera for the Applicants in HCC NO 8 of 2014

Mr. Korir and Ms Rotich for the 6th interested party and holding brief for Mr. Kigen for the 7th interested party.