



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 753 OF 2008

BETWEEN

REPUBLIC.....APPLICANT

- VERSUS -

MARAKWET DISTRICT LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE RESIDENT MAGISTRATE'S COURT AT ITEN.....2ND RESPONDENT

THE MARAKWET'S DISTRICT COMMISSIONER.....3RD RESPONDENT

THE PROVINCIAL ADMINSTRATOR & INTERNAL SECURITY....4TH RESPONDENT

- AND -

1. KAKIBARAS CLAN

2. JACOB KISANG

3. REUBEN CHELANG'A.....INTERESTED PARTIES

1. SHABAN CLAN

2. CHEPKONGA CHESOMOI

3. KITAUN ALIMARIS

4. JOSEPH K. ALIMARIS

5. JOEL K. LIMO.....EXPARTE

RULING

1. The application before me is dated 12th October 2010. It seeks the setting aside of orders made on 18th May 2010.

2. On the material day, the learned advocate for the Ex-parte Applicants failed to attend court, to prosecute the substantive Judicial Review Application dated 18th February 2009.

3. In the light of the absence of the Ex-parte Applicants, Mr. Wangila, the learned advocate for the Interested parties, asked the court to dismiss the Application dated 18th February 2009.

4. Mr. Adhiambo, learned state counsel, represented the Respondents in court on that date. He, too, asked the court to dismiss the application.

5. Having given due consideration to the requests made by the Respondents and the Interested parties, Mwilu J. (as she then was), ordered as follows;

“Application dated 18/02/2010 is dismissed with costs, for non-attendance of ex-parte applicant”.

6. The issue at hand is whether or not the ex-parte applicants have demonstrated reasonable cause to warrant the reinstatement of the substantive action.

7. As far as the Respondents are concerned, the ex-parte applicants have given no good reason to explain their failure to attend court on 18th May 2010.

8. The Respondents submitted that it was not enough for the ex-parte applicants’ advocate to send his court clerk to the court on the hearing date. As far as the Respondents were concerned, the advocate for the applicants ought to have exercised diligence, by writing to the court and to the other parties, to inform them that he would be unable to attend court on the material day.

9. In any event, the fact that the son of the advocate for the applicants had been sent home from school, was described as not being sufficiently persuasive as the learned advocate was not told that he had to attend at his said son’s school on any specified date.

10. I understand the Respondents to be saying that even though the son of Mr. Cheptarus advocate had been sent back home from the Mother of Apostles Seminary on 17th May 2010, the learned advocate was not obliged to go to that school on 18th May 2010, when the case herein was scheduled for hearing.

11. The Respondents appear to be saying that Mr. Cheptarus advocate and his clients must suffer the consequences of the choice made by the learned advocate. The insinuation is that Mr. Cheptarus advocate could easily have chosen to first deal with the case herein before attending to the son’s problems.

12. Finally, the Respondents submitted that the dismissal of the substantive Judicial Review application could only be challenged through an appeal.

13. On their part, the Interested parties submitted that the ex-parte applicant had not advanced any proper reasons for failing to attend court on 18th May 2010.

14. As far as the Interested parties were concerned, if the clerk to Mr. Cheptarus Advocate had instructed Miss Mfutu advocate to hold brief for Mr. Cheptrus, then the said Miss Mfutu should have sworn an affidavit to verify that fact.

15. By not contacting the Interested parties and the Respondents to inform them that he would not attend court on 18th May 2010, Mr. Cheptarus Advocate was said to have failed to perform his duty to the court and to the other parties.

16. The Interested parties are said to have lost interest in the case. That contention arose from the fact that the application for the reinstatement of the substantive application had been on the court file from 26th May 2010. The delay in prosecuting the application was said to have occasioned grave prejudice to the Respondents.

17. I have noted that Mr. JOSEPH C.K. CHEPTARUS advocate swore the Affidavit in support of the application. He deponed that his son was sent back home from school. His son went home bearing a

letter from the Teacher – in-charge of football, informing the boy’s parents that the boy had to take back to school the “COPA COCA-COLA Jersey” which had been issued to him.

18. Upon receipt of that letter, Mr. Cheptarus left his court-clerk, Ms. NAOMI JEROTICH RONO, with instructions regarding the 2 cases which he was scheduled to handle on 18th May 2010.

19. Ms. Naomi Jerotich Rono swore an affidavit, confirming the deposition of Mr. Cheptarus. She also explained that she did ask Miss. Mfutu advocate to hold brief for Mr. Cheptarus, in this case. However, when Miss. Rono returned to the court before which this case was listed, she found when the case was being dismissed for want of prosecution.

20. None of the factual matters about which Mr. Cheptarus and Miss. Rono deponed, were challenged by the Respondents or the Interested parties. In the event, the said statements of fact were undisputed.

21. I find that the failure to file an affidavit from Miss. Mfutu advocate did not diminish the veracity of the depositions by Miss. Rono and Mr. Cheptarus.

22. It may have been more prudent for Mr. Cheptarus to have also taken the initiative to directly contact the advocates for the Respondents and for the Interested parties, to let them know that he would be unable to attend court on 18th May 2010. But just about every single person appears to be wiser, with the benefit of hindsight.

23. I do not think that the advocate for the Ex-parte applicant can be said to have made a serious mistake by choosing to give priority to the interests of his son who had been sent home from school. I say so because Mr. Cheptarus did not simply ignore this case. He actively took steps which he believed would take care of the case. He did not simply send his court clerk to court, without any clue as to what ought to be done. His court clerk was given specific instructions, which could have addressed the situation at hand, adequately.

24. However, even if Mr. Cheptarus advocate did make an error of judgment, on how best to handle the situation on 18th May 2010, I hold the considered opinion that that error ought not to be allowed to cause his clients to suffer the consequences of their lawyer’s absence from court.

25. To my mind, the Respondents and the Interested parties will not be prejudiced if they are accorded an opportunity to advance their substantive cases. Through the determination of the substantive claims, all the parties will receive substantive justice.

26. Ms. FATUMA RASHID WANGILA, the learned advocate for the Interested parties has exhibited an Order showing that on 18th May 2010, it is an application dated 30th December 2008 which was dismissed.

27. On 30th December 2008, the application before the court was for leave to commence Judicial Review proceedings.

28. On 28th January 2009, the court granted leave to the Ex-parte applicants. Therefore, after 28th January 2009, the application dated 30th December 2008 was already spent. It could not be dismissed thereafter. Therefore, if that be the order which the Interested parties do not wish to have reviewed, I can only tell them that there is no attempt to review the same.

29. The record shows that the learned Judge ordered the dismissal of the Application dated **18th February 2010**. I have found no such application on the court file. Therefore, it would appear that the substantive Judicial Review Application, dated 18th February 2009, was never dismissed.

30. But if it be deemed that the date cited by the learned Judge was an inadvertent error on her part, I still find that the reasons advanced by the ex-parte applicant are plausible and sufficient to warrant the setting aside of the order for dismissal.

31. Accordingly, the order for dismissal of the substantive application for Judicial Review is set aside. I direct that the Notice of Motion be reinstated forthwith.

32. However, because the Respondents and the Interested parties cannot be blamed at all for the failure by Mr. Cheptarus advocate to attend court on 18th May 2010, this court cannot order them to pay the costs of this application. Accordingly, I order that the costs of the application be borne by the Ex-parte Applicants.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ngigi for Cheptarus for exparte Applicant.

Barongo for Chebii for interested party