



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION (JR) NO. 24 OF 2014**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE REGISTRAR OF SOCIETIES .....RESPONDENT**

**AND**

**1. CHARLES O. ODUK**

**2. GABRIEL ONDIF**

**3. ALFRED O. OWAKO**

**4. THOMAS KOYO**

**5. MARTHA N. OMONDI**

**6. RICHARD ONYANGO**

**7. DANCAN O. GWARA**

**8. OCHOLA OLONDE ..... INTERESTED PARTIES**

**TOM MBOYA MEMORIAL HALL DEVELOPMENT**

**ASSOCIATION REGISTERED TRUSTEES .....EX-PARTE APPLICANTS**

**RULING**

0. By NOTICE OF MOTION dated the 27<sup>th</sup> August 2014 and filed on 16<sup>th</sup> September 2014, the ex parte applicant sought the following specific ORDERS:

1. **THAT this application be certified as urgent and be heard ex-parte.**
2. **THAT this Honourable Court be pleased to issue an Order directing the County Commander of Police, Mombasa, to reinstate the Ex-parte Applicants to Tom Mboya**

**Memorial Hall by removing the youths who have been stationed at the said Hall by the Interested Parties to stop them.**

**3. THAT the costs of this application be provided for.**

0. The application was supported by the affidavit of Charles Oricho Nyawour sworn on 15<sup>th</sup> September 2014. In opposing the application the Interested Parties filed an affidavit by Augustine Ondijo Ogola of 24<sup>th</sup> September 2014. The primary complaint by the applicant is that following the orders of stay in this case, the interested parties on 20<sup>th</sup> May 2014 invaded the premises the subject of the suit and subsequently hired a group of youths who prevented the applicants and their caretakers from accessing the hall and in the process assaulted the applicants' caretakers. By the replying affidavit, the deponent while denying that any youths invaded the premises and kept the applicants out of the premises states that he was contracted to provide security under a contract for one year dated the 20<sup>th</sup> May 2014, the very day of the alleged invasion. The contract annexed as exhibit A to the affidavit of Augustine Ondijo Ogola is signed for and on behalf of Tom Mboya Memorial Hall Development Association by persons designated as chairperson v. chairperson and secretary/Assts. Secretary.
0. Counsel for the parties - Mr. Odongo for the ex parte applicant and Mr. Okanga for the Interested parties - in the absence of the counsel for respondent who was not affected by the application of 27<sup>th</sup> August 2014 made oral submissions thereon on the 24<sup>th</sup> November 2014 and ruling was reserved for the 11<sup>th</sup> December 2014. The parties have also made written submissions on the main motion for judicial review orders herein, and judgment thereon is scheduled for the 26 February 2015.
0. In urging this application dated 27<sup>th</sup> August 2014, Mr. Odongo submitted as follows:

Mr. Odongo

*Notice of Motion dated 27.8.2014. Affidavit of Charles Oricho Nyawour. Prayer No. 2 and 3. Meeting stopped by order of 1.5.2014. Interested Parties removed caretaker and took over the office. Counsel alleged there were no persons at the Hall. The caretakers were sent again but they were assaulted by the Youths. I refer to the affidavit attaching statements of the caretakers.*

*Respect of court orders. As at now there is a court order what recognizes the Ex-parte Applicants as bonafide officials. The county Commander of Police admitted that the Ex-parte Applicant obtains a court order. I refer to affidavit to establish the breach of court order. Upon service, the Interested Parties have not sworn an affidavit. It is only an affidavit of one Ogolla who has purported to hear on behalf of the Interested Parties. Order 53 4 (2) and (6) of CPR. The court can order that some persons be served. If Augustine wishes to be heard and appears to the High Court to be a person proper to be heard, he may be joined. His affidavit is an abuse of court. I pray that the affidavit be disregarded.*

*Affidavit of Augustine Ogolla should be investigated as he confirms that he is he who brought in the so called security. Annexue A does not attach or mention any official who gave Ogolla the instructions. The names of the officials are not disclosed. It states that the contract was given on 20.5.2014 on the same day of the order. Terms of the contract are given after 2 days of the contract. Annexure from state law office. There is no proof that the security firm has been registered. The deponent may be the supplier of the youths as watchmen. The persons deployed are not mentioned by name and particulars. I pray that the goods be removed.”*

0. In reply Mr. Okanga for the Interested Parties submitted that –

“Mr. Okanga

*Application of 27.8.2014 is opposed. Affidavit in support at paragraph 11 complains about the actions of the Interested Parties. If it is the Interested Parties who are breaching the court orders, the Ex-parte Applicant should cite them for contempt. Court orders must be obeyed.*

*How were the orders of the court served? There are many groups belonging to the Association. The order should have been pasted on the wall. The court can summons the parties on oath enquire what is happening on the ground. Photographs in affidavit in support are not clear and ;it is not clear who took the photographs.*

*Affidavit of Applicant is not helpful. There could be an election by order of the court as these are the wrangles that happen in societies such as cooperative societies in central, Rift Valley and Nyanza. The Ex-parte Applicants are imposing themselves by force with aid of police. The application for the County Commander should be refused. The court bailiff with help of police may be granted. Threat to tenants, blockage of sewage. There are no affidavits from any tenant that they are refused to use the washrooms. I submit that the application is a mere side show and the dispute can be settled by elections.”*

0. I have considered the pleadings, affidavits and submissions of counsel herein and I find that the application for enforcement of the order of the court must be granted, albeit in different terms. I find that the applicant has established the case that a group of youths, whether they be security officers of the Interested Parties under the security contract with the deponent of the replying affidavit or otherwise, did invade the Hall and evicted the applicant’s caretakers and prevented the applicants and their caretakers from accessing the Hall. This is in disobedience of the court orders of stay granted herein upon grant of leave to file judicial review proceedings, both which are the subject of a pending application for setting aside filed by the Interested Parties on the 3<sup>rd</sup> July 2014.
0. To use self help by way of youths to evict the applicants from the premises and alter the situation on the ground as maintained by a previous order of the court so as to achieve the same result sought in the application for setting aside of the said order, which is pending hearing and determination before the court, is a clear contempt of court. The court has not been asked to punish any of the Interested Parties or the said youths no doubt because they have not been identified. The court is, however, obliged to restore the status quo on the ground in furtherance of the court order for stay granted herein on 20<sup>th</sup> May 2014 in terms as follows:

**“That the leave granted will operate as a stay of the Registrar’s decision effecting the registration of the new officials so that the officials of the society remain as at the 6<sup>th</sup> day of May 2014 before the impugned decision.”**

0. As held by the Court of Appeal in the *Kamau Muchuha v. Ripples Ltd* (1990-1994) 1 EA 388 (CAK) and *Gusii Mwalimu Investment Co. Ltd v. Mwalimu Hotel Kisii Ltd* (1995-1998) 2 EA 100 (CAK) decisions, the status quo to be restored following an unlawful action of a defendant is the status quo ante, before the unlawful action of the contemnor. In *Gusii Mwalimu*, the court deplored the use of Police in effecting civil orders. However, the Police have a duty under the Constitution and the National Police Service Act to maintain law and order. Under section 24 of the Act, the functions of the National Police are given as follows:

**“24. Functions of the Kenya Police Service**

*The functions of the Kenya Police Service shall be the—*

**(a) provision of assistance to the public when in need;**

**(b) maintenance of law and order;**

**(c) preservation of peace;**

**(d) protection of life and property;**

**(e) investigation of crimes;**

*(f) collection of criminal intelligence;*

*(g) prevention and detection of crime;*

*(h) apprehension of offenders;*

*(i) enforcement of all laws and regulations with which it is charged; and*

*(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.”*

0. Accordingly, for the reasons set out above, I make the following orders on the Notice of Motion dated 27<sup>th</sup> August 2014:

1. **The court bailiff to restore the possession of the suit premises to the ex parte applicants.**
2. **The ex parte applicants to be at liberty to engage security officers to guard the premises.**
3. **The Officer Commanding the Police Station responsible for the area where the suit premises is situate, pursuant to the functions of the Police under section 24 of the National Police Service Act, to ensure that law and order and peace is maintained during and after the restoration of the ex parte applicants into possession of the suit premises.**
4. **Costs of the application to be in the cause.**

**Dated and delivered this 11<sup>th</sup> day of December, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Odongo for the Applicants

No appearance for the Respondent

No appearance for the Interested Parties

Mr. Murimi – Court Assistant