



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

MISC APPLICATION NO. 42 OF 2009

ERIC ODHIAMBO.....1ST APEPLLANT
SIMON MANNON OGUTU ADERE.....2ND APPELLANT

VERSUS

THE CHAIRMAN SIAYA D. L. D. TRIBUNAL.....1ST RESPONDENT
THE RESIDENT MAGSIATRET COURT SIAYA....2ND RESPONDENT
AND
PETER OPONDO ALIETH.....INTERESTED PARTY

RULING

Application dated 18th May 2009 is by the interested party and is for orders that the orders made by this court on 3rd March 2009 granting the applicant leave to apply for judicial review be set aside and that the notice of motion filed herein dated 4th March 2009 be struck out on the basic ground that the applicants did not comply with the Orders made on 3rd March 2009.

In his supporting affidavit, the interested party **Peter Opondo Alieth**, alleges that on perusal of this file, it was noted that the ex-parte applicants had been granted leave to institute these proceedings and to serve the application and have it fixed within 14 days yet the application was not served upon him as of the 18th May 2009.

However, the reasons for the application to be fixed within 14 days are not given in the supporting affidavit.

Mr. Odunga, learned counsel for the interested party quite correctly stated that the application was fixed for mention. He, however, contended that the order to serve and have the application fixed for mention within 14 days was not complied with because the last day of service was 17th March 2009 by which date the interested party had not been served although the ex-parte applicant alleges that service was effected on 13th March 2009.

Mr. Odunga, submitted that the respondent was served on 27th March 2009 and since the order given had not been complied with, the leave granted ought to be set aside and the substantive notice of motion be struck out. In that regard several cases were cited viz:-

- (1) **Aga Khan Education Service Kenya =vs= Republic & others C/APP No. 257 of 2003.**
- (2) **Republic =vs= Communication Commission of Kenya (2001) 1 E.A. 199**
- (3) **Mohamed O. Oduori =vs= Mumias Outgrowers Co & Another C/APP No. 51 of 2007 and**
- (4) **J. R. Misc Civil Application No. 86 of 2009 High Court Nairobi.**

In opposing the application, the first, ex-parte applicant, **Eric Odhiambo**, filed a replying affidavit dated 7th July 2009 in which he indicates that the interested party was served with the necessary documents on the 13th March 2009 while the respondent was served on 27th March 2009. An affidavit of service annexed to the replying affidavit confirms as much. If the last date of service was on the 17th March 2009 and the interested party was served on 13th March 2009 there would be no cause to complain that he was not served within 14 days.

The respondent was served on 27th March 2010 and has no problem whatsoever.

The learned litigation counsel, **Mr. Eredi**, on behalf of the respondents contended that the leave sought to be set aside by the interested party was properly granted.

Mr. Ogutu, learned counsel, argued on behalf of the ex-parte applicants that the present application is defective as it does not contain the order complained of. Besides the application for leave to file judicial review proceedings was brought to court under a certificate of urgency. The leave was granted without conditions. Therefore, the substantive motion was to be filed within 21 days as required by Order 53 Rule 3 of the Civil Procedure Rules.

Mr. Ogutu contended that the court on its own discretion directed that the application be served and fixed for mention within 14 days for purposes of considering the issue of stay and that is why it was indicated that leave should not operate as stay. But because the ex-parte applicants did not wish to pursue stay they abandoned the prayer and it no longer became necessary to mention the matter within 14 days.

Mr. Ogutu did not understand why the interested party came with this application yet no stay order was granted

All the foregoing arguments by all the parties have been taken into consideration by this court. The position taken by the ex-parte applicants through Mr. Ogutu is the correct position.

The Leave sought to be set aside was properly and lawfully granted on the 3rd March 2009. It was not granted with any conditions. The prayer was granted as prayed for. The necessary procedures were to follow after the grant of leave as provided by Order 53 of the Civil Procedure Rules.

On its own discretion and purely for purposes of the prayer for the leave to operated as stay, this court directed that the matter be fixed for mention within 14 days and in the meantime the leave granted was not to operate as stay.

The obligation to fix the matter for mention lay with the ex-parte applicants. They did not do so and the explanation given herein is that they decided to abandon the prayer for stay and so, the need for a mention date was no longer necessary.

Indeed, if the ex-parte applicants no longer harboured the thoughts of a stay order, why then fix a mention date?. The most sensible thing for them to do which they did was to serve the substantive motion within the statutory period of 21 days for purpose of hearing and disposal.

The present application is therefore misconceived. If the leave was granted conditionally, the story and position would have been different. However, the leave herein was granted without any conditions. It remained for the ex-parte applicants to take a mention date if they wanted to push ahead with the application for the leave to operate as stay. They did not want to push ahead. Therefore, they did not have to fix the matter for mention within 14 days. The direction to serve was to put the interested party and the respondents on notice that the matter would be mentioned within 14 days for orders of stay. Service became unnecessary after the ex-parte applicants decided to abandon the prayer for stay. In sum, the application is dismissed with costs to the ex-parte applicants and respondents.

Delivered, dated and Signed at Kisumu this 7th day of October 2010

J. R. KARANJA
J U D G E

JRK/aao