



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CONSTITUTIONAL PETITION NO. E2 OF 2020**

GABRIEL OTIENDE.....1<sup>ST</sup> PETITIONER/RESPONDENT

EVANS ONYANGO.....2<sup>ND</sup> PETITIONER/RESPONDENT

ELIJAH ODINGO OSADHO.....3<sup>RD</sup> PETITIONER/RESPONDENT

DICKSON ORUKO WASONGA.....4<sup>TH</sup> PETITIONER/RESPONDENT

RICHARD ATITO ORONDO.....5<sup>TH</sup> PETITIONER/RESPONDENT

VERSUS

COUNTY COMMISSIONER – SIAYA COUNTY.....1<sup>ST</sup> RESPONDENT/APPLICANT

CABINET SECRETARY

MINISTRY OF INTERIOR & CO-ORDINATION....2<sup>ND</sup> RESPONDENT/APPLICANT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT/APPLICANT

AND

JOHN NYAPOLA OKUKU.....1<sup>ST</sup> INTERESTED PARTY

JOSHUA OUMA MINYA.....2<sup>ND</sup> INTERESTED PARTY

DUSILA ATIENO TSUMA.....3<sup>RD</sup> INTERESTED PARTY

JOSEPH ODIALA MESO.....4<sup>TH</sup> INTERESTED PARTY

**RULING ON REVIEW**

1. This ruling determines the application dated 5<sup>th</sup> January 2021 in which the applicants who are the main Respondents in this Constitutional Petition seek the following orders:

- 1. Review and setting aside of orders made on 16<sup>th</sup> December 2020;*
- 2. Consideration of the respondent's replying affidavit filed on 4<sup>th</sup> November 2020 and served on the petitioners the same date;*
- 3. That costs of this application be provided for.*

2. The application by way of Notice of Motion is based on 11 grounds on the face thereof and supported by an affidavit sworn by Mr. Daniel Otieno Kobimbo Advocate for the Respondents.

3. The applicants' case is that they swore and filed a replying affidavit dated 3<sup>rd</sup> November 2020 and filed on 4<sup>th</sup> November 2020 as well as a memorandum of appearance ***but that the court never served*** the same and that this absence of the applicants' replying affidavit could not

have been discovered prior to the ruling of 16/12/2020 and as such the applicants' absence in the proceedings prior to the ruling aforementioned was not intentional.

4. The applicants further state that the instant petition has been overtaken by events as the office of the Deputy County Commissioner and other sub county offices had already been moved to Yala and the order of stay issued by this court stalled the administrative operations of the sub county.

5. Opposing the application for review and consideration of the replying affidavit by the applicants/Respondents in the main petition, the 1<sup>st</sup> respondent/petitioner Gabriel Otiende swore a replying affidavit on the 1/2/2021 contending that the instant application was incompetent and ought to be struck out as it invokes the Civil Procedure Rules 2010 rather than the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 in seeking to review, stay or set aside or suspend the conservatory orders issued on 16/12/2020.

6. The 1<sup>st</sup> petitioner/ respondent further deposed that the applicants had demonstrated indolence in the conduct of this matter through their failure to attend court on the 24/11/2020, sending their pleadings to the wrong email address and failure to take a proactive nature in the conduct of the petition.

7. The 1<sup>st</sup> respondent/petitioner further deposed that the applicants mischievously guided the court that the petition had been overtaken by events whereas the sub county offices still operated from Sawagongo and had not been moved to Yala and that the respondents had made every effort to have the issue addressed prior to every step by the applicants. The respondent further contended that the applicant had not presented any grounds to disturb the ruling delivered on the 16/12/2020.

8. The parties canvassed the application by way of written submissions.

#### **Applicants' Submissions**

9. It was submitted on behalf of the applicants that in view of Article 159 (2) (d) of the Constitution, this court is compelled to do substantive justice as between the parties and that the respondents had not demonstrated what prejudice they would suffer on account of the alleged procedural indiscretion.

10. The applicants' counsel further submitted that they were not merely seeking the setting aside of the aforementioned ruling but also review and as such the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 did not oust the application of the Civil Procedure Act and Rules which applied in cases of review as was held in the case of **Kooba Kenya Limited v County Government of Mombasa [2020] eKLR.**

11. The applicant further submitted that they had demonstrated sufficient grounds to warrant orders for review as the orders of the court made on the 16/12/2020 were made on the understanding that the applicants never entered appearance or filed a response to the petition herein.

#### **Respondents' Submissions**

12. It was submitted that the court is improperly moved as it invoked the Civil Procedure Rules 2010 rather than the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 in seeking to stay the conservatory orders issued on 16/12/2020 and as such the instant application ought to be struck out.

13. It was further submitted that the petition is not overtaken by events as the new sub county headquarters at Yala have not been officially launched and the operation of the sub county offices still continue at Sawagongo with the exception of the office of the Deputy County Commissioner who still holds his meetings at Sawagongo.

14. It was further submitted that the applicants have displayed indolence in their handling of this petition and have not presented sufficient grounds to warrant review of the ruling delivered on 16/12/2020.

#### **Analysis & Determination**

15. I have considered the application as presented as well as the parties affidavits and submissions for and against the application. In my humble view, the issues for determination are whether the application dated 5/1/2021 is properly before court and if so whether this court should proceed to review the conservatory orders granted on the 16/12/2021.

16. The respondents submitted that the instant application ought to have been brought by invoking the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice (The Mutunga Rules) and Procedure Rules 2013 and not the Civil Procedure Act and Rules. In response, the applicants submitted that the Mutunga Rules do not oust the provisions of the Civil Procedure Act and Rules.

17. Rule 23 of the Mutunga Rules provide as follows;

#### ***“Conservatory or interim orders***

***(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.***

*(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.*

*(3) The orders issued in sub-rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.”*

18. The Mutunga Rules do not provide for setting aside of conservatory orders however in Rule 25 it provides as follows:-

***“Setting aside, varying or discharge***

***An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.”***

19. It is thus evident that the Mutunga Rules do not specifically provide for the form in which a conservatory order may be set aside or reviewed. However, the Civil Procedure Rules still remain the parent rules in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules apply. Accordingly, it is my finding that the instant application is properly before court.

20. On whether this court ought to review or set aside the ruling delivered on the 16/12/2020, the starting point is to examine the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. It is common ground that the High Court has power to review its own decision. However, such power must be exercised within the framework of Section 80 Civil Procedure Act and Order 45 Rule 1.

21. Section 80 of the Civil Procedure Act provides:

***“80. Any person who considers himself aggrieved-***

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

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

22. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides:

***“45 Rule (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”***

23. A clear reading of the above provisions show that section 80 of the Act gives the power of review while Order 45 sets out the procedure applicable. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:

***(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;***

***b) On account of some mistake or error apparent on the face of the record, or***

***c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”***

24. In the instant petition, the applicants claim that the non filing of the replying affidavit and counsel’s absence from court on the relevant date amounts to *new and important matter or evidence* which the court ought to consider in reviewing the its ruling of 16/12/2020.

25. I have perused the court record and note that the applicants’ memorandum of appearance signed by Ms Janet Langat Deputy Chief Litigation Counsel for the Applicants herein was filed in court on 26th October 2020 but the same was never accompanied by a replying affidavit which latter was only attached to the affidavit supporting the instant application. The said Memo of Appearance was send via an email by Mr. Kobimbo of Monday 26<sup>th</sup> October, 2020 and is a single document.

26. On the other hand, the replying affidavit of Mwachaunga Chaunga sworn on 3<sup>rd</sup> November 2020 was never filed in court except as an annexure to the application for review of this court’s ruling that granted conservatory orders which are impugned. There is no evidence that the email of 4<sup>th</sup> November 2020 allegedly attaching the replying affidavit was received by the court registry and not printed and placed in the

court file, considering that the Office of Attorney General being a government Office is not required to pay any court fees to file pleadings or documents in court. That being the case, it was not enough for the applicants' counsel to merely send documents/ replying affidavit by email but to make a follow up and ensure they were received and placed in the file.

27. There is also no acknowledgment of the said email and it is not clear whether the email as used was accurate as we have no email called Siayacourtcivil, Siayacourt is not the official email used for this court whereas the siayahighcourt cited is not clear whether it is a gmail or at court.go.ke email.

28. I do note however the emails attached to the applicants' application that detail counsel's effort to be admitted to the hearing. However, there is an indication at the bottom that the email was not delivered hence it was upon the applicants' counsel to make efforts to reach the court, including making calls which he has not stated that he did. Furthermore, the applicants' counsel did not file any written submissions to oppose the application for conservatory orders and they did not inquire whether their affidavit was on the court file or notify the court at the time of giving directions that they did not intend to file any submissions, or that they would rely on the said affidavit. If they had done so, the court would have ensured that the affidavit being relied on was on record as I retreated to write the impugned ruling.

29. I am not persuaded that the applicants' replying affidavit which was never filed amount to *new and important matter or evidence*. The applicants have not demonstrated that their replying affidavit was with this court but not placed before the judge for consideration.

30. Furthermore, the conservatory orders issued were issued based on facts placed before this court which facts have not been proven to be false as the applicants depose clearly that ***the sub county headquarters have moved but operations have stalled as a result of the said orders.***

31. All said and done, I observe that the order the applicants seek to have reviewed is a conservatory order issued on the 16/12/2020. I do note that Conservatory orders are in my view not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person. (See the case of **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR**)

32. The Supreme Court emphasized the public law nature of conservatory orders in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

***“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

33. Accordingly, it is clear that conservatory orders are issued not to aid a party but to preserve the status quo that is being challenged by the petition. Without delving into the merits of this petition, I do note that the basis of the instant petition is alleged lack of public participation in decision making. It is my humble view that it is not in the best interest of administration of justice to allow the application dated 5/1/2021 for setting aside the conservatory orders and that would have the effect of rendering the petitioners herein mere pious sojourners or explorers in their pursuit of compliance with constitutional values and in effect render the petition herein an academic exercise and nugatory.

34. Consequently, I find the applicant's application not merited, I dismiss it with an order that there shall be no costs.

35. Orders accordingly

**Dated, Signed and delivered at Siaya this 3<sup>rd</sup> Day of March, 2021 in the presence of all parties and their advocates on record both virtually and physically as per the written pronouncement in the court file.**

**R.E.ABURILI**

**JUDGE**