



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 78 OF 2020

SIKH WOMEN SOCIETY.....1ST APPELLANT/APPLICANT

THE CHAIRPERSON OF THE SIKH WOMEN SOCIETY,

MANDEEP KAUR KENT.....2ND APPELLANT/APPLICANT

THE IMMEDIATE PAST CHAIRPERSON OF THE SIKH WOMEN SOCIETY,

AMARJIT KAURRAUT.....3RD APPELLANT/APPLICANT

TRUSTEE/SPOKESMAN OF THE

SIKH WOMEN SOCIETY.....4TH APPELLANT/APPLICANT

VERSUS

VEENA SINGH CHAWLA.....1ST RESPONDENT

THE REGISTRAR OF SOCIETIES.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The memorandum of Appeal herein was filed on 20th February 2020. The next day (21st February 2020) the notice of motion of even date was filed. The application sought various orders namely:

- Stay of the order and/or the proceedings in Chief Magistrate's court Civil Case No. 7423 of 2019.
- In the alternative review or setting aside of the order of 20/12/2019 in the said CMCC No. 7423 of 2019.
- Review of the Ruling of 3rd February 2019 in the said file.
- Setting aside of the interlocutory Judgment in the said file.
- Grant of leave to the applicants to file memorandum of appearance and defence both dated 7th November 2019 and filed on 21st November 2019 in the lower court.
- Fixing for hearing of the notice of motion dated 31st January of 2020 before the lower court.
- Setting aside of the orders issued on 20th December 2019 and 3rd February 2020 and all consequential orders.

- The 1st respondent's counsel M/s Chawla & company advocates to provide their physical address for purposes of service.

2. The 1st respondent filed a preliminary objection (P. O) dated 5th July 2020; grounds of opposition dated 5th July 2020; and a replying affidavit by Veena Singh Chawla sworn on 3rd July 2020. All this are in response to the application dated 21st February 2020.

3. Next is the application dated 30th November 2020, by the 1st respondent seeking recusal by Justice Githua. The same was withdrawn by Mr. Chawla for the 1st Respondent on 14th July 2021.

4. There is also the notice of motion dated 11th June 2021, seeking for reinstatement of the interim orders first issued on 21st February 2020. Further that directions be given in respect to the application dated 21st February 2020.

5. The 1st respondent filed a replying affidavit by Kuldeep Singh Chawla sworn on 28th June 2021; grounds of opposition and a P.O both dated 9th July 2021 plus a list of authorities namely;

i) The Constitution of Kenya

ii) The Civil Procedure Act and the Civil Procedure Rules

iii) Ecobank Kenya Ltd v Minolta Ltd and 2 others [2018] eKLR.

6. Due to the multiplicity of applications and various communication between the parties the court on its own motion called for the original court file from the Magistrate's court. I wanted to satisfy myself of what had transpired before the trial court and the said file was availed.

7. Noted in the lower court file is that interlocutory Judgment was entered on 13th November 2019 and the matter set for formal proof on 3rd December 2019 when the matter proceeded. On 20th December 2019 the case was set for delivery of Judgment on 27th February 2020.

8. The present appeal was filed on 20th February 2020. On 21st February 2020 the High court issued an order for stay of order and/or proceedings in the lower court for 30 days. On 27th February 2020 both Mr. Billing and Mr. Chawla appeared before the trial court which confirmed that the orders of the High court had been brought to her attention. She fixed the matter for mention despite the stay of proceedings having been granted for 30 days from 21st February 2020.

9. Meanwhile on 20th May 2020 the High court extended the interim orders up to 30th July 2020. They were further extended to 11th November 2020, then to 10th December 2020, and in between the application for recusal dated 30th November 2020 was filed. Further extensions were made on various dates up to 11th May 2021. Thereafter the application dated 11th June 2021 seeking more extension was filed.

10. Upon perusal of the notice of motion dated 21st February 2020 I noted the following:

i) Memorandum of appearance dated 7th November 2019 was filed in the lower court on the same day (Receipt dated 7th November 2019 annexed.)

ii) Joint defence dated and filed in court on 21st November 2019;

iii) Verifying affidavits by the defendants filed on 21st November 2019.

iv) List of witnesses, 3 witness statements, list of documents, authorities under seal all filed on 21st November 2019 by the defendants.

11. After all the pacing up and down the applicants filed a notice of motion dated 31st January 2020 in the lower court under certificate of urgency (MKK2). The said certificate of urgency; the notice of motion; first and second supporting affidavits; all have the official court seal of Milimani Chief Magistrate's commercial courts (cash office). Among the many prayers sought was a prayer for the interlocutory Judgment entered against the applicants to be set aside and leave be granted for them to enter appearance and file defence.

12. The original record of the lower court confirms that the applicants entered appearance on 7th November 2019 (original document is in the file). A copy of the official receipt for the same dated 7th November 2019 is also in the said file. This therefore confirms that at the time the interlocutory Judgment was being entered on 13th November 2019 the applicants had already entered appearance.

13. The original record does not contain any defence filed by the applicants. From the documents in possession of the applicants at page 31 of the application dated 21st February 2020 a defence was filed and stamped on 21st November 2019. The question is, why the said defence is not in the lower court file.

14. Again missing from the lower court record though stamped is the applicants' application dated 31st January 2020 seeking to set aside the interlocutory judgment. Where did it go to?

15. In the lower court file an affidavit of service was filed by Moureen Auma Andary who stated that she served the applicants with the plaint and summons to enter appearance on 24th October 2019. They acknowledged receipt and she filed the signed documents. They indicate that appearance was to be entered within 15 days of service. Counting the days from 24th October 2019 the 15th day was 7th November 2019 which is the date that the applicants filed their memorandum of appearance.

16. The 1st -4th applicants filed their joint defence on 21st November 2021.

Order 7 Rule 1 of the Civil Procedure Rules provides:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

17. The joint defence was filed within 14 days of filing the memorandum of appearance as is required by the Rules.

18. It can be clearly seen that the interlocutory Judgment entered on 13th November 2019 was irregular. It could only have been entered after 21st November 2019. I also note that with the memorandum of appearance on record, the formal proof could only have proceeded upon proof of service of the hearing notice on the applicants. This was never done by the trial court.

19. Article 165 (6) of the constitution provides:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Article 165 (7)

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

20. The Civil Procedure Act which guides the proceedings herein provides as follows:

“Section 1A

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court

Section 1 B

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

21. Having taken note of all the short falls in this appeal and having called for the original lower court file and having made all the above findings in line with the above cited provisions of the Law I make the following orders:

i) There would be no need to proceed with this appeal since the lower court record is incomplete with several documents missing

under questionable circumstances. The material in the lower court file is of no assistance to this court.

ii) For justice to be done and to be seen to be done I set aside the interlocutory judgment entered on 13th November 2019.

iii) I also set aside the formal proof proceedings undertaken on 3rd December 2019.

iv) The order setting down the matter for judgment issued on 20th December 2019 is also set aside.

v) The memorandum of appearance by the applicants filed on 7th November 2019 and the joint defence filed on 21st November 2019 shall be admitted as having been filed on time. The same to be served on the respondents within then (10) days from the date of this Ruling.

vi) This matter to be mentioned before the Chief Magistrate (in charge) Milimani Commercial courts for allocation of this file for hearing and determination before any other magistrate with competent jurisdiction besides Hon. M. W Murage M/s Senior Resident Magistrate.

vii) This Ruling has determined this appeal and the appeal file is now closed. This lower court file to be returned to Milimani Commercial court.

viii) Costs shall be in the cause

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE