



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO.26 OF 2018

RICHARD MASINDE WAFULA & 219 OTHERSPLAINTIFFS/RESPONDENTS

VERSES

TRANS-NZOIA TEACHERS ENTERPRISES LTD & 23 OTHERS... DEFENDANTS/APPLICANTS

RULING

1. By their application dated 3rd July, 2019 the applicants pray for the following orders:

(a) That there be stay of execution of the orders of this court vide ruling delivered on the 24th January, 2019 pending the determination of this application.

(b) That the court does review its ruling dated 24th January, 2019 and all consequential orders and the same be set aside.

(c) The honourable court does reject and quash the minutes of the Deputy Registrar in regard to the special meeting held on 7th March, 2019 at Kitale Museum hall.

2. The application is supported by the sworn affidavit of **John Mwangi** together with the attached annexures. The same has equally been opposed vide the affidavit in reply of **Richard Masinde Wafula** dated 16th November, 2019.

3. Briefly, the application is premised on the ruling of this court which was delivered on the 24th day of January, 2019 in which the court inter alia permitted a holding of an election of the defendant company to choose new directors. The same was to be supervised by the Deputy Registrar of this court. The said elections took place and it appears that the Applicants were not satisfied with its outcome hence this application for review.

4. The grounds which they have cited are that the election was held outside the 35 days which this court had stipulated and there was no extension of time. That there was no proper notice issued as well as the list of the shareholders who were to participate in the said elections and that the Deputy Registrar did not conduct the elections as per the directions of this court.

5. The upshot of the Applicant's complaint was that the elections were not conducted properly and that their failure to participate was because the Deputy Registrar failed to notify them of the new date. They have since filed an appeal against the ruling of 24th January, 2019.

6. The Respondents in their reply have denied the above allegations and contented that the elections were properly held and according to the orders of this court. That the orders have been fully executed and there was therefore nothing to stay as the names of the new officials have been forwarded to the Company Registrar.

7. The Respondents further averred that the application was defective for the simple reason that the Applicants have already filed an appeal and thus they cannot again ask for the orders they have appealed against to be reviewed. They submitted that this court was *functus officio* as far as this application was concerned.

8. Having read the application as well as the submissions by the parties which this court does not intend to reproduce here, save to state that they all pull towards their respective diametrically opposing directions, the first issue to determine is whether in light of the provisions of Section 80 of the Civil Procedure Act and Rule 45 of the Civil Procedure Rules CAP 21 L.O.K this application is meritorious. The same is necessary for the simple reason that its outcome will determine the entire application.

9. Section 80 states as follows;

“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.”

10. The provisions of Order 45 rule 1 essentially mirrors Section 80 above which in any event is the substantive provision and the latter subsidiary in nature. The legislature in its wisdom expected that parties would have the liberty to appeal against the orders or decrees of the court and at the same time apply for review of the same if they meet the set standard requirements.

11. In this regard, it is evident and for that matter not in dispute that the applicants were dissatisfied with the ruling of this court of 24th January, 2019 and they did file an appeal to the Court of Appeal number **ELD CIVIL APPEAL NO. 4 OF 2019**. The same is still pending as there is no evidence that it was settled or withdrawn.

12. If that is the case therefore, this application cannot stand. The aforesaid section, namely Section 80 of the Civil Procedure Act contemplates that a party cannot seek an appeal of an order and at the same time apply for a review of the same order. This is for the simple reason that either way a judicial body would be required to adjudicate over the same matter and it may come to more less the same or different positions which may be embarrassing.

13. A party in the premises is required to apply for a review in the event that it has not contested the decree or the order vide an appeal process. Once an appeal is preferred then the aggrieved party cannot seek to review the impugned order.

14. In this case, the Applicants have sought and indeed have appealed against the orders of this court. They cannot be allowed to seek the second alternative of reviewing the order. They must await the outcome of the appeal.

15. For the above reason, the application stands dismissed. The other reasons may have been necessary to adjudicate upon but there is no need to discuss since they form in my view sufficient grounds in the appeal process. By way of example, if there was a quorum hitch or the Deputy Registrar of this court did not handle the elections well, then the same ought to be decided by the Court of Appeal. These are not new issues which have just been discovered by the Applicants.

16. Consequently, the application is hereby dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Kitale this 10th day of February, 2020.

H. K. CHEMITEI

JUDGE

10/02/2020

In the presence of:-

Mrs Kibonei holding brief for Barongo for the Applicants

Karuga for Plaintiffs.

Court Assistant – Kirong

Ruling read in open court.