



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 31 OF 2009

RICHARD KIPTUM SAWE.....1ST APPLICANT & 134 OTHERS

VERSUS

BENJAMIN RONO.....1ST RESPONDENT & 3 OTHERS

RULING

1. By a notice of motion dated 5th September, 2019 the applicants pray for orders:-

i. suspending and/or staying the implementation and/or the execution of the ruling delivered on the 14th day of August, 2019 together with all consequential orders against the respondents/applicants pending the hearing and determination of this application and/or until further notice.

ii. That for avoidance of doubt the interim office led by one David Kiptanui Yego & 11 others shall in the meantime be stopped and/or stayed from taking over the Sirikwa Squater Group office and not to have any dealings with the Sirikwa Squater Group office, books of accounts, certificate of registration or its office bearers until this application is heard and determined.

iii. That the court sets aside, vacate, dissolve and/or discharge the ruling and orders entered against the respondents/applicants on 14/8/2019 together with all consequential orders and the respondent/applicants be granted leave to respond to the applicant's miscellaneous application.

2. The application is based on the grounds that:

a) service of the miscellaneous application dated 30/1/2019 together with a hearing notice dated 7/2/2019 is disputed.

b) The affidavit of service is full of falsehoods and the only way to rectify this is to call for the deponent to attend court for cross examination.

c) The 1st 2nd and 3rd respondents/applicants are strangers to any group known as Sirikwa squatters Group and Sirikwa Squatter Self Help group which are two different entities.

d) The applicant's miscellaneous is fatally defective, bad in law and mischievous and lacks merit as the issues raised are substantive and can only be dealt with in a substantive suit.

e) The orders of 14/8/2019 were obtained misrepresentation, fabrication of the documents, lack of disclosure of material issues and secrecy.

3. In response to the application, the 1st applicant deponed that 20/1/2019, they filed an application seeking to have elections and books of account from the respondent.

4. On 14/8/2019 an order was given by the court mandating the interim office to call for general elections. That after the order was served, they hurriedly closed the bank account at the **Bank of Africa** and opened individual accounts to defeat the order.

5. The application is overtaken by events since some of the books have been received and election rescheduled and the respondent/applicants will have a chance to vie for any posts.

6. The respondent/applicants have been reported to the anti-corruption authority and are yet to clear their names and instead of them clearing their names, they are trying to hide in the instant application.
7. The application was canvassed by way of written submissions. The 1st, 2nd and 3rd Respondent/Applicant submitted that what is in dispute is what gave rise to the orders rendered on 14/8/2019. The purported service of miscellaneous application dated 30/1/2019.
8. That without service, the proceedings and orders of the 14/8/2019 were illegal, invalid and of no effect and attracts ex-debito justitiae the right to have it set aside.
9. Further, that there is a clear distinction between Sirikwa Squatters Group and Sirikwa Squatters Self Help Group. The issues raised in the miscellaneous application are substantive and can only be dealt with a substantive suit and not a miscellaneous application.
10. The respondents on their part submitted that the ruling delivered on 14th August 2019 directed that election be done within three months from the date of issuance. The ruling was mainly intended to bring normalcy in the group by conducting general elections. It is contended that no elections have been held and therefore it is in the interest of justice that the said ruling be upheld as setting it aside will not serve any meaningful purpose.
11. The main issue for determination is whether the court should exercise its discretion to set aside the orders issued herein on 14th August, 2019.
12. This Court has unfettered discretion under **Order 51 rule 15 of the Civil Procedure Rules** to set aside any order made ex parte. Section 3A of the Civil Procedure Act on the other hand gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary powers must however be exercised judicially.
13. The principles that guide the court in setting aside of an ex parte judgment or order were laid out in the case of **Shah –vs- Mbogo & Another (1967) EA 116** as follows: -
- "...the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice".**
14. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J**, set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;
- "The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule....."***
15. The Applicants contention is that they were never served with either the application dated 31/1/2011 nor a hearing notice dated 7/2/2019.
16. In the sworn affidavit by **Silas Kandie** dated 7th February 2019, he deposes that on 6th February 2019 he received an application dated 31st January, 2019 and a hearing notice dated 7th February for service upon the respondents.
17. The first thing that stands out in that affidavit of service are the discrepancies in dates on the affidavit of service which lends credence to the contestation that service was not proper. That alone tilts the scales in favour of the Applicant that it had a reasonable excuse for its non-attendance of the application dated 30/1/2019 when this matter came up for hearing.
18. What prejudice will the respondents suffer? The applicants point out that, the ruling was mainly intended to bring normalcy in the group by conducting a general election. The Respondents admit that subsequent to that ruling no elections have been conducted. Meaning that upholding the ruling will not serve any meaningful purpose, and appears to be more a question of flexing muscles on the strength of the court order obtained.
19. Conducting an election is the only means to make each party satisfied and the Respondents have not demonstrated the prejudice they will suffer if the Application is to be allowed, other than poking holes at the applicants' moral character, saying the applicants are wrong doers. The substance of the affidavit by 1st to 3rd respondents go into the content of the dispute rather than the issue of service, and whether the orders should be set aside. The overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice for the litigants.
20. This view is informed by **Article 50 of the Constitution of Kenya** which secures the right to a hearing before the Court. The court be obligated to safeguard that right.
21. The inconvenience to be suffered by the Respondent if any as a result of setting aside the orders of 14th August, 2019 can be adequately remedied through an award of costs.
22. In the light of the aforesaid, the Notice of Motion Application dated 15th September, 2019, is merited and be allowed in the following

terms:

- a) The orders issued on 14th August 2019 be and are hereby set aside
- b) The applicants are granted leave to file and serve a response within 14 days from today's date
- c) The main application shall proceed for inter-partes hearing within 14 days from today.
- d) Costs shall be in the cause

Delivered and dated this 22ND day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE