



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 280 OF 2018

PHILIP KWOPA.....1ST PLAINTIFF

EDDAH MARETE.....2ND PLAINTIFF

VERSUS

EXECUTIVE COMMITTEE NYAYO

EMBAKASI RESIDENTS ASSOCIATION.....1ST DEFENDANT

COMMITTEE OF EMINENT PERSONS OF

NYAYO EMBAKASI RESIDENTS ASSOCIATION.....2ND DEFENDANT

REGISTRAR OF SOCIETIES.....INTERESTED PARTY

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated 4th December 2018 and filed on 5th December 2018 was filed pursuant to Section 1A,1B, 3 and 3A of the Civil Procedure Act Cap, Order 51, Rule 1 and 4 of the Civil Procedure Rules, Article 36 of the Constitution of Kenya 2010. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT this court be pleased to issue orders compelling the 1st and 2nd Defendants to conduct elections within thirty (30) days in accordance with the Association's current constitution with a closed list of candidates listed in AGM minutes held on 23rd September 2018 pending hearing and determination of this matter.

3. THAT this court be pleased to issue orders declaring the 1st Plaintiff/Applicant as the sole aspirant for the position of the chairperson of the 1st Defendant's Association pending hearing and determination of this matter.

4. THAT this court be pleased to issue orders declaring the positions of Secretary Assistant Secretary and committee member unopposed respectively.

5. THAT this Honourable court do direct that the 3rd Defendant supervises and ensures election are held in consonance with the Associations constitution and other direction which this court deems fit.

2. The Plaintiffs' Written Submissions were dated and filed on 25th January 2019. Their List of Authorities were dated and filed on 7th May 2019. The 1st and 2nd Defendants' Written Submissions were dated 10th May 2019 and filed on 13th May 2019. The Interested Party did not file any Written Submissions because his Notice of Motion application dated 11th December 2019 and filed on 19th December 2019 seeking to have the suit against him was allowed on 17th January 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein

is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

4. In support of the present application, both the Plaintiffs swore Affidavits on 4th December 2018.
5. Following the 1st Defendant's announcement that elections would be held on 23rd September 2019 in which it invited the 2nd Defendant's members to vie for elections, the 1st Plaintiff expressed his interest to vie for the position of Chairman. He was cleared to vie for the said position against his only opponent, one Peter Obiene.
6. However, elections were not held on the aforesaid date due to a lack of the voters' register. The 2nd Defendant was then appointed and authorised through its members' resolution to organise its elections within thirty (30) days thereof.
7. The 1st Plaintiff stated that he and the said Peter Obiene were represented in the 2nd Respondent. The decision making powers were, however, reserved for three (3) members of Nyayo Embakasi Residents Association (NERA) who had been appointed in the interim body.
8. However, the 2nd Defendant did not hold the elections within the said thirty (30) days. On 10th November 2018, the said Peter Obiene withdrew from the race whereafter the 2nd Respondent appointed one Vincent Okwemba to replace him. It was the 1st Plaintiff's contention that the withdrawal of the said Peter Obiene meant that he was the sole unopposed candidate and that elections should be held to declare him as such.
9. He stated that he was apprehensive that the 2nd Defendant's attempts to enact a new constitution was intended to bar him from contesting the elections. He also averred that the positions of Secretary, Assistant Secretary and Committee members should be declared as unopposed.
10. The 2nd Plaintiff's assertions were on all fours with those of the 1st Plaintiff.
11. They both therefore asked this court to allow their application to avert prejudice being visited on them and other members of the 2nd Defendant due to its acts and/or omissions.

THE DEFENDANTS' CASE

12. In response to the said application, on 16th January 2019, Peter Obiene swore a Replying Affidavit on behalf of the Defendants herein. The same was filed on even date.
13. He averred that most of the outgoing office bearers resigned and some moved out from Nyayo Embakasi Estate while the Treasurer was deceased. He pointed out that the 2nd Plaintiff was not a paid up member of NERA and was thus not eligible to vote and/or to vie for any election seat (**sic**).
14. He stated that the elections were not held on 23rd September 2018 due to logistical challenges, lack of a proper register and rules of the election. He added that the Rules allowed any paid up member of the NERA to present himself for elections on the election date.
15. It was his contention that elections should be held within three (3) months and that the 1st Plaintiff would not suffer any prejudice if a new election that was transparent, credible and devoid of any conditions by the 1st Plaintiff was held.

LEGAL ANALYSIS

16. The Plaintiffs averred that the current Constitution of NERA governed and regulated the affairs of elections which have to be held every year.
17. They termed the Defendants' failure to call elections a manifestation of abuse of office, ill-motivated and contrary to the aforesaid constitution.
18. In their Written Submissions, they did not rely on any case law although this court noted that their List of Authorities was dated and filed on 7th May 2019.
19. On their part, the Defendants stated that they were not averse to Prayer Nos (2) and (5) of the present application save that the elections should be open to all the eligible members.
20. They were emphatic that the 1st Plaintiff's assertion that he was the sole candidate for the position of Chairman was not based on the Constitution.
21. The court carefully analysed the respective parties' Written Submissions and noted that none of them raised any legal arguments for determination. Their respective arguments were based on facts of the case, issues that were best set out during the trial.

22. It appeared to this court that the Plaintiffs were seeking orders for a mandatory injunction. However, they did not demonstrate if they were entitled to the same. The court is a neutral arbiter and could not purport to argue their case for them.

23. It was not lost to this court that in principle, all the parties were agreed on elections being held and being supervised by the 2nd Defendant. What they were not agreed upon is when the elections should be held and who should vie. The Plaintiffs wanted the elections held within a period of thirty (30) days that had since passed while the Defendants wanted a period of three (3) months to hold the elections.

24. A perusal of the Constitution of NERA did not give much light as to how elections are to be conducted. It did not state how candidates were to be nominated and/or the mode of elections.

25. This therefore posed a challenge to this court as there was no clause that mandated that once elections aborted, only the candidates who had initially been nominated would vie in subsequent elections or if candidates who had expressed interest to vie would automatically be elected if the ones who were opposing them had stepped down.

26. The court can only grant what parties pray for. In the absence of clear guidelines and/or procedures on how elections held after aborted ones are to be conducted, this court found its hands tied regarding the locking out of other candidates from participating in future elections or declaring the 1st Plaintiff as the sole aspirant for the position of Chair or declaring that the positions of Secretary, Assistant Secretary and Committee were unopposed.

27. Notably, Prayer No (5) of the present application could not be granted because there was no 3rd Defendant against whom the orders would be binding. In any event, the Registrar of Societies was no longer a party to the suit herein.

28. Accordingly, having considered the Affidavit evidence and the Written Submissions by the respective parties, this court was not satisfied that the Plaintiffs had demonstrated that they were entitled to the orders that they had sought.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated 4th December 2018 and filed on 5th December 2018 has no merit and the same is hereby dismissed. The costs of the application will be in the cause. The most that this court could say was that the parties therein are at liberty to hold the elections of NERA without any further delay.

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of October 2019.

J. KAMAU

JUDGE