



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONST. PETITION CASE NO. 12 OF 2018

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 33, 35, 40, 47, 40, 47, 48, 50 (1), 159 & 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 1 OF 2015

BETWEEN

ABDUL ROTICHPETITIONER

(On His Behalf Of The Members Of Sirgoi Holdings Ltd)

VERSUS

THE BOARD OF DIRECTORS

SIRGOI HOLDINGS LIMITED 1ST RESPONDENT

SIRGOI HOLDINGS LTD 2ND RESPONDENT

HOSEA SITIENI 3RD RESPONDENT

RULING

The issue before this court concerns a Notice of Motion dated 26th July 2018 and filed under certificate of urgency on 27th July, 2018. The key prayer in it is that pending the hearing and determination of this petition the Honorable court be pleased to issue a temporary order of injunction restraining the 3rd Respondent from serving the 2nd Respondent as the Managing Director.

On 27th July, 2018 when the application was presented in court, the court directed it be served for directions on 31st July, 2018. On 31st July, 2018 *Mr. Okara* appeared in court for the applicant but the Respondents were absent. *Mr. Okara* informed the court that the Respondents were served. He requested for time to file an affidavit of service. It was filed. It is sworn by one *Vincent O. Ogotu*, a licensed Court Process Server. It shows on 27th July, 2018 he served the application dated 26th July, 2018 which was coming up for hearing on 31st July, 2018, and copies of petition to the Chairman, Board of Directors, *Mr. Barabara Tanui* and the Managing Director, *Mr. Hosea Sitienei*. After the Affidavit of Service was filed, the court considered that the Respondent were served, and had made no response to it. They as well had not appeared to oppose it. It was granted as prayed.

The Applicant/Respondent aggrieved by the said orders filed the current application on 9th August, 2018 seeking to set aside those orders which were issued on 1st August, 2018. Their main ground in the said application is that they were condemned unheard which is against the rules of natural justice. They aver that though they were served with copies of the petition and the Notice of Motion as alleged, the hearing date of 31st July, 2018 was not served upon them. The served documents did not carry a hearing date. For the reason they could not have been expected to attend court on 31st July, 2018. They crave for a chance to oppose the application dated 26th July, 2018.

The Respondents opposes the application on the ground that an affidavit of service was duly served and the court satisfied itself on the issue of service before granting the orders on 31st July, 2018.

The only issue for determination is whether the applicants were aware of the hearing date of 31st July, 2018. I have looked at the annexed served documents upon the applicants by the alleged process server and none of it has the hearing or mention date of 31st July, 2018. They

were served and were aware of the application and the suit, but not that it was to be heard on 31st July, 2018. They aver that they are affected by the orders which were issued before they were accorded an opportunity to be heard. They wish oppose the said application and crave for a moment and chance to do so. In the case of Elizabeth Wamuranga Icika –vs- Jamii Bora Limited [2014] eKLR, a similar situation arose. The court held that,

“Though it is evident that the Defendant/Applicant herein was served with the Notice of Motion dated 23rd June, 2014, it is indeed clear that its Notice of Motion did not have a hearing date. The orders also served on them showed the orders were to last up to 3rd July 2014. The court also relied on a Return of Service, which had an attached copy of the certificate of urgency bearing a received stamp from the Defendant/Bank. However the Notice of Motion attached had a hearing date of 3rd July 2014 whereas the applicant’s copy bore no date. That was therefore misleading and the court relied on the said return of service to allow the plaintiff’s Notice of Motion dated 23rd June, 2014.”

Unlike in the foregoing case, in our case the Notice of Motion had no date at all. The court was misled by the Affidavit of Service which indicated, **“... I received copies of Application dated 26th July, 2018 and coming up for hearing on 31st July, 2018.”** The impression is that the date was served upon the applicant but was not. They were therefore condemned unheard which is against the rules of natural justice.

The application is merited. The orders of 31st July, 2018 are hereby vacated. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 21st day of November, 2018.

In the presence of:-

Mr. Wanyonyi holding brief for Mr. Okara for petitioner

Mr. Omusundi for Respondents

Miss Kemei holding brief for Mr. Katwa for 1st and 2nd Respondents. We have just come on record.

Ms Ann- Court assistant