



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 126 OF 2017

1. JOSHUA KYALO NYUMBU

2. LEONARD ZAMBIA MWANGI

3. RICHARD MUIRURI (Suing as Chairman, Secretary & Treasurer for and on behalf of
ATHI RIVER JUA KALI ASSOCIATION.....APPELLANTS/APPLICANTS

VERSUS

1. DANIEL NYAMAI NDETI

2. JAIRUS M. TUMBO

3. TIMOTHY KIMANTHI MWANZWII

4. BENSON MUSUVA KYALO

5. NATHAN MUTUA KAVITA.....RESPONDENTS

RULING

1. The Applicants filed a notice of motion under ***Order 51 Civil Procedure Rules 2010 of Section 1A, 2A & 3A Civil Procedure Act, the Constitution of Kenya*** for and on behalf of **ATHI RIVER JUA KALI ASSOCIATION**. It seeks an order that the court be pleased to stay the order of Senior Resident Magistrate's court at Machakos delivered on 18/8/2017 pending the hearing of the Application and appeal herein.

2. The Application is supported by the following grounds:-

- a) That Applicants were not afforded a chance to respond and challenge the application dated 9/11/2016.**
- b) That the Application did not meet the required threshold to be allowed as prayed.**
- c) That the Application failed to satisfy the terms of the Order of the court by Honourable Simiyu delivered on 20/6/2012.**

The Application is supported by the affidavit of **Joshua Kyalo**, the Chairman. He contends that a ruling was delivered on 18/8/2017 and the Application that resulted in the said ruling was heard without him being given a chance to challenge the respondents' case. That his affidavit contains averments on the evidence that should have been considered had the applicant been present in the proceedings and the case heard on merit. That the application be allowed in the interests of fairness as the Respondents stand to suffer nothing if due process is followed.

3. The 4th Respondent Benson Musuva Kyalo opposed the application and filed a replying affidavit. He deposes that the application has no merit. That the appellants have been in office for 13 years and have never called for an election, contrary to the constitution and rules of the association. That the applicant is not likely to suffer irreparable damages as they have been in office for 13 years. That the applicant wants to perpetuate their stay in office to the detriment of other members and that said they have not come to equity with clean hands, thus the appeal is wanting in merits. That the association should continue running in compliance with its constitution and rules. That the Appellant's Application for stay orders has already been overtaken by events since elections have since been held on the 28/09/2017.

4. The Application was disposed of by way of written submissions. The Applicant submits that he has filed an appeal against the ruling of the Senior Resident Magistrate court at Machakos made on 18/8/2017 as the same was made in the absence of the response of the

defendants'/applicants and contrary to the order made by Honorable Simiyu on 20/6/2012 warranting the noble intervention of the superior court. That the application was made in a timely manner and that the respondents stand to suffer nothing if the application is allowed. That it is in the interest of fairness that the application be allowed.

5. On the law, the Applicants submit that a case should not be prosecuted based on assumptions and cited the case of *Mohammed Musa & Another v Peter M Mallanyi & Another Civil Appeal No 243 of 1998* where it was stated that "litigants must bear in mind that even in prosecuting a case ex-parte, the required standards of proof must be observed. Particularly where there is denial of material pleadings by the opposite party and that the onus is upon the Plaintiff to adduce evidence to enable the court to reach a conclusion thereon.

6. The Respondents in their submissions relied on the replying affidavit and submitted that the law applicable is Order 42 rule 6 and that the applicants must demonstrate that they will suffer substantial loss if stay is not granted. They cited the case of *Kenya Shell Ltd v Kibiru and Another (1986) KLR 410* where Platt Ag JA observed that substantial loss is the cornerstone for granting stay. That the Applicants are running to court to cry for orders yet they have never complied with any court orders and they have been in office for 13 years and further that the Application for stay has been overtaken by events since the elections were conducted on 28/09/2017.

7. I have considered the Application as well as the rival affidavits and submissions. The issue that arises for determination is whether the Applicant has satisfied the conditions for stay pending Appeal. Stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules. It provides;

No order for stay of execution shall be made under sub-rule (1) unless:-

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. The Applicants have claimed that they stand to suffer substantial loss if an order of stay is not granted since the appeal will be rendered nugatory in the end. Indeed the dispute between the parties herein is about elections that had been ordered to be conducted pursuant to a compromise reached by the parties on the 20/06/2012. However the lower court later received an Application dated 9/11/2016 filed by the Respondents herein and which was later allowed vide a ruling dated 18/08/2017 whereby the court ordered elections to be conducted within 60 days. It is as a result of that ruling which precipitated the present Application. The Applicants have already lodged an appeal against the said ruling and are now seeking for an order to stay the implementation of the said ruling dated 18/8/2017 pending the determination of the Appeal.

The Respondents in their replying affidavit and submissions have availed evidence that in fact elections have since been conducted as it took place on the 28/09/2017 and as such this Application has already been overtaken by events. As the elections have already been conducted, I am satisfied that an order of stay will serve no useful purpose in the circumstances. It has also transpired that the Applicants had been in office since 2004 and they are alleged to have never bothered to call for elections for over 13 years until the filing of this case which led to the compromise dated 20/06/2012 where it was agreed that elections be held. If indeed those elections were duly held as desired by all the parties herein, I do not now see why the Applicants are claiming that they stand to suffer loss and damage. It would appear to me that the Respondents assertion that the Applicants are intent at perpetuating their stay in office ad infinitum holds true. I am unable to see how the Applicants will suffer loss as they had entered into an agreement with the Respondents that elections be held. In any event if the Applicants are interested in further holding offices then they could as well offer themselves for election once it is called. The stay if granted will occasion great prejudice to the Respondents and other members of the association as the issue of holding elections would become a pipe dream more so that they had been kept away by the Applicants for more than 13 years. I find the Applicants have not demonstrated that they stand to suffer any loss. Further as the elections have already been held, the present Application for stay has been overtaken by events.

9. Having arrived at the above conclusion, I need not delve into the other issues regarding whether the Application has been filed timeously and whether the security has been offered for the due performance of the decree which may be binding upon the Applicants. The determination of these two issues therefore become moot in the circumstances.

10. In the result it is the finding of this court that the Applicant's Application dated 12th September, 2017 lacks merit. The same is ordered dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Machakos this 6th day of November, 2018.

D.K. KEMEI

JUDGE