



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 149 OF 2016**

**THE REGISTERED TRUSTEES MUSLIM ASSOCIATION**

**JAMIA MOSQUE COMMITTEE, ELDORET..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**ABDULAI JAMA ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**ABDI OMAR ..... 3<sup>RD</sup> APPELLANT/APPLICANT**

**IDRIS KAITANY ..... 4<sup>TH</sup> APPELLANT/APPLICANT**

**VERSUS**

**SULEIMAN ABDALLA EWATON ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 14<sup>th</sup> December, 2016, the four applicants/appellants namely, *The Registered Trustee Muslim Association Jamia Mosque Committee Eldoret* (hereinafter the 1<sup>st</sup> appellant); *Abdulai Jama*; *Abdi Omar* and *Idris Kaityany* moved this court seeking one substantive order. They sought orders of stay of execution and/or further execution of the orders emanating from the ruling delivered on 24<sup>th</sup> October, 2016 in Eldoret CMCC No. 252 of 2016 and stay of all subsequent proceedings in this matter pending the hearing and final determination of the appeal.

2. The application is expressed to be made under *Section 1A; 1B, 3, 3A, 63 and 79 G of the Civil Procedure Act* and *Order 40 Rule 7, Order 42 Rule 6(1), (2) and (6) of the Civil Procedure Rules*. It is premised on grounds that the appellants are aggrieved by the ruling delivered by the lower court on 24<sup>th</sup> October, 2016; that they have preferred an appeal which in their view has high chances of success; that the application has been filed timeously; that if orders sought are not granted the appeal will be rendered nugatory and the appellants will suffer substantial loss.

They also averred that they were ready and willing to provide any security which the court may order for due performance of the order as may ultimately be binding on them. The application is also supported by an affidavit sworn by the 2<sup>nd</sup> appellant on 14<sup>th</sup> December, 2016.

3. The facts leading to the filing of the instant application are undisputed. The respondent *Suleiman Abdalla Ewaton* filed an originating motion in the High Court which was registered as Civil Suit No. 24 of 2015. He mainly sought injunctive orders against the appellants by themselves or through their

servants or representatives restraining them from summoning, holding or organizing any meeting of the 1<sup>st</sup> appellant pending the hearing of the summons interparties and/or pending the holding of elections. He also sought orders that the Executive Committee of the 1<sup>st</sup> appellant be declared suspended through a special general meeting and formal elections be conducted for new office bearers to manage the affairs of the 1<sup>st</sup> appellant and that the offices of chairperson, secretary, treasurer and organizing secretary and/or trustees allegedly held unlawfully by the 2<sup>nd</sup> to 4<sup>th</sup> appellants be declared vacant.

4. On 16<sup>th</sup> March, 2016, the High Court (*Hon. Kimondo J*) transferred the originating summons (OS) to the Chief Magistrate's court for hearing and determination.

5. In a Notice of Motion dated 19<sup>th</sup> January, 2016, the respondent sought orders of temporary injunction restraining the appellants from dealing with, disposing, alienating or in any manner appropriating the assets of the 1<sup>st</sup> appellant and from disposing off motor vehicle Registration Number KAM 931E Nissan Van pending the determination of the suit. There was a second prayer that the court be pleased to order/and or direct that a special general meeting be held to elect an interim steering committee to manage the affairs of the 1<sup>st</sup> appellant.

6. The trial court (*Hon. Lily Nafula SPM*) in a ruling delivered on 19<sup>th</sup> May, 2016 allowed the application and ordered that a special General meeting be held within twenty one (21) days to elect an interim steering committee to manage the affairs of the 1<sup>st</sup> appellant.

7. The appellants then filed an application dated 3<sup>rd</sup> June, 2016 seeking stay of execution of the orders of 19<sup>th</sup> May, 2016 and during the hearing of the application, it was alleged that no elections had actually been conducted. The court ordered the Directorate of Criminal Investigations Eldoret West/East to investigate those claims. In a letter dated 21<sup>st</sup> July, 2016, a *Mr. Samson Buttuk* wrote a report confirming that elections had been held as directed by the court.

8. Following the report, the trial court in a ruling made the same day vacated interim orders of stay issued on 3<sup>rd</sup> June, 2016 and concluded that elections had been conducted. It may be worth noting that the ruling of 21<sup>st</sup> July, 2016 or an order extracted therefrom were not annexed to the application but the existence of the ruling and orders issued therein are not contested by the respondent.

9. However, in a dramatic form of events, there was another report made in a letter dated 24<sup>th</sup> July, 2016 which contradicted the earlier report of 21<sup>st</sup> July, 2016. The letter, authored by the SCCIO Eldoret West/East one *Ali B. Samatar* on whose behalf the letter of 21<sup>st</sup> July, 2016 had been written, stated that further investigations had revealed that the elections in question had not been held and sought time to investigate the matter further.

10. On the basis of the second letter, the appellants filed an application seeking review of the orders issued on 21<sup>st</sup> July, 2016 which application was rejected on 24<sup>th</sup> October, 2016. The appellants were aggrieved by the court's ruling. This is what led to the filing of the instant appeal vide a memorandum of appeal filed on 31<sup>st</sup> October 2016. They also filed the application now under my consideration. The foregoing facts are by and large the depositions made by the parties in the affidavits in support of their respective positions.

11. The application is contested. There is a replying affidavit sworn by the respondent on 19<sup>th</sup> December, 2015. In a nutshell, the respondent urged the court to dismiss the application on grounds that it was made in bad faith; that the appellants only intention in filing the application was to ensure that they remained in office so that they could continue misappropriating the 1<sup>st</sup> appellant's assets. He prayed that the application be dismissed for lack of merit.

12. At the hearing, learned counsel for the appellants *Mr. Tororey* assisted by *Mr. Kiboi* and learned counsel for the respondent *Mr. Okara* made oral submissions supporting their respective positions. I have

considered the rival arguments; the pleadings; the affidavits sworn by the parties and all annexures thereto.

13. The parameters within which applications for stay of execution pending appeal are determined are well set out in *Order 42 rule 6 (2) of the Civil Procedure Rules (CPR)*.

A reading of the aforesaid provision reveals that there are conditions which an applicant should satisfy in order to deserve orders of stay pending appeal. The applicant must demonstrate that if the orders sought are not granted, he will suffer substantial loss; that the application has been filed without unreasonable delay and that he was willing to offer any security for the performance of the decree as the court may in its discretion order. My take is that these conditions are just guidelines which the court can use as beacons in exercising its discretion on whether or not to grant stay of execution pending an appeal.

14. In the case of ***Butt V Rent Restriction Tribunal (1982) KLR 419***, the Court of Appeal emphasized the point that the court considering an application for stay pending appeal has wide discretion in determining whether or not such orders are warranted. It stated as follows; -

***“The power of the court to grant or refuse an application for stay of execution is a discretionary power....The general principle in granting or refusing stay is; If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory should that appeal court reverse the judge’s (read learned magistrate’s) discretion. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”.***

15. Madan JA (as he then was) expressed himself thus at page 419;

***“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”***

16. Applying the above principles to the instant application, I note that the ruling giving rise to the appeal was delivered on 24<sup>th</sup> October, 2016; the memorandum of appeal was filed on 31<sup>st</sup> October, 2016 and the application was filed on 14<sup>th</sup> December, 2016. However, the appellants had filed a previous application on 31<sup>st</sup> October, 2016 which was withdrawn on 14<sup>th</sup> December, 2016 after it was found to be incompetent. The current application was filed on the same day.

In view of the foregoing, I am satisfied that the application was filed without unreasonable delay.

17. The application seeks inter alia stay of execution of all orders emanating from the ruling subject of the appeal. The ruling however only dismissed the appellants’ application for review of the orders made on 21<sup>st</sup> July, 2016. The effect of the orders dismissing the application for review was that the orders that remained in force were the orders made on 21<sup>st</sup> July, 2016. These are therefore the orders which would be stayed if the application was allowed.

18. The appellants spent considerable time urging me to find that the respondent was not a member of the 1<sup>st</sup> appellant and that if I decline to allow the application, the affairs of the association will be managed by strangers. But in my view, whether or not the respondent was a member of the 1<sup>st</sup> appellant is not of critical importance in determining this application considering that it is not disputed that the respondent was not among the persons that were allegedly elected as members of the interim steering committee. What should be of concern to this court is whether the appellants have demonstrated sufficient cause to warrant the exercise of the courts discretion in their favour.

19. After carefully evaluating the material placed before me, I find that if I were to decline granting the orders sought, I will in effect be validating the purported election of the interim steering committee when there are conflicting reports on record concerning whether or not the elections bringing on board the steering committee were ever held. This would also have the effect of rendering the appeal nugatory considering that the appeal challenges the orders dismissing the appellant's application for review after they were aggrieved by the orders legalizing the elections.

20. Though the appellants sought to demonstrate that the appeal has good chances of success, it is not my role at this stage to enquire into the merits or otherwise of the appeal. This is the province of the court that will hear the appeal.

21. This court is now enjoined by *Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act* to do substantive justice to the parties. This is the overriding objective – See: **Stephen Boro Gitiha V Family Finance Bank & three others Court of Appeal (Nairobi) Civil Appeal No. 263 of 2009 (2009) eKLR; Harlt Sheth Advocate V Shames Charania Court of Appeal (Nairobi) Civil Appeal No. 68 of 2008 (2010) eKLR.////////**

22. In as much as it would not be in the interests of justice to make orders which are going to make the appeal nugatory, it would also be in the interest of justice to have the hearing of the appeal expedited so that the substantive issues raised in the appeal can be determined both expeditiously and conclusively in order to finally resolve the leadership wrangles that appear to have engulfed the 1<sup>st</sup> appellant. I do not find it prudent to interfere with the status quo regarding the management of the 1<sup>st</sup> appellant before there is a final determination regarding whether or not the contested elections were held as alleged.

23. In view of the foregoing, I am persuaded to find that the application is merited and it ought to be allowed. But in order to ensure that the appellants do not go to sleep after obtaining the stay orders, I am inclined to grant a conditional stay on terms that I will indicate shortly.

24. Regarding the second limb of the application seeking stay of the lower court's proceedings pending the determination of the appeal, I note that the appeal arises from a ruling made in an interlocutory application. The main suit is still pending hearing. In my opinion, it would be prejudicial and against good order to have the hearing of the main suit in the lower court or other proceedings related to the disputed elections continue when there is an appeal pending in the High Court having a bearing on some of the issues raised in the suit pending in the lower court.

25. For the foregoing reasons, I am minded to allow the application in its entirety which I hereby do. I order that there shall be stay of the orders that remained in force following the ruling delivered by *Hon. H.O Baraza* (PM) on 24<sup>th</sup> October 2016 more specifically the orders made on 21<sup>st</sup> July 2017 and stay of proceedings in Eldoret CMCC No. 252 of 2016 pending the hearing and determination of the appellants' appeal.

26. These two orders are granted on condition that the appellants shall file and serve the record of appeal; cause the appeal to be admitted and set it down for directions within ninety (90) days of today's date. In default of compliance with any of the three conditions set out above within the time specified, the orders of stay shall automatically lapse.

27. The costs of the application shall be in the appeal.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 9<sup>th</sup> day of February, 2017**

In the presence of:

Mr. Tororei for the applicants together with Mr. Kiboi

Mr. Kigamwa for the respondent

Mr. Lobolia – Court clerk