



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC. APPLICATION NO. 76 OF 2015

**IN THE MATTER OF AN APPLICATION BY WEBUYE JAMIA MOSQUE FOR LEAVE TO
APPLY FOR ORDERS OF JUDICIAL REVIEW**

AND

IN THE MATTER OF THE SOCIETIES ACT

AND

IN THE MATTER OF LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF THE LAND REGISTRAR BUNGOMA/MT. ELGON DISTRICT

AND

IN THE MATTER OF GAZETTE NOTICE NO.8171 DATED 30TH OCTOBER 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

LAND REGISTERED TRUSTEES OF WEBUYE JAMIA MOSQUE.....EXPARTE APPLICANT

AND

**PATRONS OF WEBUYE MUSLIM COMMUNITY SHOP.....INTERESTED
PARTY/APPLICANT**

RULING

[1]. The applicant brings this motion under section 3 3a and b c of the Civil Procedure Act and Orders 22 rule 22 order 10 rule 11 of the Civil Procedure Rules. He prays firstly for stay of the orders granted by this Court on 9/5/2016 pending the hearing of this Application inter-parties. Secondly, he prays that the said orders be set aside and/or be varied and that he be given leave to file its replying affidavit to the application dated 15th day of December 2015 and costs.

[2]. The applicant relies on the grounds that it did not participate in the proceedings in Court on 9th of May 2016. Further that it was neither invited to take part nor was it served with Court process or at all. It continued to allege that the orders sought in Court are similar to a current suit in Court in Bungoma ELC No.134 of 2015 now pending for hearing. That unless these orders are granted, that case shall rendered academic and of no consequence.

[3]. Mr. Murunga Learned Counsel for the applicant argued and relied on the affidavit in support by Mr. Waziri Abubakar on the due process of the Court. That the applicants were duly served and that he personally pointed out the applicants to the process server. That it was not the respondents fault that the applicants did not file any pleadings. He argued that Bungoma ELC case No. 134 of 2015 was different from the present case in that, that case dealt with fraud on the part of the applicants while this matter dealt with Judicial Review of the orders of the Land Registrar, declaring them *ultra vires* and *null and void*. That he relied of the said orders sworn on 29/7/2016 and annexures therein. He emphasized that the interested parties were not served and/or invited for hearing and that the hearing was taken *ex parte*. He relied on order 5 rule 13,14 and 15. He also relied on article 50 of the Constitution, the right to fair hearing. He argued that that right was taken away from his client.

[4]. Mr. Abdillahi Hassan Abdirahaman a trustee of Webuye Jamia Mosque on behalf of other trustees swore an affidavit and stated that the application was an abuse and does not in any way jeopardize Bungoma ELC 134 of 2015. He said that the Attorney General who was served on behalf of the Land Registrar admitted that there was a mistake and that he said he would not oppose the mistake. Finally, he stated that he knows that the order was executed by the Land Registrar on 18th May 2016 and that the application had been overtaken by events.

[5]. On 22nd September 2016 Mr. Abdillahi Hassan swore a supplementary Affidavit in which he attached a judgement in Criminal Case No.60 of 2012 in which Mr. Ali Abubakar Waziri was charged four counts as follows;

Count (1) – *Forgery contrary to section 350(1)(2) of the penal code in that on 2/7/2002 in Bungoma Lands Office within Bungoma Township of Bungoma District with intent to defraud forged a certificate of lease purporting to be the genuine trustee of Jamia Mosque Webuye.*

Count (2) – *Forgery of an official Document contrary to section 351 of the Penal Code.*

Count (3) – *Uttering a false Document contrary to section 353 of the Penal Code*

Count (4) – *procuring of a document by false pretence contrary to section 355 of the Penal Code.*

He was convicted of all those charges and fined Ksh.20,000/- on each count in default to serve 6 months for each Coun and the Sentences were to run concurrently.

[6]. Mr. Makokha learned Counsel for the respondents in his submissions opposing the application emphasized that, firstly that the application was over taken by events since the Court order was registered.

That it is clear from the record that the applicants were served on 15/12/2015 in a Mosque near Webuye Way bridge. That it is clear that on 17/2/2016 the parties were in Court when the Court was not sitting and that all parties were given a hearing date for 9/5/2016. That the applicants and their lawyer were in Court on 9/5/2016 and that they chose to keep quiet. The Learned Counsel said that Bungoma ELC 134/2015 deals with the issue of ownership of land between the respondents and the applicants therein and whether there was any instrument transferring the suit property to Webuye Muslim shop, the interested parties herein and whether the Land Registrar had power to transmit to the applicants herein when the process was flawed. Mr Makokha emphasized that the transfer of the land to the applicants

herein was fraudulent in view of the criminal charges against Mr. Ali Abubakar Waziri who has sworn the supporting affidavits herein. Finally, he argues that no prejudice shall be occasioned on the applicants at all.

[7]. The issue herein is service. Were the applicants served, if they were not served, what prejudice will they suffer? Have they been denied their right of fair trial as they allege?

[8]. There is no doubt from the Affidavit of service that the Attorney General was served for and on behalf of the Land Registrar with the application under review. There was no reason why the Land Registrar did not come and defend his actions. The respondent argues that the applicant was served with the application on 15/12/2014 and that he was in Court in January when the Court clerk gave a date for 9th May 2016. This may as well be true. But there is no return of service to show that the applicant was served. The Court record does not show that the applicant was present on both days.

If I were to order that since the applicants were not served and therefore, grant the orders the applicants want, the applicants will then be reinstated as the registered owners in their own names of the suit land.

Then the application by the respondents would have to be served and heard on merits and the Court would have to decide whether the orders of the Land Registrar registering the land in the names of the applicants are to be quashed and repeat the process all over again. However, we now know that the registration in the names of the applicants was through a criminal act. Mr. Ali Abubakar Waziri who has sworn an affidavit supporting this affidavit was convicted of four counts of Criminal activity in regard to this matter. Service or no service, the end result will be that the registration of the applicants as proprietors of the suit land was by fraud. The Court will then be acting in vain. Courts of Law do not act in vain.

The suit property is registered in the names of the current trustees of Webuye Jamia Mosque for public good. That public includes the applicants. I cannot possibly see any prejudice to be suffered by the applicants if that state of registration remains. The applicants who have tainted their hands cannot be allowed to hind under service to try and take this matter to square one when no useful purpose will be achieved by so doing.

The application is without merit and is dismissed with costs.

Ruling read in open court.

DATED and DELIVERED at BUNGOMA this 10th day of March, 2017

S.N. MUKUNYA

JUDGE

In the presence of:

Mr. Wattanga - For Makokha for the Applicants

Mr. Musumba - For Murunga for Exparte applicant

Mr. Anwar - For Otsiula