



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
MISC. APPLICATION CASE NO. 395 OF 2016

ANN NJERI WAIHUMBU.....1ST APPLICANT
SUSAN NDUTA NDUNGU.....2ND APPLICANT
MARTIN GACHERU3RD APPLICANT
DANIEL ABEA4TH APPLICANT
SUSAN NDUTA KIMANI.....5TH APPLICANT

VERSUS

JOSEPH NDEMI WANJIRI.....1ST RESPONDENT
LUKA GITHINJI NDEGWA2ND RESPONDENT
GODFREY CHEGE MUIGAI3RD RESPONDENT
ANN RUTH WANJIKU4TH RESPONDENT
JACKSON MUSYOKA JUMA5TH RESPONDENT

RULING

1. The Notice Motion dated 29th July, 2016 is expressed to be brought under section 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The application seeks orders that the Officer Commanding Muthangari Police Station and/or an officer under his command do give assistance for the purpose of providing security, maintaining law and order during the handing over of the office of Kawangware Market Development Society from the Respondents to the Applicants who are the lawful elected officials of Kawangware Market Development Society.
3. The application is premised on the grounds stated on its face and is supported by the affidavit of Anne Njeri Waihumbu sworn on the 28th day of July, 2016. It is the Applicant's case that following an internal audit on the financial status of Kawangware Market Development Society (hereinafter the society),

elections were carried out in respect of the officials of the society. According to the Applicants, the elections were carried out in accordance with the Constitution of the Society and as directed by the Registrar of Societies. The Applicants thereafter filed a notification of change of officers. On 19th April, 2016 the Registrar of Societies issued them with a certificate of confirmation of the Applicants as the officials of the society. However, when the Applicants proceeded to take over as the office bearers of the society, the Respondents who were the former officials of the society declined to vacate office.

4. Meanwhile, the Respondents who were aggrieved by the elections and the confirmation of the new officials by the Registrar of Societies moved to institute a suit in the High Court (Judicial Review Division) Misc. Appl. No. 182 of 2016. In the said application, the leave of the court was sought *inter alia* to apply for an order of *certiorari* to remove the decision of the Registrar of Societies given on 19th March, 2016 for purposes of being quashed. Leave was also sought for an order of *mandamus* and or prohibition directing the Registrar not to issue and or prohibit him/her from issuing punitive directions against the former officials. It was further deponed that the said Judicial Review proceedings were struck out on the 29th June 2006 and that a subsequent application seeking a review of the said ruling was also dismissed.

5. The Applicants' contention is that the Respondents have declined to peacefully vacate the society's offices and have threatened to cause chaos during the handing over exercise, hence the application herein.

6. In opposition to the application, the Respondents filed the grounds of opposition dated 15th August, 2016. The application is opposed on the following grounds:

“1. THAT the application is spurious, brought in bad faith and abuse of the Court process.

2. THAT counsel for the Applicants concealed the material facts being that there is an ongoing matter between the parties herein before a court of competent jurisdiction in judicial Review Division at Milimani, Misc Application Number 319 of 2016.

3. THAT the matter referred in 2 above was heard interparties on 28th July, 2016 wherein counsel for the applicants was present/represented and the court gave directions for a further hearing on 17th august 2016.

4. THAT the matter under consideration in Misc application No. 319 of 2016 involves bother the parties and the subject matter herein and if this application allowed it will render the orders sought in Misc application No. 319 of 2016 nugatory

5. THAT the application herein is filed in mischief as it doesn't conform to rules of procedure in institution of suits, there is no plaint herein.

6. THAT application is incurably defective and/or fatally defective and should therefore be struck out with costs to the respondents.”

7. The application was argued before me on 17th August, 2016. In his submissions, the Applicants counsel stated that the facts herein have not been controverted as no replying affidavit was filed. He further argued that this application could not have been filed in the Judicial Review proceedings as the said proceedings were struck out and that therefore there was nothing pending.

8. Counsel for the Respondent filed the Notice of Appointment of Advocate late after the filing of the grounds of opposition. However, the said Notice of Appointment was deemed by the court to have been duly filed and the application proceeded on merits. The position taken by the Respondents' counsel is that the Miscellaneous Application herein seeks substantive orders and that therefore the matter ought to have been instituted by way of a plaint accompanied by an application. It is conceded that HC Misc. Appl. (JR) 182 of 2016 which sought leave to commence Judicial Review proceedings was dismissed. That subsequently, HC Misc. Appl.(JR) 319 of 2016 was filed.

9. I have considered the application, the reply to the same and the submissions of the counsels for the parties herein.

10. A question has arisen regarding whether there is a competent action before this court. It is argued by the Respondent's side that the Miscellaneous Application herein is incompetent as it seeks substantive orders yet it is not accompanied by a plaint. However, according to the Applicants' counsel, their Judicial Review proceedings in HC Misc. App 182/2016 were struck out and therefore the application at hand could not have been filed in the said Judicial Review proceedings and that there is no affidavit evidence by the Respondents to dispute the issues of fact.

11. The question that comes to my mind is whether there is a suit upon which the application is anchored. My answer is that there is none. The Judicial Review proceedings upon which the instant application refers to were struck out. The dispute between the parties in respect of the election remains unresolved. In the absence of any suit the application before court is therefore an originating motion. In my view the Applicant cannot institute the proceedings herein by way of a Miscellaneous Application and ought to have instituted the same in a manner provided under the Civil Procedure Act or any other statute.

12. As stated by the Court of Appeal in the case of **Geoffrey Ndungu Theuri v Law Society of Kenya (1988) eKLR**

“The law of this country is not deficient in providing the mode by which a civil suit may be commenced. Order 6 rule 1 provides in mandatory terms how such an action may be brought.

It says:- “ Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”

13. I also find support in the following persuasive authorities: **Joseph Kibowen Chemjor v William C. Kiseru (2013)** where Hon Munyao Sila, J stated thus:

“It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings.

At this level, the court is not adjudicating on any rights. Where there is a call to adjudicate on rights of parties then it must be said that there is a “civil action” and this must be commenced in the manner prescribed by the Rules.”

(See also **David Kanjai Keter & 9 other v Ethics and Anti- Corruption Commission & another (2014) eKLR** where Hon Emukule, J expressed his views on the issue of proceedings commenced by way of a Miscellaneous Application).

14. On whether the proceedings herein are *subjudice* HC Misc. Appl. (JR) 319 of 2016, there is no material placed before this court to enable this court to form an opinion whether this matter is *subjudice* or not. The Respondents chose not to file any affidavit evidence and could not bring the facts of the

alleged suit to the court from the bar.

15. Before I wind up this ruling, I must state that I am alive to the provisions of article 159(2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities of procedure. However, the matter at hand goes beyond procedural technicalities into matters of substance regarding whether the rights of the parties herein in relation to the disputed election have been resolved.

16. With the foregoing, I find the application incompetent. Consequently, I strike out the same with costs to the Respondents.

Dated, signed and delivered at Nairobi this 1st day of Sept , 2016

B. THURANIRA JADEN,

JUDGE