



Odago & 14 others v Board of Registered Trustees of the Anglican Church of Kenya Diocese of Maseno East Parish & another; Oyare & 15 others (Interested Party) (Judicial Review Miscellaneous Application E042 of 2023) [2023] KEHC 25825 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25825 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E042 OF 2023
RE ABURILI, J
NOVEMBER 23, 2023
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS
AND PROHIBITION
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
ACT, THE CONSTITUTION OF KENYA AND ALL OTHER LAWS
AND
IN THE MATTER OF THE ACK DIOCESE OF MASENO EAST
STANDING COMMITTEE OF SYNOD MEMBERS
ELECTIONS HELD ON 24TH AUGUST 2023

BETWEEN

TOM ODAGO & 14 OTHERS EXPARTE APPLICANT

AND

THE BOARD OF REGISTERED TRUSTEES OF THE ANGLICAN CHURCH OF
KENYA DIOCESE OF MASENO EAST PARISH 1ST RESPONDENT

REV. BISHOP JOSHUA OWITI OUMA 2ND RESPONDENT

AND

THE VEN. NICHLAS OTIENO OYARE & 15 OTHERS INTERESTED PARTY



RULING

1. I have considered the Chamber Summons dated 23/11/2023, the grounds and the affidavit in support and the annexures thereto. I observe that the impugned elections took place in August 2023 and therefore there is no urgency at this time in bringing these proceedings seeking to quash the process that has already taken place three months later.
2. I therefore decline to certify the matter as urgent.
3. Nonetheless, the application is *ex parte* in the first instance and this court has discretion to grant the leave or stay sought or to direct that the application be served for *inter partes* consideration and or hearing. Having considered the application, and in order to avoid duplication of arguments during the hearing of the substantive application and during leave stage, I proceed to consider the application *ex parte* in the following terms:
4. The reasons for leave before commencing judicial review proceedings were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
5. The Learned Judge further held that leave may only be granted if on the material available, the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant; the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.
6. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence placed before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.
7. The applicants aver that the respondents unilaterally and arbitrarily carried out the elections using a mode by way of Show of Hands instead of Secret Ballot which was in contravention of the Anglican Church Constitution.
8. Albeit it has not been stated whether there are available dispute resolution mechanisms in the Church Constitution, the *ex parte* applicants herein seek leave for orders of Declaration that those elections were a nullity, certiorari to quash the elections and prohibition to prohibit the 1st to 16th interested parties from continuing to carry out the duties of the Church as well as mandamus to direct and compel the respondents to carry out fresh elections of the Standing Committee of the Synod by way of secret ballot.
9. According to the applicants, the respondents acted outside its mandate and as such failed to fulfil the legitimate expectations of the members of the Church as far as the holding of the Standing Committee of the Synod was concerned.



10. To this extent, and in light of the material placed before me in the affidavit and the annexures, and upon a cursory perusal of that affidavit evidence before court and without delving into the arguments by the ex-parte applicants, it is my view that the case is an arguable one to justify leave. It cannot be said to be frivolous or vexatious.

11. On the question of whether the said leave should operate as a stay of the impugned actions by the respondents, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

12. In R (H). v Ashworth Special Hospital Authority (2003) 1 WLR 127, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In Taib A. Taib v The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 the court held that:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

13. In this case, the act complained of was already implemented that is, elections were held on 24th August 2023. The applicants have come to court three months after the interested parties have already assumed office and exercising the functions of their respective offices.

11. I find that it is not in the interest of justice that this court should stay such a process at this stage. I decline to grant stay.

14. In the end, I grant leave sought to apply for judicial review orders as prayed. I however decline to order that such leave do operate as stay of implementation of the impugned process owing to lapse of time.

15. The substantive motion to be file and served upon all the respondents and the interested or affected parties within 21 days of today in a separate Judicial review file.

16. I so Order.

17. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23D DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

