



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1115 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

ALEX MISIGO MATISHA.....APPLICANT

VERSUS

THE REGISTRAR OF SOCIETIES.....RESPONDENT

AND

SIMON RUGUT.....1ST INTERESTED PARTY

SAMSON KHALWALE.....2ND INTERESTED PARTY

JACOB LUSENO.....3RD INTERESTED PARTY

LEVI BOSIKO BWAMU.....4TH INTERESTED PARTY

MAXWEL SHITSIMI.....5TH INTERESTED PARTY

RULING NO 3

1. The Applicant herein, Alex Misigo Matisha, has filed an application by way of a Chamber Summons application dated 9th October 2020, seeking orders that he be granted leave to seek by way of Judicial Review, for an order of mandamus to compel the Respondent to forthwith intervene in the affairs of the African Church of the Holy Spirit, which is currently embroiled in leadership wrangles and financial impropriety with normal operations heading to a standstill. The Applicant also seeks orders that the costs of the application be provided for.

2. The said application is supported by a statutory statement dated 9th October 2020, and a verifying affidavit sworn on the same date by the Applicant. This Court directed that the said Chamber Summons application be canvassed *inter partes*, after noting that the Applicant had cited various other pending cases involving some of the parties herein in the application, and particularly on the issue of whether the instant application is an abuse of the process of Court. The parties' respective cases on the issue of leave are as follows.

The Applicant's Case

3. The Applicant deponed that he is the official Deputy High Priest of African Church of the Holy Spirit, and also serving as the Church Registered Trustee. He averred that as a Registered Trustee, he raised a Complaint to the Director of Criminal Investigation Office Kakamega, East Sub-County regarding the misappropriation and theft of funds then rampant at the Church Headquarters and the Branches, and attached a copy of the said letter which was copied to the Director Criminal Investigations Department, Nairobi, the Regional Criminal Investigations Office, Kakamega, the Deputy Registrar of Societies, Office of the Attorney-General and the High Priest of the African Church of the Holy Spirit Lugala, Headquarters .

4. He also contended that at one stage, some officers of the Church being Simon Rugut, National Chairman, Jacob Luseno, National Treasurer, Samson Khalwale, General Secretary and Maxwell Shitsimi, Recorder, who he has joined herein as Interested Parties, defied the

President's directive on gatherings due to the Covid 19 pandemic by calling for a meeting at the Church Headquarters of over three thousand church faithful.

5. The Applicant detailed the meetings that were thereafter held to discuss his complaints and resolutions made thereto, and the leadership structures and wrangles in the subject church. He averred that the aforementioned executive officers have dragged the church into cases such as Civil Suit case no. 238/2020 at Nakuru Magistrate Court, Civil Suit case no. 324/2016 Chief Magistrate Kakamega, and Civil Suit no. 7308/2019 at Nairobi Milimani Commercial Magistrate Court and annexed copies of pleadings and documents on the said cases.

6. According to the Applicant, the Respondent has the mandate to act on the complaints raised, but has neglected to act positively hence leaving the subject Church to drown in persistent wrangles.

The 1st Interested Party's Case

7. Simon Rugut, the 1st Interested Party, filed a Replying Affidavit sworn on 8th December, 2020, wherein he deponed that he is the National Chairman of African Church of the Holy Spirit. In support of the application dated 9th October, 2020, he stated that the 2nd, 3rd, 4th and 5th Interested Parties had taken their own way of operating the said church without proper consultation from him as the National chairman, and without following the church constitution. Further, that the said four Interested Parties have dragged the churches into court cases for their own interest and beliefs and have called several executive meetings which are chaired by the 4th Interested Party without his consent as a National chairman. He further averred that the Registrar of Societies is informed about the misdeeds and has never called or given guidance. He requested the Court to remove his name as the 1st Interested Party on this matter.

The 4th Interested Party's Case

8. Levi Bosco Bwamu, the 4th Interested Party filed a Replying Affidavit dated 20th November, 2020 and deponed that he has authority of the 1st, 2nd, 3rd and 5th Interested Parties to do so and annexed a copy of the duly signed authority. He denied that there are leadership wrangles in the subject church as alleged by the Applicant, the current church leadership is under the High Priest who is also the head of the church. He averred that he has not received, neither has the executive received any complaint against the church and that he has no knowledge of the existence of summons by the Director of Criminal Investigations to answer any complaint lodged against him or the officials of the church. He further stated that the Applicant is dragging the Respondent to court for no reason when the church has its own dispute resolution mechanisms he has failed, neglected and or refused to explore.

9. Lastly the 4th Interested Party denied that none of his co-Interested Parties have sued the church and stated that in most if not all the cases filed, the church officials are the ones who have been sued. Further, that the case in Nakuru was engineered by the Applicant when he appeared at an interlocutory stage to record a Consent on behalf of the church, when he had no authority to do so.

The Determination

10. The Applicant's advocates on record, Maosa & Company Advocates, filed submissions dated 29th January 2021, wherein the averments made by the Applicant were reiterated. It was submitted that the Applicant has established a *prima facie* case against the Respondent who has neglected to act in a matter wherein he has oversight powers, and as a result the Applicant's constitutional rights have been violated; namely that is the right to be a member of a society. Further, that the Respondent is under an obligation to protect the rights of the Applicant by invoking the available statutory powers so as to intervene in the affairs of the respective church organization. Lastly, that this Court has unfettered discretion to grant leave to pave way for the institution and prosecution of the substantive motion seeking the order of Mandamus.

11. Andia & Company, the Advocates for the 1st, 2nd, 3rd, 4th and 5th Interested Parties also filed written Submissions dated 20th November, 2020. It was contended therein that a party in a judicial review seeking an order of Mandamus must show the existence of a statutory duty conferred or invested by a statute upon some person, body of persons or tribunal which such a person or body of persons has failed to perform. It was their case that the Respondent's role is clearly spelt out in the Societies Act and does not include the role to intervene in the churches wrangles but the role to perform inspection of documents and accounts, and call for further particulars as provided for under Sections 38 and 39 of the Societies Act.

12. The said Interested Parties also submitted that they have their own dispute resolution mechanisms as provided for under the church's Constitution which provides for dispute resolution and punishment of offenders, and the alleged wrangles and financial improprieties can be effectively solved and settled by the church, through the Constitution. Reliance was placed on the decision in the case of **Hydro Waterwell (k) Limited vs National Water Conservation & Pipeline Corporation (2019) eKLR**, where the court held that the purposes of an application for leave for Judicial review is first to eliminate at an early stage any applications for Judicial review which are either frivolous, vexatious or hopeless and secondly 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 consideration.

13. I have considered the Chamber Summons application dated 9th October 2020 and the applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

14. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

1. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
2. whether the claimant has capacity to bring a claim for judicial review;
3. whether the claimant has a sufficient interest to bring a claim for judicial review;
4. whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
5. whether the claim is otherwise an abuse of process;
6. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
7. whether the claim has been brought promptly;
8. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

15. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Some of the grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

16. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

17. In the present application, the pleadings by the Applicant and Interested Parties have disclosed that there disputes which resulted to pending court cases in different courts on the leadership in the church. It is thus evident that the subject matter of the *ex parte* Applicant's application is also pending in other courts of competent jurisdiction, and therefore, not only does that Applicant have other adequate alternative remedies that it is already utilizing, there is also the risk of this Court giving conflicting orders. This application is therefore also in abuse of the Court process. To this extent I find that the Applicant has not met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

18. I accordingly order as follows:

I. The *ex parte* Applicant's Chamber Summons dated 9th October 2020 is found not to have merit, and is hereby dismissed with no order as to costs.

II. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant, Respondents and Interested Parties by electronic mail by close of business on Thursday, 29th April 2021.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant, Respondent and Interested Parties and/or their Advocates on record.

P. NYAMWEYA

JUDGE