



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 142 OF 2019

PRADIPKUMAR BHAGWANJI SHAH.....1ST PETITIONER

SURESHCHANDRA PREMCHAND SHAH.....2ND PETITIONER

(Suing on their own behalf and on behalf of other Members of the
Shree Visa Oshwal Community, Nairobi)

-VERSUS-

DINESH MEGHJI DHANANI.....1ST RESPONDENT

MAGANLAL MOTICHAND CHANDARIA.....2ND RESPONDENT

NALIN KHIM VORA.....3RD RESPONDENT

(Sued as the Registered Trustees, Shree Visa Oshwal Community)

DHIRAJ DEVAN DODHIA.....4TH RESPONDENT

JINITJAYANTILAL SHAH.....5TH RESPONDENT

BINDI RASHMI SHAH.....6TH RESPONDENT

HETAL CHANDULAL HARIYA.....7TH RESPONDENT

AYUSH MILAN SHAH.....8TH RESPONDENT

BINDI NISHIT SAVIA.....9TH RESPONDENT

(Sued as the Office Bearers, Shree Visa Oshwal Community Nairobi)

JUDGMENT

INTRODUCTION.

1. The Petitioners by way of Petition dated 5th April 2019 pray for the following reliefs:-

a) A declaration that the removal of the Pratimas at the Mahavir Swani Jinalay, situated on L.R. No. 209/1696 located along Keekorok/Jainsala Roads, Nairobi would be a violation of the worshippers' right to freedom of religion and equal protection of the law.

b) A declaration that the Mahavir Swani Jinalay, situated on L.R. No. 209/1696 located along Keekorok/Jainsala Roads, Nairobi ought to be protected as a building and/or monument of national cultural heritage.

c) A permanent injunction restraining the Respondents, through themselves, or through their servants, agents, employees, task force, from in any way removing, transferring, desecrating, or in any way interfering with the Pratimas at the Mahavir Swani Jinalay, situated on L.R. No. 209/1696 located along Keekorok/Jainsala Roads, Nairobi.

d) Such other and/or further relief as this Honourable Court might deem fit and just to grant.

e) The costs of this Petition be provided for.

Petitioners' Case

2. The Petition is supported by the Affidavit of the 1st Petitioner herein and sworn on 5th April 2019 in which the Petitioners have made several averments.

3. The facts of the case are that the Petitioners seek to prevent the transfer of the idols known as *Pratimas* from being transferred from the Mahavir Swani Jinalay (the town temple) to the Munisuvrat Swani Jinalay (Ngara temple) by the 4th to 9th Respondents.

4. The Petitioners allege that the town temple has historical significance as its structure was built circa 1927 and is considered one of the oldest and most iconic buildings in Nairobi. The Petitioners claim that the building forms part of the national's cultural heritage and should be designated as a protected building under the **National Museums and Heritage Act, 2006**. The Petitioners further claim that if the idols are removed from the building it shall no longer be a town temple, and would be equivalent to destroying the temple.

5. The Petitioners contend that the removal of the idols would amount to a violation of **Articles 32, 27 and 10 of the Constitution**. It is averred that removing the idols would infringe upon the right to religion of the worshippers who have worshipped and practiced their faith in the town temple for many years. The Petitioners further assert that the worshippers as the town temple have equal benefit of the law, and therefore should be entitled to full and equal enjoyment of the freedom of religion. Lastly they claim that because of the history of the building dating back to colonial days, it should form and be protected as part of this nation's cultural heritage.

6. The Petitioner filed a Further Affidavit sworn by the 1st Petitioner herein on 4th February 2020 in response to the Respondent's Replying Affidavit. The Petitioner asserts that what lies at the heart of the Petition is that the decision of the Managing Committee and simple majority of members present can decide upon matters affecting the Petitioners' freedom of religion, equality and protection before the law.

7. The Petitioner is not convinced that the rights of the minority can be freely violated by the majority. It is claimed that only 60 members voted to remove the idols out of a community of an excess of 4000 members.

8. It is the Petitioners' contention that this decision should be made a process of genuine consensus building, arrived at through deep, spiritual reflections and considerations and not by majority votes. Furthermore, the Petitioner claim to be supported by the *Acharya/ Maharji Saheb* who did not give a final approval to relocate the idols but conditioned his suggestion upon the unanimous agreement by the whole community.

9. The Petitioners assert that the religious rituals required to be done on the idols, there is on a daily basis a devotee who perform the requisite rituals. They further contend that in India there have been no temple/idols moved. They also dispute the case of Zanzibar where the Jain community left the temple due to the revolution of 1964.

RESPONDENTS' CASE

10. The Respondents filed a Replying Affidavit sworn by the 5th Respondent herein on 8th July 2019. It is the Respondents' position that the decision to move the idols was premised on the fact that the area had become congested, there was inadequate parking space, and that security was not guaranteed due to homeless persons living around the area. Furthermore, it contended that on any given day only a handful of persons attend the worshipping prayerful rituals at the town temple, and on most days no members of the community visit to the temple in order to perform the daily rituals required to be done on the idols.

11. The Deponent asserts that the Managing Committee sought to opinion on the relocation by the *Maharji Saheb* who is a highly respected spiritual leader of the Oshwal Community who approved the relocation. Furthermore, upon the General meeting of the community held on 6th December 2018 majority of the members present voted in favour of the relocation. The same decision was reached on other general meetings including one held on 19th February 2019.

12. The Respondents clarifies that the town temple was indeed building 1927 but was not established as a *Jinalay* until 1957 when the idols were installed, which means it is 38 years shy of becoming a site of pilgrimage. Therefore the argument by the Petitioners' that the town temple is a pilgrimage site as a reason for retaining the idols is invalid. Furthermore, it is contended that the town temple has not reached the statues for declaration of a monument under the National Museums and Heritage Act, 2006. The Respondents assert that the decision to move idols is not novel as the same has been done in India, Zanzibar, and at the Ngara Temple in Nairobi in 1964.

13. The Respondents aver that the Petitioners have not raised any legal or constitutional issues to warrant the interference of the court. It is asserted that this is an internal dispute within the Community against a decision reached through a democratic process and by vote of majority.

14. It is further contended that the Petitioners' right to religion is not threatened as they are still free to worship at the town temple, and any elaborate rituals involving the idols can be done at the Ngara temple only four kilometres away. The Respondents claims that by moving the idols to the Ngara temple will allow more devotees to worship, and the temple is more secure and has more parking than the town temple. The Respondents allege to be acting the interest of the larger community as opposed to the Petitioners.

PARTIES SUBMISSIONS

(i) PETITIONERS SUBMISSIONS

15. The Petitioners filed submissions dated 11th May 2020 in which it is submitted that the issues for determination are:

i. Does the Petition raise constitutional issues touching on the freedom of religion and the right to equal protection and/or benefit of the law?

16. The Petitioners rely on the holdings in Nyakamba Gekara v Attorney General & 2 others [2013] eKLR, Seventh Day Adventist Church (East Africa) Limited v Minister of Education & 3 others [2014] eKLR, SDA v Minister of Education [2014] where the courts extrapolated on the right to religion.

17. Reliance is also placed on the decision of the Supreme Court of India in Civil Appeal No. 10866-10867 of 2010 M Siddig (D) Thr Lrs v Mahant Suresh Das & Others to support their contention that there exists an intrinsic link between the idols and the temple itself. Therefore it is submitted that removal of idols from the temple amounting to the desecration of a place of worship. In the above case, it was posited that juristic personality was bestowed upon the idols in order to protect the interests of the devotees.

18. On the right to equal benefit and protection of the law, the Petitioners assert that they have a right to be treated equally to the worshippers at the Ngara Temple. The Petitioners claim that the Respondents are favouring the worshippers at the Ngara Temple over those of the Town Temple.

ii. If so, has there been a violation, infringement or a threatened violation/infringement of the said freedom and right?

19. The Petitioners submit that the freedom of religion involves manifesting one's faith through overt acts, which in this case would be worshipping at the Town Temple. It is asserted that this right was infringed when the Respondents called a vote on the matter at an alleged hurriedly called General Meeting. The Petitioner avers that you cannot call a vote on a religious right as it is not a matter that turns on the appeal of the majority.

20. They rely on the holdings in Regina Williamson & others v Secretary of State for Education and Employment [2005] 2 AC 246; R v Big M Drug Mart Limited cited in SDA v Minister of Education (supra); Republic v Khadis Court Nairobi & 2 other ex-parte TL [2018] eKLR; West Virginia State Board of Education v Barnette, 319 U.S 624 [1943] cited in East African Breweries Limited v Attorney General & 2 others [2019] eKLR.

21. The Petitioners argue that this court is mandated to safeguard the Bill of Rights as was determined in Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR; Jasbir Singh Rai & 3 others v Tralochan Singh Rai Estate & 4 others [2013] eKLR.

iii. Is the Town Temple deserving of protection as a site of National Heritage by virtue of its historical heritage?

22. The Petitioners argue that the state is obliged to promote and protect all forms of national and cultural heritage sites under Article 11 (2) (a) of the Constitution. The Petitioners submit that it is not in dispute that the building which houses the temple was built in 1927 and therefore it is steeped in history and culture. They cite the cases of Isaiah Waweru Ngumi & 2 others v Chairman National Land Commission & 6 others [2017] eKLR. The Petitioners urged to direct the relevant authorities under the National Museums and Heritage Act to look into whether the Temple qualifies as a monument or protected building.

(ii) THE RESPONDENTS SUBMISSIONS

23. The Respondents filed submission dated 3rd February 2020 and submit that the issues for determination are:-

i. Whether this court has jurisdiction to hear and determine this matter

24. The Respondent submits that the courts typically refrain interfering in the affairs of registered societies. The Respondents urge the court to be guided by the holding in Lalji Meghji Patel v Karsan Premji [1976] eKLR where the court held that:-

“The Courts in Kenya will not interfere in matters of religion and conscience, provided of course that no breach of the laws of Kenya is involved. The Courts will not interfere with matters of dogma or ritual and other internal matters within the competence of a church or religious establishment.”

25. The Respondents assert that the Petitioners have not challenged the legality of the process of passing the resolution. Furthermore, they contend that the matter is an internal dispute within the community and therefore cannot be resolved by the Court as the court cannot enter into the realm of internal thoughts and reflection about the religious beliefs.

ii. Whether there has been a violation of any of the Petitioners' constitutionally protected rights

26. The Respondents submit that there has been no violation of the Petitioners fundamental rights and freedoms as they are at liberty to continue to worship in the temple. Furthermore, the Respondents contend that the resolution to move the idols was passed legally by the Community according to their Constitution through the general meetings held on 28th November 2018, 6th December 2018, as well as other meetings evidenced as per Annexures marked "JJS 3, JJS 4 and JJS5".

27. It is asserted that the right to exercise one's religion includes the right to transfer the idols, and if the court grant orders restricting this it would amount to limiting the same rights. The Respondents further contend that the Petitioner have not proven any unequal treatment, as adherence to a majority vote does amount to discrimination. This is supported by the decision in **Rangal Lemeiguran & others v Attorney General & others [2006] eKLR.**

iii. Whether the relocation of the Pratimas amounts to a personal violation of the Petitioners' human rights?

28. The Respondents assert that the movement of the idols to the Ngara Temple is beneficial to the community and in the larger community's best interest. The Respondents further argue that contrary to the Petitioners' allegations there is no favouritism or bias against any Temple.

iv. Whether the Respondents have been wrongly joined in the suit?

29. The Respondents argue that the 4th to 9th Respondents have been wrongfully joined to the suit as a tactic to intimidate the current office bearers of the Management Committee of the Community. They assert that they acted in their official capacity and not in their individual capacity. They suggest that the proper Respondents would have been the Registered Trustees of the Shree Visa Oshwal Community in accordance with Clause 25.13 of the Community's Constitution.

v. Whether the Petitioners are entitled to the reliefs sought?

30. The Respondent asserts that the Petitioners' rights were not violated and therefore they are not entitled to the reliefs sought. On the matter of the declaration of the Town Temple as a monument it is submitted that the Court cannot exercise the power of the Cabinet Secretary and National Museums of Kenya by making such a declaration. It is pointed out that both the Cabinet Secretary and National Museums of Kenya have not been enjoined as parties. Reliance is placed on the decision in **Narok County Council v Trans Mara County Council & another [2000] eKLR.**

ANALYSIS AND DETERMINATION

31. I have very carefully considered parties rival pleadings, submissions and authorities relied upon as well as counsel rival submissions. From the aforesaid the following issues arise for this Court's consideration:-

- a) *Whether the court has jurisdiction to hear and determine this matter?*
- b) *Whether there has been a violation of any of the petitioners' constitutionally protected rights?*
- c) *Whether the relocation of pratimas amounts to a personal violation of the Petitioners human rights?*
- d) *Whether the Respondents have wrongfully been enjoined in this petition?*
- e) *What relief (if any) are the Petitioners entitled to?*

A. WHETHER THE COURT HAS JURISDICTION TO HEAR AND DETERMINE THIS MATTER?

32. The jurisdiction of court to deal with a constitutional issue is clearly provided in various Articles of the Constitution of Kenya 2010. **Article 23 of the Constitution** states that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Under **Article 165(3)(b) of the Constitution** the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

33. The Petitioners urge the Petition discloses a clear constitutional issue as to whether moving the pratimas from the Town Temple to the Ngara Temple in the manner contemplated by the Respondents, through subjecting it to a vote in a General meeting amounts to a breach of the Petitioners' freedom of religion as enshrined under the constitution.

34. The freedom of religion is provided for under **Article 32 of the Constitution of Kenya 2010** which provides :-

"32. Freedom of conscience, religion, belief and opinion-

(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

35. The Constitutional provisions herein above highlight, the importance placed on one's right to express and manifest his/her religious beliefs as was fittingly expressed in the case of *Nyakamba Gekara v. Attorney General & 2 Others (2013) eKLR*, where the Court stated:

"In the same view, the case of *R (Williamson) v Secretary of State for Education and Skills [2005] 2 AC 246* is highlighted. Lord Nicholls had this to say:

"Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals' respect each other's beliefs. This enables them to live in harmony."

36. It is evidently clear that **Article 32 of the Constitution** on freedom of conscience, religion, belief and opinion is fundamentally important to the peaceful functioning of any democratic society. The freedom of religion clearly involves in one being able to express his/her beliefs through overacts.

37. The above position was openly expressed in the case of *Seventh Day Adventist Church (East Africa) Limited v. Minister of Education & 3 Others (2014) eKLR* where the Court held that freedom of religion is a two pronged fork:-

"As is now internationally perceived, freedom of religion includes two closely related but nevertheless clearly distinguishable entitlements: freedom to adopt a religion or belief of one's choice and freedom to manifest that religion or belief in worship, observance, practice and teaching. To "hold a religious belief" has been said to relate to the inner act of believing and "to manifest" has been said to relate to the external acts of giving expression of one's faith."

38. The Petitioner further aver that apart from the freedom of religion there is also the right to equal benefit and protection of the law. It is Petitioner's position that the constitution at **Article 27 of the Constitution** guarantees all persons the right to equal protection and equal benefit of the law that **"every person is equal before the law and has the right to equal protection and equal benefit of the law"**.

39. From the above the petitioners contend the petition raises Constitutional issues touching on the freedom of religion and the right to equal protection and/or benefit of the law.

40. The Respondents on the other hand contend that the court's jurisdiction in dealing with spiritual matters arising within a registered society is limited. The Courts, as a general rule refrain from lightly interfering in the internal affairs of a registered society, which has its constitution in respect of how to solve internal disputes. In the decision of the Court of Appeal for *East Africa in Lalji Maghji Patel v. Karsan Premji (1976) eKLR* the Court stated thus:

"The Courts in Kenya will not interfere in matters of religion and conscience, provided of course that no breach of the laws of Kenya is involved. The Courts will not interfere with matters of dogma or ritual involved. The Courts will not interfere with matters of dogma or ritual and other internal matters within the competence of a church or religious establishment. If the members of the Mombasa temple wish to recognise one or other or both the Nairobi temples, that is entirely a matter of individual choice and conscience for the members of the Mombasa temple, and the Constitution guarantees their freedom of conscience in this respect."

41. I note in the instant Petition that the **Shree Visa Oshwal Community** is a duly registered society governed by a constitution and by-laws. The Constitution is duly exhibited at pages 72 to 116 of the Petition. The Constitution of **Shree Visa Oshwal Community** contains express provisions regarding the conduct of the internal affairs of the community.

42. The Constitution of the **Shree Visa Oshwal Community** has specific provisions, for example, specifically with regard to decision making, it provides for General Meeting as the main decision making forums of the community. The constitution of the community clearly provides that every member has a right to attend and participate in General Meetings as per **clause 8 of the Constitution** which provides:

"8.1. Members shall be entitled to attend the Annual General meeting, General Meeting or Extraordinary General Meeting and to participate in their proceedings, to move resolutions and be eligible to be elected to the Managing Committee or Sunday or a Public holiday, the Nomination for such vacancy shall close at 5.00p.m on the following Weekday. The Nomination must be proposed and seconded by Members of the Community. Any member elected at that General Meeting shall hold office until the Annual General Meeting held in the next Election year and shall, unless the Constitution or By-laws provide otherwise, be eligible for election at that meeting Provided that if there has been no nominations for Chairman and the Chairman is elected in accordance with this sub-clause 10.1.4 then the remainder of the Management Years before the next election shall be deemed to be one term of two 92) management Years for the purpose of Clause 11.1." (Emphasis mine).

43. The community constitution is very elaborate and provides for the process of convening and conducting General meetings; inter alia; the requisite notice, the quorum for such meetings, passing of resolutions and amendment of any resolutions passed. The petitioners herein admit that the decision complained of was arrived at through the democratic process laid down by the community in its constitution and its by-laws and through a majority of the members present at the General Meeting. It is noted that from the petition itself, that there is absolutely no challenge to the legality of the process of passing the resolution.

44. The Petitioners in the instant petition; state that the decision reached at ought to have gone through deeper spiritual reflections and considerations. I find from the Petitioners' pleadings, and averments that this is purely an internal dispute within the community where some of the members of the community feel that they do not agree with a decision reached through a democratic process and by a vote of the majority. I find that the position already taken by the petitioners cannot possibly be resolved through litigation through the court because the court cannot enter into the realm of internal thoughts and reflections about a religious belief.

45. The matter before this court as brought by the Petitioners relate to matters of religion and conscience as provided at **Article 32(1) of the Constitution**, where it is provided that every person has the right to freedom of conscience, religion, thought, belief and opinion. In the instant Petition between the Petitioners and Respondents all of them are members of **Shree Visa Oshwal Community** a registered Society governed by a Constitution and by-laws. I find that it is not proper for the court to interfere in matters of religion and conscience, as long as, there is no violations of the laws of Kenya is involved. In view of the foregoing it is my considered view that this court lacks jurisdiction to decide the instant dispute as placed before it. I find that this court further lacks jurisdiction to reverse a resolution passed democratically by the members of the community regarding important matters of faith and religion. On that ground alone the petition ought to be dismissed but in view of other pertinent issues raised herein and in case the court is faulted on this finding, and out of abundance of caution, I shall proceed to consider the other issues and on merit of the Petition.

B. WHETHER THERE HAS BEEN A VIOLATION OF ANY AS THE PETITIONERS' CONSTITUTIONALLY PROTECTED RIGHTS?

46. The Petitioners assert that the Respondents' actions of being intent of removing the pratimas from the Town Temple to the Ngara Temple actually infringe upon the petitioners rights and freedom of conscience, religion, belief and opinion as enshrined under **Article 32 of the Constitution of Kenya 2010**. It is urged by the Petitioners the freedom of religion involves being able to manifest one's faith through overt acts, thus in this case, worshiping at Town Temple and the Town Temple is inextricably linked to the Pratimas. It is averred that the Respondents have by their action purported to infringe upon the Petitioners rights by calling "a vote" on the matter at a hurriedly called General Meeting. The Petitioners otherwise contest that a vote called on a religious right, as it is not a matter that turns on the appeal of the majority. They also urge the same applies to the right to equal benefit and protection, which they aver cannot be voted away.

47. The petitioners in support of the above proposition sought to rely on the English case of **Regina Williamson & others v Secretary of State for Education and Employment (2005) 2 AC 246** where Lord Nicholls stated:-

"Freedom of religion protects the subjective belief of the individual. As Iacobucci J. also notes, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising..."

Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are the individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, the threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the [European] Convention..."
(Emphasis mine).

48. The above position was reiterated by the Canadian Court in **R v Big M Drug Mart Limited, as quoted in SDA v. Minister of Education [2014]** where Dickson CJG held:-

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms... Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination." (Emphasis added).

49. The Petitioners submit by dint of **Article 32 of the Constitution** are inherently free to decide where they would like to worship and manifest their religious beliefs and that forcing the Petitioners and other like-minded people to visit another temple simply because the same was voted upon is a blatant violation of the petitioners' guaranteed right to freedom of religion. That to do so it is averred is to subjugate the freedom of religion to the tyranny of the majority. The Petitioners on this proposition seek to rely on the decision in **SDA v Minister of Education (2014) eKLR** in which Lenaola J (as he then was) stated:

"I cannot offer a better definition of the main attributes of freedom of religion but as Dickson CJC went on to say in the above case, if a person was compelled by the State or the will of another to do that which he would ordinarily not have chosen to do, he is not acting of his own volition and thus cannot be said to be truly free.... He went on to say that freedom of religion meant in a broad sense, that subject to such limitations as are necessary to protect public safety, order, health or morals or fundamental rights of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. He expressed himself as follows:

"What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the 'tyranny of the majority.'" (Emphasis mine)

50. The Petitioners urge that it is a well established principle of law, save for the absolute rights under the Bill of rights other rights and freedoms under the Constitution may be limited to the extent necessary in an open and democratic society. This is reflected in **Article 24 of the Constitution** which provides thus:-

“24. Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a. the nature of the right or fundamental freedom;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;

51. The Petitioners urge that in the case of religion, there is need to strike a balance when deciding whether to limit one’s right to freedom of religion which is delicate; as expressed by the court in *Seventh Day Adventist Church (East Africa) Limited vs. Minister of Education & 3 Others (2017) eKLR* where it was stated:-

“...that freedom of religion is a complex issue and requires delicate balance since it protects the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differ from the beliefs which are being observed in schools or by the majority. In other words, a fair balance must be struck, as correctly observed by the learned Judge, between the rights of the individual and the rights of others...”

52. The Petitioners aver that the Respondents have evinced their intention to still keep the Town Temple open even after pratimas are relocated, necessitating the question; if the state of the Town Temple is as bad as the Respondents are claiming, then why not concentrate efforts at bringing the Town Temple to the required standards as opposed to voting to move the pratimas? The Petitioner conclude by asserting that it is evident in the situation at hand that the Respondents are seeking to unjustifiably and unfairly limit the Petitioners’ freedom of religion, more particularly their right to worship in a place of their choice. The Petitioners aver that they seek the protection of this Honourable Court to preserve the Town Temple and fend off the majoritarian tyranny of the Respondents which they aver is being used to curtail religious freedom and depriving the petitioners of equality and benefit of the law. They rely on the decision of Justice Robert Jackson in *West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)*, quoted in *East African Breweries Limited v. Attorney General & 2 others [2019] eKLR*:

“...if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” (Emphasis mine).

53. The Petitioners seek this Honourable Court exercise its constitutional mandate to safeguard the Bill of Rights. It is Petitioners averment that this position was considered by the Supreme Court in the case of *Jashir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate & 4 Others (2013) eKLR*, where the Chief Justice Mutunga said the following in relation to the jurisdiction of the High Court to deal with matters involving violations of constitutional provisions:

“The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in *Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR*.

54. The Respondents contend the Petitioners contention as regards alleged infringement of their freedom of religion under **Article 32 of the Constitution** and denial of Equal benefit of the law under **Article 27 of the Constitution**; that none of the Petitioners’ Constitutionally protected rights have been threatened or violated in any way.

55. In the instant Petition, it is clear that the Petitioners are at liberty to continue their worship at the Town Temple, if they so wish. There is no evidence of their being denied the exercise of their freedom of religion. On the issue of any of the elaborate rituals involving the pratimas, the respondents argue that the petitioners are at liberty to participate in the same at the Ngara Temple which is approximately four (4) kilometres from the Town Temple.

56. The Respondents in their uncontested affidavits and annexures have no doubt been able to demonstrate that the resolution complained of was passed in accordance with the community constitution and by-laws: therefore the resolutions were passed legally. It is clear from the Respondents pleadings that:

“(i) Notice of a general meeting and agenda was given on 28th November 2018 which notice exceeded the minimum notice period of 7 days required by the Constitution of the Community. (See annexure “JJS-3” at page 17 of the Replying Affidavit.) This is confirmed in paragraph 8 of the 1st Petitioner’s Affidavit in support of the Petition.

ii) A general meeting of the Community was held on 6th December 2018. (See Annexure “JJS-5” at page 24 to 31 of the Replying Affidavit). This is also confirmed in paragraph 12 and 15 of the 1st Petitioner’s Affidavit in support of the Petition.

iii) *The attendance at the meeting met the quorum for a general meeting, being 50 members. (See Sections 10.4.1. and 10.4.2 of the Visa Oshwal Community Constitution at page 79 of the Petition and the attendance during the AGM contained in annexure “JJS-4” at pages 18 to 23 of the Replying affidavit.)*

iv) *The meeting was conducted and the resolution passed in accordance with the constitution and bylaws (See the minutes, Annexure “JJS-5” at pages 24 to 31 of the Replying Affidavit.)*

v) *Discussion and approval of the decision to move the Pratimas appears at pages 26 to 31 of the Replying Affidavit.*

vi) *The 1st Petitioner is quoted to have contributed to the debate during the AGM at page 27, 4th paragraph and page 29 paragraph 1. The 2nd Petitioner was present and is listed as number 58 at page 20 of the Replying Affidavit.” (Emphasis added).*

57. In view of the above it turns out that any member of the community was aware of the meeting as well as the agenda. Every member including the Petitioners had an opportunity to exercise their right to influence the decision by attending the meeting and voting for or against the transfer of pratimas. The failure of the members to turn out in large numbers, cannot in any way detract from the validity of the resolution passed lawfully granted the constitutional quorum was met, as the quorum at beginning of Annual General or General Meeting of the community is fifty (50) members.

58. In the instant Petition, there is no dispute that the Petitioners attended the meeting and voluntarily participated in voting. In doing so, the petitioners exercised their constitutional right by voting against the transfer. I find that during the voting any member who choose to walk out of the meeting, also made a deliberate choice not to exercise their democratic right to vote for or against the motion and seek to influence the decision making in the procedure clearly laid down in the community constitution and by-laws. I find that the petitioners who are admittedly members of the community; voluntarily subscribed to the community and are accordingly bound by its constitution. They took part in the General Meeting and voluntarily voted. I therefore find that they are bound by the resolution to transfer the pratimas; the transfer having been passed in accordance with the constitution of the community.

59. The community constitution has provision for challenging any resolution made in a General Meeting. The Petitioners exercised that right of challenge. The Resolution challenged by the Petitioners resolved to move the pratimas from the Town Temple to Ngara Temple. The resolution passed by the General Meeting is generally for the benefit of the members of the **Visa Oshwal Community** as a whole. I find no evidence adduced suggesting that the decision violates the rights of the community. There is further no evidence to the effect that the pratimas are being offended or disposed off from the community worship rights. The relocation is within the community’s Temples, which are close to each other and for reasons acceptable to the community as evidenced in the community resolution at the General Meeting. Further it has not been suggested nor demonstrated that the Pratimas are being sold nor are the religious rights being violated.

60. On turning on equality before law; it is clear from the community constitution that all members of the community have a right and freedom of conscience, religious, belief and opinion as protected under **Article 32(2) of the Constitution**. I find that for the court to enter into the arena of dispute in matter of religion, grant an order for injunction restraining the transfer would be tantamount to unjustifiably taking away or limiting the very constitutionally guaranteed right under **Article 32 of the constitution of Kenya 2010**.

61. The Petitioners allege violation of right to equal treatment before the law. The burden of proof lies on the petitioners to prove violation of right to equal treatment before the law. The Petitioners herein have failed to prove any unequal treatment meted to them. I find the resolutions arrived at the General Meeting was determined through vote and the majority carried the day as per community constitution. The adherence to a majority vote in accordance with the constitution of the community herein, does not amount to discrimination.

62. The Respondents sought reliance in the case of **Rongai Lemeiguran & Others vs. Attorney General & others [2006] eKLR** where court quoted with approval the reasoning of Warren Chief Justice **REYNOLDS VS. SIMMS (377 US 533, 12 L Ed]** where he wrote

“”Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect, a majority of the State’s Legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights and might otherwise be thought to result.” (Emphasis mine).

63. I find that this Honourable Court in interpreting the Constitution and the Bill of Rights the Court is required to bear in mind the national values under **Article 10 of the Constitution of Kenya 2010**; specifically **10(2)(a)** which states:

“10. National values and principles of governance

(2)The national values and principles of governance include—

(a)patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;”

64. From the above and upon considering the Petitioners submissions and those of the Respondents under the sub-heading herein above, I find that the Petitioners have failed to point out and prove any specific violation of their rights. I therefore find that no violations of the petitioners constitutionally protected rights has been proved.

C. WHETHER THE RELOCATION OF PRATIMAS AMOUNTS TO A PERSONAL VIOLATION OF THE PETITIONERS HUMAN RIGHTS?

65. The Petitioners urge that the moving of the Pratimas from Town Temple to the Ngara Temple would irredeemably lower the stature of the temple to the point that petitioners will not be able to continue worshipping there.

66. The Respondents aver that the relocation of the pratimas does not amount to a personal violation of the petitioners' human rights; as it is clear that the community is in the process of reorganizing its offices. It is urged that few disgruntled members should not be allowed to hold the entire community at ransom. It is clear from the evidence that the transferring of the pratimas to Ngara Temple, the Respondents on behalf of the community are providing an opportunity for more devotees to worship them. It is averred that the Ngara Temple is more secure and has more parking space than the Town Temple; on average between 100 and 600 devotees attend the temple to perform their worship on any given day. It is further urged all necessary rituals are conducted at the Temple. From the aforesaid the Respondents have demonstrated that the best interest of the entire community will be better served by the relocation of the Pratmas to the Ngara Temple. It has further been demonstrated by the Respondents that there is a larger community whose interest, have been taken into account and who have made their interest clear and spoken through their majority vote in favour of the transfer. I find from the outcome at the General Meeting Resolutions for transfer no favouritism or bias was made against any Temple as the Respondents only act in the best interest of the community as a whole. I therefore find the Respondents implementation of a decision made by the community, in accordance with its constitution and by-laws, does not in any way threaten or violate the petitioners' individual right to freedom of worship.

D. WHETHER THE RESPONDENTS HAVE WRONGFULLY BEEN ENJOINED IN THIS PETITION?

67. According to the Constitution of the *Shree Visa Oshwal Community*, under management, it is provided that the community shall be managed by management committee of twenty five (25) members. The Rights, Duties and Powers of the Management Committee is well spelled under clause 12.7 where it is provided:-

“12.7 The policy and general management of the affairs of the Community shall be directed by the Managing Committee. The Office Bearers shall have power to enter into contracts on behalf of the Community as per the By-laws, Rules and Regulations.”

68. The 4th to 9th Respondents are described in the Petition as elected office bears of the community and who have been sued as office bears, *Shree Visa Oshwal Community*, Nairobi.

69. The Respondents aver that the 4th to 9th Respondents have wrongfully been sued in their individual capacity, as a deliberate attempt to intimidate the community office bearers of the management committee of the community.

70. It is urged further that the community being a registered society, the decision that aggrieved the petitioner was arrived at by the community and any actions taken by the Respondents was in their official capacity but not individual capacity. It is urged the right Respondents, ought to have been the Registered Trustees of the *Shree Visa Oshwal Community* as provided under clause 25.13.

71. *Clause 25.13 of the Community Constitution* provides:-

“25.1 There shall be three (3) Trustees who shall be elected by majority votes either in the Annual General Meeting or General Meeting.”

“25.5 A Trustee shall not be a member of the managing Committee or any sub-committee of the Community or a delegate to the Oshwal Education and Relief Board.”

“25.11 The Trustees shall not unduly interferer with the activities of the Managing Committee which are in accordance with provisions of the Constitution and in accordance with the decisions taken in the Annual General Meeting, General Meeting or Extra-Ordinary General Meeting.”

72. The Constitution of the Community is clear who should sue or be sued. Under *clause 25.13 it is provided :-*

“25.13 The Trustees may sue or be sued on behalf of the Community and all costs and expenses incurred in respect of such suits and or legal actions shall be borne by the Community.”

73. In view of the aforesaid, I find that the 4th to 9th Respondents being amongst the three Trustees as provided in the community constitution under clause 25.1 they have wrongfully been sued on behalf of the community as provided under clause 25.13 of the community constitution. I find the petition against the 4th to 9th Respondents fatally defective and bad in law.

E. WHAT RELIEF (IF ANY) ARE THE PETITIONERS' ENTITLED TO?

74. The Petitioners urge that the Town Temple deserves protection as a site of National Heritage by virtue of its historical heritage under the relevant law for being a national monument of cultural and historical significance; it is contended that **Article 11(2)(a) of the Constitution** obligates the state to promote and protect all forms of national and cultural heritage.

75. The Petitioners aver, that it is not disputed, that the building that houses the Town Temple was built in 1927 and that it is steeped in history and culture. The Petitioners referred to the case of *Isaiah Waweru Ngumi & 2 others vs. Chairman National Land Commissioner & 6 others (2017) eKLR*; in which the Petitioner had moved to Court seeking preservation of Sigona Club notwithstanding that the Director General of National Museum had declined to gazette the same; it was stated:-

“The parties are in agreement that if Sigona House has historic value and is declared as a monument or protected building by the relevant Cabinet Secretary under Section 25 of the National Museums and Heritage Act, then the suit property would not be liable to be compulsorily acquired for road purposes. However, they disagree on whether Sigona House should be declared as such a monument or protected building.

The Petitioners argue that Sigona House is an “An ancient building which was built way back during the 2nd World War” (Paragraph 13 of the Supporting Affidavit of the Petitioners) and that it is where the Petitioners and their age-mates received their basic education “under the tutelage of the legendary and illustrious teacher Madam Mrs. Wairire”. According to the Petitioners, Sigona House is “like Bethlehem” as they know “no other place in the world that binds [them] together better than Sigona House.” They believe that Sigona House is a cultural art fact which should be preserved just like other ancient sites in Kenya like the Gede Ruins and Mombasa Old Town. Indeed, they believe it would be an act of discrimination for the Respondents not to protect Sigona House despite what they believe is its historic value.” (Emphasis added)

76. In the above-mentioned case while the court found that it could not substitute its decision with that of the Director General, it nevertheless directed the Director General to consider the matter while following a process that conforms with the constitutional principles of inclusivity, public participation, consultation and transparency.

77. The Respondents urge that the Town Template has not reached the status for declaration as a monument under the *National Museums and Heritage Act, 2006*. Section 25(1) of the *National Museums and Heritage No. 6 of 2006* provides:-

“(1) After consultation with the National Museums the Minister may by notice in the Gazette declare—

(a) an open space to be a protected area within the meaning of this Act;

(b) a specified place or immovable structure which the Minister considers to be of historical interest, and a specified area of land under or adjoining it which is in the Minister’s opinion required for maintenance thereof, to be a monument within the meaning of this Act;

(c) a specified site on which a buried monument or object of archaeological or palaeontological interest exists or is believed to exist, and a specified area of land adjoining it which is in the Minister’s opinion required for maintenance thereof, to be a protected area within the meaning of this Act;

(d) a specified object or type of object, whether or not part of an immovable structure, which the Minister considers to be of historical, cultural, or scientific interest, to be a protected object within the meaning of this Act;

(e) a building and a specified area of land adjoining it which in the Minister’s opinion is required for the maintenance thereof to be a protected building within the meaning of this Act; or

(f) a geopark to be a protected area within the meaning of this Act, and the notice shall state that objections to a declaration made under this section shall be lodged with the Minister within two months from the date of publication of the notice.” (Emphasis mine)

78. It is clearly provided under *Section 25(1) of the Act* that only the Cabinet Secretary in consultation with the National Museums of Kenya has the power to declare that such a structure is a monument. I find that until the cabinet secretary declares by Gazette Notice that a particular building is a monument, the same cannot be treated as a monument. Furthermore, constitutional principles of inclusivity, public participation, consultation and transparency is mandatory. This court is further alive to the fact that it cannot assume the statutory duty of the Cabinet Secretary and the National Museums of Kenya by proceeding to declare a building a monument without giving the relevant and authorized authorities the opportunity to carry out the mandatory statutory duties. I further note neither the Cabinet Secretary nor the National Museums of Kenya have been enjoined as parties in the suit and it would be against the Rules of natural justice to issue orders against non-suited parties.

79. The Court of Appeal dealing in a similar case in *Narok County Council v Trans Mara County Council & another (2000) eKLR* expressed itself as follows in that regard:-

“Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty: it is where the Statute is silent on what is to be done in the event of a disagreement ... Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant Section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit....If the Court acts without jurisdiction, the proceedings are a nullity....The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the Constitution but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and is such cases call that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister...Even through resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not required to do, but also, to do

what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.” (Emphasis mine)

80. In view of the foregoing I am satisfied that this Honourable Court lacks jurisdiction to declare the Town Temple as a monument as sought by the Petitioners. I find the order is not warranted or capable of being granted in the present circumstances.

81. On the issue on other reliefs sought in this Petition, I find the Respondents were able to demonstrate to this Court that the Petitioners rights were not violated or threatened. It has also been demonstrated that the decision which is the genesis of the suit was arrived at democratically and in the manner which is clearly set out in the constitution of the community; and in a General Meeting in which the Petitioners were present and effectively participated in the process but unfortunately outvoted by the other members. I find that granting the injunction sought would be tantamount to unjustifiably usurping the rights and freedom of the conscience, religion, belief and opinion of the members of the entire community as protected under **Article 32(2) of the Constitution**. I therefore find that the Petitioners are not entitled to the reliefs sought.

82. The upshot is that the petitioners have not demonstrated any violation of their rights to warrant the courts’ interference. I find no merit in the petitioners’ entire petition dated 5th April 2019.

83. On costs notwithstanding the Respondents have succeeded in their defence, I have considered that the parties in this matter are all members of one community and the issue arose out of a religious disagreement and that it would be in the best interest if each party bears its own costs. In exercise of my discretion on costs, I accordingly order each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this 3rd day of August, 2020.

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J. A. MAKAU

JUDGE