



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 257 OF 2016

KERICHO MUSLIM ASSOCIATION (Suing through its

Secretary-MOHAMMED ABDULAHI UNSHUR).....PLAINTIFF

-VERSUS-

SUPREME COUNCIL OF KENYA MUSLIMS.....1ST DEFENDANT

REGISTRAR OF SOCIETIES.....2ND DEFENDANT

AND

ABDULQADIR ABDUL AZIZ & 24 OTHERS.....INTERESTED PARTIES

RULING

1. Before me are two (2) Notices of Preliminary Objection: the first has been filed by the 2nd defendant and is dated 28th October, 2016 whereas the second has been brought by the interested parties herein and is dated 22nd August, 2018. Both preliminary objections essentially seek to have the plaintiff's suit struck out/dismissed on the basis that the same purports to challenge an administrative decision of the 2nd defendant thus giving rise to a judicial review process. However, the interested party is also seeking to have the plaintiff's application dated 29th September, 2016 dismissed as well for the above reason.

2. Parties filed written submissions on the respective preliminary objections. In its submissions, the 2nd defendant contended that since the crux of the plaintiff's suit is premised on a matter touching on judicial review in the sense that it involves the decision by the 2nd defendant to decline to accept the purported election returns from two (2) separate factions, this court lacks the jurisdiction to entertain the same. The 2nd defendant further submitted that this court ought not to grant the orders being sought by the plaintiff as this would amount to a restraint on the 2nd defendant's statutory mandate.

3. The interested parties in their submissions reiterated the sentiments of their counterparts that this court lacks the requisite jurisdiction to entertain the plaintiff's claim since the same reveals a matter for judicial review particularly on the part of the 2nd defendant. In closing, the interested parties urged this court to find that the application and plaint dated 29th September, 2016 are non-starters and incurably defective.

4. In its submissions in opposition to the above, the plaintiff argued that there is no pure point of law to be determined and that though the 2nd defendant is a party to the suit, the plaintiff's complaints are largely against the 1st defendant; that the 2nd defendant was merely enjoined for the purpose of shedding light on the facts in issue.

5. I have considered the grounds set out in the respective preliminary objections which by and large convey a similar message, together with the rival submissions by the parties. The court in *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* elaborately illustrated the definition and purpose behind preliminary objections as hereunder: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. It therefore follows from the above that a Notice of Preliminary Objection is purely limited to points of law and cannot therefore apply to issues requiring further investigation of facts and evidence by the court.

7. That being the case, I have perused the aforesaid application and plaint contemporaneously filed by the plaintiff on 29th September, 2016.

The orders sought in the application are largely injunctive orders against the 1st defendant. Equally, the reliefs as set out in the plaint are both declaratory and injunctive in nature, and are directed at the 1st defendant.

8. Further to this, the claim is premised on facts arising out of a disputed election and for which the plaintiff is challenging the 1st defendant's authority to oversee and involve itself in for the reason that the plaintiff claims it is not a member of the 1st defendant. These, to my mind, are neither issues for judicial review nor directed to the 2nd defendant.

9. In fact, I have not come across any prayer seeking to quash the decision(s) of the 2nd defendant. The orders sought in no way have a direct impact on the 2nd defendant's functions or mandate.

10. The reliefs available under an action for judicial review are well-established: that is, mandamus, prohibition and certiorari. I might add that the said remedies are concerned with the procedure or process followed in the making of a decision by a public body as opposed to the actual decision.

11. The above position was reinforced in the Court of Appeal case of *Municipal Council of Mombasa v Republic and Another [2002] eKLR* cited by the Employment and Labour Relations Court in *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR* it was held:

“Judicial Review is concerned with the decision-making process, not with the merits of the decision itself....The court would only be concerned with the process leading to the making of the decision....”

12. Further to the above, the Court of Appeal in the matter of *Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR* drew reliance from the following reasoning taken in *Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300*:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint...Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision...”

13. From the foregoing, it is clear that judicial review cannot apply herein since the plaintiff has in no way challenged the process applied by either of the parties in respect to the impugned election; rather, it is the 1st defendant's authority to supervise the same that is in issue.

14. In the premises, I have no reason to find that this is a matter for judicial review hence this court holds the proper jurisdiction to entertain the suit.

15. The upshot is that the Notices of Preliminary Objection dated 28th October, 2016 and 22nd August, 2018 correspondingly lack merit and are hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at NAIROBI this 28th day of March, 2019.

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

..... for the 1st Defendant

.....for the 2nd Defendant

..... for the Interested Parties