



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 120 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND MANDAMOUS  
BY MUSEMBI NZIOKI KIVUI**

**AND**

**IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONDUCT OF THE SYOKIMAU MAVOKO COMMUNITY ASSOCIATION TO BAR THE  
SUBJECT HEREIN FROM ATTENDING MEETINGS OR RECOGNISING HIM AS A BONAFIDE MEMBER**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 & 2, SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26, THE JUDICATURE  
ACT CAP 8 LAWS OF KENYA**

**BETWEEN**

**MUSEMBI NZIOKI KIVUI.....EX PARTE APPLICANT**

**VERSUS**

**1. JOSEPH NZAMALU MUTUNGI**

**2. SAMUEL KIGERA**

**3. PIUS MUSEMBI KIVINDU.....RESPONDENTS**

**RULING**

1. The ex parte applicant has filed a notice of motion dated 3<sup>rd</sup> July, 2017 seeking:

***a) An order of prohibition directed to the respondents Syokimau Mavoko Community Association barring its Managing Committee from arbitrarily dismissing him from the self-help group.***

***b) An order of mandamus directed to the respondents Syokimau Mavoko Community Association compelling the Syokimau Mavoko Community Association to conduct a fresh Annual General Meeting in place of the one conducted on 22<sup>nd</sup> September, 2016 and thereafter allocate him his legitimate shares in the intended purchase of L.R. No. 8784/4 (Mavoko).***

2. The motion is based on the grounds in the body of the motion and the affidavit of the ex parte applicant. He stated that he was the vice chair of Syokimau Mavoko Community Association. That the said self-help group (hereafter referred to as '**the group**') has been in existence since the year 2012. That as per Article 8 (b) (i) of the group's constitution, the respondents are to conduct an annual general meeting not later than 30<sup>th</sup> June of each year upon issuance of proper notice of 21 days. That in contravention of the said provision, the respondents conducted the annual general meeting on the 22<sup>nd</sup> September, 2016 without notice to him. That in the minutes for the said meeting, it is falsely indicated that he attended the meeting but did not sign the attendance sheet. That the name of one Dominic Mataya appears as member number 19/1P, 30/1P, 232, 233, 234/1P and signatures have been appended next to the name yet the said person died on 21<sup>st</sup> December, 2015. That Samuel Kyalo's name has been falsely inserted under number 223, 224 and 225/1P falsely signifying that he was in

attendance and his signature forged. That the annual general meeting of 22<sup>nd</sup> September, 2016 is a sham and thus the court ought to order a fresh annual general meeting. That the office bearers of the group have since fraudulently changed the office bearers at the registrar of societies, specifically, the position of the Assistant Treasurer in which he has been replaced by Nelson Mutisya Musyoka. That the report of the task force on irregular appropriation of Public Land and the Squatter Problem in Athi River District of November, 2011 at page 22 and 23, the East African Portland Cement Company ('EAPCC') is listed as the owner of parcel situate at Athi River District known as L.R. No. 8784/4 1332 acres. That the EAPCC informed the task force at page 23 that the said land, its status then indicated as Kunkur (raw material for cement manufacture), would be distributed giving priority to local community and company staff provided such persons organize themselves into groups through participation of local leadership. That the chair of the National Land Commission in a gazette extract of 25<sup>th</sup> July, 2015 indicated that the Kunkur quarry, L.R. No. 8784/4 ('the land') belonging to EAPCC shall be awarded to local communities and that among the petitioners for the land is the group. That EAPCC on 26<sup>th</sup> August, 2013 wrote to the District Commissioner Athi River signifying willingness to deal with the group in offering them the sale of mined Kunkur land. That the group in a series of meetings on allocation of plots to members held in the year 2015 had agreed to allocate to the ex parte applicant eight acres out of the land. That the conduct of the 1<sup>st</sup> respondent and the managing committee of the group has directly through oral communication signified unwillingness to allocate the ex parte applicant's rightful share of the land. He stated that the same has been done arbitrarily and with malice since he has never been summoned to answer to any allegations of gross misconduct or any other act or omission that would necessitate the action taken against him by the group. That the minutes of the said meetings are within the custody of the 1<sup>st</sup> respondent. That in contravention of the law, some of the trustees' own shares in the impugned property citing conflict of interest. That on 31<sup>st</sup> May, 2016, he wrote to the registrar of societies complaining of an alleged illegal meeting held on 7<sup>th</sup> May, 2016 in Kitengela in which some members of the committee were replaced. That he has since obtained the mutation map of the land being acquired by the group in which he is a member. He stated that he has obtained the minutes of the meeting held on 4<sup>th</sup> June, 2016 in which the group appointed its current trustees and discussed his alleged misconduct. That on 5<sup>th</sup> February, 2016, there was a meeting chaired by Mr. Alphonse Mutinda advocate in which internal disputes between the 1<sup>st</sup> respondent and him were amicably resolved. That as at January, 2015, he was still the group's vice treasurer. That he is neither aware of any charges of gross misconduct against him nor was he summoned and or accorded a fair hearing to answer to the charges before the decision of his suspension or dismissal was arrived at and termed the meeting a sham.

3. The 3<sup>rd</sup> respondent filed a replying affidavit on 6<sup>th</sup> May, 2018 in opposition to the motion. He contended that the ex parte applicant is not a bona fide member of the group as he has not displayed his membership card which is a prerequisite for membership. He denied that he is a trustee of the group. He stated that vide the registrars of societies letter dated 11<sup>th</sup> August, 2016 the group was ordered to hold the Annual General Meeting within 60 days of that letter. That the secretary of the group was vide the same letter mandated to issue a 21 days' notice to the members of such meeting. That notice was duly issued. That despite the group's constitution stipulating that Annual General Meeting shall be convened not later than 30<sup>th</sup> June, of each year, the meeting of 22<sup>nd</sup> September, 2016 was as a result of the order from the registrar of societies therefore there was no contravention of the group's constitution as alleged. That the Annual General Meeting was attended by the widow of Dominic Mataya who signed the list of members who attended the AGM on behalf of her late husband. That the ex parte applicant's affidavit should be expunged from the record since he cannot authoritatively depone on matters relating to Samuel Kyalo. That since the ex parte applicant failed to attend the AGM of 22<sup>nd</sup> September, 2016 to defend his seat as the Assistant Treasurer, Nelson Musyoka was elected to replace him and there is nothing fraudulent in the change of office bearers. That the notification of change of office bearers to the registrar of societies following elections of 22<sup>nd</sup> September, 2016 is genuine and not fraudulent as alleged. It was contended that no evidence has been tendered by the ex parte applicant to show that he had been allocated 8 acres of land out of L.R. No. 8784/4. It was contended that the ex parte applicant has never been the group's Assistant Secretary and further that the grievances raised in this motion can easily be resolved by the group through its constitution.

4. The ex parte applicant filed a supplementary affidavit on 14<sup>th</sup> June, 2018. He in reference to paragraph 6 of his affidavit contended that the error in names is a typographical error that is excusable. That the replying affidavit by the 3<sup>rd</sup> respondent is based on outright lies. That the 3<sup>rd</sup> respondent feigns ignorance when he stated that the ex parte applicant is not a bona fide member of the group and that in a clear contrast, he admitted that the ex parte applicant lost his seat since he failed to attend a special meeting held to defend the seat. He emphasized that he was never served with a notice pursuant to the alleged notice by the registrar of societies dated 11<sup>th</sup> August, 2016 and was unaware of the meeting of 22<sup>nd</sup> September, 2016. That he ought to have been served through notice in writing or short message. That the 3<sup>rd</sup> respondent has not demonstrated how he served the ex parte applicant for the meeting of 22<sup>nd</sup> September, 2016 in which major decisions were made as to include property distribution and election of new members in which he lost his seat undefended. That the act of the 3<sup>rd</sup> respondent swearing a false affidavit denying his bona fide membership to the group demonstrates malice the officials of the group have exhibited on his membership and right to own his share of the land. He contended that it has not been demonstrated that the widow of Dominic Mataya signed on behalf of her deceased husband and alleged that the signature is a forgery.

5. The ex parte applicant's submission is essentially a reiteration of his averments in the affidavit in support as well as the supplementary affidavit. The Respondents filed their submissions dated 8<sup>th</sup> March 2019. It was submitted by the respondents that the supplementary affidavit filed by the applicant dated 13<sup>th</sup> June 2018 purporting to be an amendment offends the provisions of Order 8 Rule 7 of the Civil Procedure Rules which requires that all amendments to be shown by striking out in red ink all deleted words but in such a manner as to leave them legible and by underlining in red ink all added words. It was therefore submitted that this court will only rely on the earlier affidavit which cites wrong parties to the suit who cannot comply and/or enforce any ensuing orders. It was also submitted that this case does not fall under the ambit of Judicial Review matters since Syokimau Mavoko Welfare Association is a registered society with its own constitution that governs its operations including dispute resolutions. It was the view of the respondents that the issues ought to have been resolved under the Societies Act. Respondent's counsel relied on the case of **Nairobi JR No.469 of 2017, In the matter of Fair Administrative Action Act No. 4 of 2015 versus The Registrar of Societies** where it was held that **"the court does not relish being turned into a forum at which disputes of societies are resolved since it is not the duty of the court to run and manage such private entities"** Finally it was submitted that the application is not properly before this court as the relief sought is private in nature and further that no leave was sought by the applicant in the first place before filing the present application and it should be dismissed with costs.

6. I have given due consideration to the application and the rival dispositions thereto. The Court of Appeal held as follows with regard to the orders of prohibition in **Joram Mwenda Guantai v. The Chief Magistrate Nairobi Civil Appeal (2007) 2 EA 170:**

*“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to discontinue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal or wrong decision on the merits of the proceedings – equity so the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression...”*

7. The scope of mandamus was discussed by the Court of Appeal in Kenya National Examinations Council v. Republic Ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR as follows:

*“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”*

8. In Mureithi & 2 Others v. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 it was held:

*“A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”*

9. Applying the test, the applicant laments that he was dismissed from the group and an AGM held and his right to 8 acres of land denied yet he was not served with a notice to the said meeting. The respondents deny that the applicant had no right to the land as alleged and that he was absent in the meeting despite being issued with a notice thereto. The Senior Deputy Registrar General to the Office of the Attorney General and Department of Justice wrote to the Secretary of the group on 11<sup>th</sup> August, 2016. The letter reads:

*“...After perusing your file and the various correspondences, we are unable to ascertain the genuine office bearers of your society. It has also come to our attention that your annual elections are due.*

*To this end, we direct that the Secretary as per our records (Alex Kyalo Mutemi), issues a 21 days’ notice to convene the Annual General Meeting of all the active members within 60 days from the date of this letter. One of the Agenda for the meeting should be Election of office bearers.*

*Once Annual General Meeting is held, you should forward the following documents to this office within 14 days after the Annual General Meeting:*

- 1. The Notice issued by the Secretary convening the Annual General Meeting.*
- 2. Typed minutes of the Annual General Meeting certified by three office bearers; chairman – Pius Musembi Kivindu, Secretary – Alex Kyalo Mutemi and Treasurer – Mathula Nthula.*
- 3. List of members who attended the Annual General Meeting. Signed by all members indicating their identification card numbers.*
- 4. FORM H – Notification of change of officers or title duly filled bearing the name of the officials who have been elected and signed by the three office bearers; Chairman, Secretary and Treasurer...”*

10. From the contents of the letter, service was meant to be served upon all active members among whom the ex parte applicant was one. The respondents herein have not established how they served the ex parte applicant as they merely annexed the notice. Having failed to do so, the applicants’ allegations are presumed to be true facts. It is clear to me that natural justice was not employed in dismissing the ex parte applicant. Further, the elections were not conducted in conformity with the requirements enlisted by the Senior Deputy Registrar General to the Office of the Attorney General and Department of Justice. However it is noted that the dispute involves members of a society which has its own constitution to regulate its affairs and disputes and further their matters are regulated by the Registrar of Societies. This is evidenced

by the notice that had been issued to the Syokimau Mavoko Community Association by the Registrar of Societies directing them to convene the meeting which took place later on the 22<sup>nd</sup> September 2016. It is the said meeting that precipitated this application. The applicant's grievance appears to be two fold namely that he has been unfairly removed from being an official of the Association and secondly that he was to be entitled to some parcel of land once the Association's request to be allocated land by the East African Portland Cement Company Ltd sails through. It is therefore obvious that the applicant's right is one of a private nature. This then seems to conflict with the Judicial Review remedy of Mandamus that the applicant now seeks. In the case of **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano**: Civil Appeal No.24 of 1985 the court held as follows:

**“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private in nature.”**

11. Applying the above test, it is clear that the Respondents did not convene the meeting of 22<sup>nd</sup> September 2016 on their own volition but had been directed by the Registrar of Societies to do so. The applicant has not sought to enjoin the said Registrar of Societies as a party herein. Again the applicant seems to suggest that he has some legitimate expectation to be allocated some parcel of land once the Association's request for land is accepted by East African Portland Cement Company Ltd. The applicant's demand that the Respondents be compelled to allocate him land which is yet to materialize appears to be an unreasonable demand and therefore the judicial review order of mandamus is untenable since the Respondents have no legal duty to perform such a task in the absence of the alleged land. The applicant has not convinced me that the Respondents are in breach of the duty to act fairly or have failed to exercise some statutory discretion reasonably or that they have acted unreasonably. In any event the issue of the land to be given by Portland cement company ltd was yet to materialize so as to found a cause of action by the applicant. Further if indeed the applicant is a member of the association, his rights have not been taken away as they will be considered once the land is allocated to the association. Hence I find that the applicant has failed to demonstrate that there is a duty imposed on the respondents to act and that they have failed to act in accordance with that duty.

12. Finally it has emerged that the applicant appears not to have sought leave so as to file the present application. This is a mandatory requirement as provided under Order 53 Rule 1 of the Civil Procedure Rules—“**No application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefor has been granted in accordance with this rule**”

The failure by the applicant to seek leave as aforesaid renders the present application a non-starter.

13. In the result, it is my finding that the applicant's application dated 3<sup>rd</sup> July 2017 lacks merit. The same is ordered dismissed with costs to the Respondents.

Orders accordingly.

**Dated and delivered at Machakos this 19<sup>th</sup> day of June, 2019.**

**D.K KEMEI**

**JUDGE.**