



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 652 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF THE SOCIETIES ACT (CAP. 108) LAWS OF KENYA.

AND

IN THE MATTER OF A DECISION BY THE REGISTRAR OF SOCIETIES REFUSING TO REGISTER THE EX-PARTE APPLICANT HEREIN AS THE DULY ELECTED OFFICIALS OF NHC LANGATA COURT RESIDENTS ASSOCIATION AS CONTAINED IN ITS LETTER DATED 16.5.2017.

BETWEEN

REPUBLICAPPLICANT

VERSUS

REGISTRAR OF SOCIETIES.....RESPONDENT

AND

MARIAM MIRUNG'U.....1ST INTERESTED PARTY

CHRIS OHABO.....2ND INTERESTED PARTY

LUCILLE OWINO.....3RD INTERESTED PARTY

LAMECK ABRAHAMS.....4TH INTERESTED PARTY

SAM GIBUNI.....5TH INTERESTED PARTY

EX-PARTE: STEPHEN O. OWINO, BARNICE A. MUTHONI,

RAYMOND O. JABANDA, ZUBEIDA S.MASUDI,

MARYGORETTE M. KYALE AND BENJAMIN O. OMOLO

(Suing in their capacity as officials of NHC Lang'ata Court Resident's Association).

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd day of November, 2017 the *ex parte* applicants herein seek the following orders:

a. AN ORDER OF CERTIORARI to remove and bring into this Honourable Court for purposes of being quashed and quash the decision of the Respondent contained in a letter dated 16.5.2017, directing the then NHC Lang'ata Court Residents Association Secretary General; Mr. Jacob Aliet to convene a Special General Meeting (SGM) with a view of electing new officials within the next 45 days.

b. AN ORDER OF MANDAMUS to compel the Respondent to register the Ex-Parte Applicants as the duly elected officials of NHC Lang'ata Court Residents Association.

c. AN ORDER OF PROHIBITION, prohibiting the Respondent from interfering with the running of the affairs of the NHC Lang'ata Court Residents Association, as currently constituted and by dint of the election of the Ex-Parte Applicants at a Special General Meeting held on 26.3.2017.

d. THAT Costs of this application be provided for.

Ex Parte Applicants' Case

2. According to the Applicants, the members of **NHC Lang'ata Court Residents Association** (hereinafter referred to as "the Association") hold an Annual General Meeting at the beginning of every year to elect new office bearers amongst other agenda.

3. They averred that on 22nd January, 2017, the Association held an Annual General Meeting ("AGM") at which the Ex-Parte Applicants herein were elected as the officials thereof. Since then and despite subsequent re-election in Special General Meetings ("SGM") sanctioned by the Respondent, the Respondent has refused to register the Ex-Parte Applicants as officials of the association, under the **Societies Act (Cap. 108) Laws of Kenya**, in an unclear circumstances and for no apparent reason.

4. It was averred that the Ex-Parte Applicants were first elected on 22nd January, 2017 by the members of the association as their officials through an AGM held on the same date, pursuant to the association's Constitution and Rules, a copy of which is deposited with the Respondent. On 23.1.2017, after the elections of the Ex-Parte Applicants' as the new official of the association, the outgoing officials handed over the office and the Ex-Parte Applicants submitted to the Respondent the following documents to facilitate their registration as such; A notice dated 19th December, 2016, calling for the AGM of 22nd January, 2017, AGM Minutes of the meeting held on 22nd January, 2017, a resolution for adaption of the amendment of the Association's Constitution and Rules, Form H, Annual Returns and copies of the Identification Documents of the new officials. On or about 25.2.2017 after failing to get any response from the Respondent on registration of new officials, the Ex-Parte Applicants' visited the offices of the Respondent for an enquiry of the progress of the process and they were informed that the 1st Interested Party herein had lodged complaints in respect of the AGM held on 22nd January, 2017 and by a letter 22nd January, 2017, the Respondent's Registrar unilaterally nullified the proceedings of the aforesaid meeting and directed a Special General Meeting ("SGM") be held.

5. The applicants contended that on 26th February, 2017 the outgoing secretary; **Jacob Aliet** convened a meeting of the then officials in order to plan for the SGM, as directed by the Respondent, but the 1st Interested Party, who was the Chairperson and signatory to various associations documents at the time failed to turn up, upon which the secretary herein lodged a complaint with the Respondent vide a letter dated 20th March, 2017, which is explicit in its content. The Respondent's Assistant Registrar further by the said letter of 22nd January, 2017 directed the secretary on record to convene a SGM of the association by issuing a 21 days' notice, to which the outgoing secretary; **Jacob Aliet** complied and issued a notice for the aforesaid meeting held on 26th March, 2017.

6. The Applicants further deposed that on 29th March, 2017 the then Secretary of the association; **Jacob Aliet**, wrote to the Respondent and in his letter enclosed; the minutes of the SGM, Register of Active Members with names, signatures and Identification Card numbers of the members who attended and duly filled and signed form H, for registration at the behest of the Respondent. By a letter dated 28th April, 2017, the Respondent called for a meeting of two factions of the association on 10th May, 2017 at 10:00am, which meeting was attended by 1st-3rd Ex-Parte Applicants and a Resident; **Cohen Amanya** on the one part and the Interested Parties on the second part, with only the 1st Interested Party being a member of the Association. Even though the Ex-Parte Applicants were ready and indeed submitted themselves to the said Consultative meeting, the said process in itself was illegal for the reason that the Respondent was influenced by those non-members to the association, who were present.

7. The Applicant averred that by a decision contained in a letter dated 16th May, 2017, the Respondent through its Deputy Registrar of Societies; **Anne N. Mwangi**, nullified the proceeding of the SGM held on 26th March, 2017 for no apparent reasons in support of such actions and directed for a further SGM to be held in 45 days, which decision aggrieved the Ex-parte Applicants. On 30th May, 2017, **Jacob Aliet**, wrote to the Respondent's Deputy Registrar; **Ann N. Mwangi** expressing that he did not have mandate to call for any SGM as directed to him in her letter of 16th May, 2017 since he was no longer the secretary of the association hereof.

8. Thereafter the Ex-Parte Applicants on 12th July, 2017 instructed the firm of **Ahmednasir, Abdikadir & Co. Advocates** to make a further follow up over the matter and wrote a letter on the same date, which letter was responded to by the Respondent's letter dated 26th May, 2017 containing word for word the contents of its earlier letter of 16th May, 2017. On 3rd October, 2017 the Ex-Parte Applicants' through the aforesaid firm of advocates, wrote again to the Respondent to record the concerns effecting members of the association as pertains to payment of utilities bills and services which have so far run into arrears since January, 2017 and as such the welfare of the members is totally compromised due to the actions of the Respondent.

9. It was the Applicants' case that the Respondent by its decision of 16th May, 2017 to cancel the results of the Association's SGM held on 26th March, 2017 without any evidence or complaint of want of quorum, indeed there was overwhelming evidence that the quorum was met and that the actions of the Respondent was taken without observing the **principles of natural justice** in that:-

- a. It failed to give the Ex-Parte Applicants sufficient or any reasonable notice of the proceedings (if any) of the allegations levelled against them, the complaint and complainants.
- b. It failed to give the Ex-Parte Applicants a fair opportunity to present their case to enable them to correct or contradict any relevant statements and/or allegations prejudicial in their view.
- c. It failed to avail and/or show the Ex-Parte Applicants and/or apply any evidence, whether written or oral in support of allegation that there was no quorum met during the SGM prior to making a decision not to register Ex-Parte Applicants as officials of the association.

10. It was therefore contended that the Respondent acted *Ultra-Vires* as to the law governing the validity of the election of officials of the association elected at the SGM held on 26th March, 2017 and the consequential procedures in arriving at a decision not to register the Ex-Parte Applicants as the lawful elected officials thereof and in particular:-

- i. Acting without power.
- ii. Acting without following the prescribe procedure therein.
- iii. The Respondent did not adhere to the institutional frame work and or composition and or the conduct of affairs and business of the Registrar of Societies.

11. To the Applicants the Respondent's actions were in abuse of power and with improper motive in arriving at its decision, firstly the nullification of the AGM of 22nd January, 2017 without calling the affected persons and in particular the Ex-Parte Applicants who were elected as the officials of the association, the cancellation of the SGM of 26th March, 2017 proceedings, were again the Ex-Parte Applicants had been elected as officials of the association in THAT:-

- i. The Respondent acted without substantive fairness.
- ii. The Respondent acted irrationally and without regard to the principles applicable in its decision making process.
- iii. The Respondent targeted a certain group of persons who had been elected as officials of the association.

12. The Applicants' case was therefore that the Respondent's decision and actions are in law unreasonable in THAT:-

- i. The decision and action in light of the evidence and material known and within its knowledge was outrageous and was merely an unwarranted allegation.
- ii. Its decision was unreasonable in failing to provide any evidence to the Ex-Parte Applicants to support the findings that there was no quorum at the SGM held on 26th March, 2017 culminating to their election as officials thereof.

13. The Respondent was also accused of having acted in breach of the Principle of proportionality and in particular the Respondent in its actions failed to strike a fair balance between the adverse effects its decision and actions would have upon the Ex-Parte Applicants vis-a-vis its decision contained in their letter dated 16th May, 2017 to the Ex-Parte Applicants.

14. Further, the Respondent in its decision and actions acted in breach of its duty to act in good faith and in the interest of the Ex-Parte Applicants in THAT:-

- i. It failed to produce any evidence pursuant to its decision prior to nullifying the proceedings of the AGM and SGM herein and refusing to register the Ex-Parte Applicants as officials of the association.
- ii. The Respondent acted with malafide.

15. To the Applicants the actions of the Respondent violated the legal principle of Legitimate Expectation. The Ex-Parte Applicants like every other validly elected officials of an association had the following, among other Legitimate Expectations, THAT:-

- i. The Respondent as established under the **Societies Act** (Cap. 108) Laws of Kenya would adhere to the regulations governing the conduct of its business, to fairness and principles of law and honour its assurance to that effect.
- ii. The Respondent must adhere to the contents and directions contained in its letter dated 21st February 2017 leading to the cancellation of the results and proceedings of the AGM and directing the secretary on record to conduct fresh elections of the officials of the association.
- iii. The Ex-Parte Applicants had legitimate expectation that when they submitted their names to the Respondent after being elected at the SGM held on 26th March, 2017, they would be registered as the officials of the association hereof.

16. It was averred that the Respondent owes the Ex-Parte Applicants a concrete and justifiable reason for the nullification of the proceeding

of the SGM held on 26th March, 2017 and failure to register them as the duly elected officials of the association herein.

17. In the premises the Respondent decision not to register the Ex-Parte Applicants as the duly elected officials of the association and any other action taken that emanate thereof is not only illegal, but also discriminatory and failure to recognize them is a nullity and devoid of legal effect. To the Applicant, the failure on the part of Respondent to consider material evidence before it, entertaining non-members to interfere with the internal management and running of the association's affairs is a violation of the Ex-Parte Applicants right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair and contrary to Article 47 of the Constitution. Without derogating from the foregoing, the Ex-Parte Applicants' case was that having been elected as officials by members of the association and having notified the Respondent of the changes, they expected a decision that was expeditious, efficient, lawful and reasonable from the Respondent.

Respondents' Case

18. The application was however opposed by the Respondent.

19. According to it, the **NHC Langata Court Residents' Association** is a society registered by the Respondent on the 8th of August 2011 and was issued with a Certificate of Registration number 34828. The society file number is SOC/61191.

20. It was averred that the society has been experiencing wrangles dating back from the year 2015 and that various factions of the society have on different occasions since the year 2015 written complaint letters to the Respondent seeking the intervention of the Respondent in resolving various disputes facing the Society.

21. The Respondent averred that on 14th February 2017 it received yet another complaint vide a letter dated 13th February 2016 wherein the Chairperson alleged that there was a purported election conducted on an annual general meeting held 22nd January 2017 which was in violation of the Society's constitution. According to it, it confirmed from the Society's constitution that there was a violation of internal rules as Clause 8b(i) of the Society's constitution provides that the annual general meeting shall be held not later than 20th January 2017 and the Notice calling the meeting shall be accompanied by annual statement of accounts and this was not adhered to.

22. In response to the said complaint the Respondent wrote to the society vide a letter dated 21st February 2017 requesting the secretary to furnish the Respondent's office with the approved budget for the year 2015 and the audited accounts for the year ending 31st December 2016 in line with the Society's constitution and Section 31 of the **Societies Act** Cap 108 Laws of Kenya. Further, the Respondent informed the society vide the said letter 21st February 2017 that the annual general meeting held on 22nd January 2017 was not properly called as per the society's Constitution and was therefore null and void and directed the Secretary of the society to call a proper meeting within 21 days in accordance with the society's constitution.

23. It was the Respondent's position that despite the guidance by the Respondent on the proper manner of convening a General meeting the applicants through **Stephen O. Owino, Raymond O. Jabanda and Marygorette M. Kyale** wrote to the Respondent vide a letter dated 31st January 2017 purporting to be the officers of the society and seeking to amend the Society's constitution. However the Respondent further wrote to the society vide a letter dated 21st February 2017 informing them that the amendments of the Constitution sought could not be approved as they were signed by persons who are not officers of the society.

24. It was disclosed that on 27th February 2017 the Respondent received a notice from the secretary of the society calling for a special general meeting to be held on 26th March 2017 and that the respondent received a Notification for change of officers and minutes signed by only two officers of the society contrary to Section 17 of the Societies Act in respect of a purported special general meeting held on 26th March 2017.

25. On 27th March 2017 the Respondent received a complaint from the bon afide Chairperson of the society and the 1st Interested Party herein **Mariam Miring'u** vide a letter dated 27th March 2017 alleging that the election was not properly conducted and that there was lack of quorum.

26. According to the Respondent owing to the long standoff in the society and in an effort to find a lasting solution the Respondent vide a letter dated 28th April 2017 invited the two factions in the society for a consultative meeting at the Respondents office on 10th May 2017 which meeting was attended by the interested parties, **Stephen O. Owino** one of the applicants herein and his Counsel. At the said meeting, it was agreed by all parties that both factions shall nominate one representative from each phase of the estate to form a committee which would come up with a clear and proper register of members for purposes preparing for a special general meeting to conduct a proper election to be supervised by the Respondent. Despite being present and agreeing to the resolutions of the consultative meeting held by the Respondent on 10th May 2017 the applicants failed to comply with the directive issued by the Respondent hence frustrating the efforts of the Respondent in resolving the underlying disputes in the society.

27. It was averred that the applicants failed to abide by the directive issued by the Respondent in respect of the consultative meeting held on 10 July 2017 and instead wrote to the Respondent through their counsel vide a letter dated 12th July 2017 demanding to be confirmed by the Respondent as the elected officers of the society. To this letter, the Responded replied vide a letter dated 26th May 2017 informing the applicants of the need to comply with the Respondents directive issued on the consultative meeting held on 10th May 2017. Instead the applicants wrote yet another letter dated 3rd October 2017 demanding to be confirmed by the Respondents as the elected officers of the society.

28. It was therefore the Respondent's position that despite its best efforts in guiding the society to resolve its subsisting wrangles the

applicants filed this suit in bad faith seeking to advance their unilateral interests before the interests of the society. It was its case that the Registrar of Societies does not interfere in the affairs of societies and only intervenes where complaints have been raised by bona fide officials or members of the society.

29. The Respondent lamented that its to resolve the subsisting disputes in the society have been frustrated by the applicants herein who have willfully failed to comply with the Respondents directives.

30. To him, the ex parte applicants have no reasonable grounds to bring this suit and are merely casting aspersions against the office of the Registrar of Societies the Respondent herein and therefore the present suit by the applicants herein lacks merit and should be dismissed with costs to the Respondent.

Determination

31. I have taken into account the foregoing as well as the submissions filled herein.

32. In this case it is clear that the genesis of the applicants' grievances was the decision made vide the letter dated 21st February, 2017, by which the Respondent nullified the proceedings of the AGM held on 22nd January, 2017 and directed a Special General Meeting ("SGM") be held. In these proceedings, there is no order seeking to nullify the decision made on 21st February, 2017.

33. The Court of Appeal set out the grounds upon which the judicial review reliefs of certiorari, prohibition and mandamus may be granted in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR** when it stated:

"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for 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 a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"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 and 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."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made 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."

What do these principles mean? They mean that an order of mandamus will 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 made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

34. It is therefore my view and I hold that without seeking to quash the Respondent's decision the decision made vide the letter dated 21st February, 2017, by which the Respondent nullified the proceedings of the AGM held on 22nd January, 2017 and directed a Special General Meeting ("SGM") be held, it is not efficacious to grant the orders sought herein. To my mind the proceedings that took place subsequently cannot be successfully challenged on the grounds of failure to adhere to the process due to the conflict in the factual averments that would have to be resolved before a decision either way is made.

35. In the premises this application fails and is dismissed with costs to the Respondent.

36. It is so ordered.

Dated at Nairobi this 29th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzaku for the Applicant

Mr Mukubi for the Respondent

CA Ooko