REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

JUDICIAL REVIEW NO. 3 OF 2016

(Formerly Nakuru High Court Judicial Review No. 3 of 2016)

IN THE MATTER OF AN APPLICATION FOR RELIEF OF JUDICIAL REVIEW IN THE FORM OF CERTIORARI

AND

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

BETWEEN

REPUBLIC…….....……APPLICANT

AND

REGISTRAR OF SOCIETIES…….RESPONDENT

-VERSUS-

NAROK MUSLIM WELFARE ASSOCIATION…...EX-PARTE/APPLICANT

R U L I N G

1. The Ex-parte Applicant described as **Narok Muslim Welfare Association** successfully moved the High Court at Nakuru for leave to commence Judicial Review proceedings against the Registrar of Societies (the Respondent). Pursuant to leave granted, the Applicant did file a Substantive Motion on 19/2/2016.

2. On 2/9/2016 **Odero J** transferred the matter to the then High Court Sub-registry at Narok when an application by **Ahmed Bashir Gele, Onoro Ole Nkaiwuatei** and **Hassan Lemeria Ole** on their own behalf and on behalf of the **Narok Muslim Welfare Society** for leave to be enjoined as Interested Parties was placed before her. The application by the Interested Party was subsequently set down for hearing on 26/9/2016 but Mr. Karanja Mbugua for the Applicant was absent despite notice. The Respondents did not object to the Interested Party's application which was allowed.

3. The Preliminary Objection to the Substantive Motion that had been filed by the Respondent on 19/4/2016 was set down to be heard on 22/11/2016, the morning on which the Applicant filed a Motion for stay of the proceedings herein pending the court's determination of prayer (b) of the Motion seeking for leave to amend the name of the Ex-parte Applicant from "**Narok Muslim Welfare Association**" to "**Narok Muslim Welfare Society**".

4. The court directed on 22/11/2016 that both the Preliminary Objection and the Motion be heard simultaneously. Pursuant to earlier directions, the Interested Parties and the Respondent had filed skeleton arguments. Counsel for the Ex-parte Applicant, the Respondent and the Interested Parties also made oral submissions.

5. As filed and urged through written and oral submissions, the Respondents' Preliminary Objection is 3-pronged. The first limb is premised on the provisions of Section 41 (1) of the Societies Act, stipulating that a society can only appear in a suit through an appointed representative acting on its behalf. That therefore the present Applicant had no *locus standi* and the suit ought to be struck out.

6. In support of this submission, three authorities including **Eritrea Orthodox Church –Vs- Wariwax Generation Ltd [2007] eKLR** were relied on. It was argued that flowing from the Applicant's lack of *locus standi*, this court cannot exercise its jurisdiction in the matter. In further opposition to the Notice of Motion filed on 22/11/2016 for leave to amend, and in apparent support of the second limb, the Respondent took the position that the suit is fatally defective and cannot be cured by amendment.

7. Citing the case of **Ernie Campbell** & **Co**. **Limited –Vs- Automobile Association of Kenya [2007] eKLR** the Respondent argued that leave to amend will only be allowed if the amendment will facilitate the framing and resolution of the real issue between parties. Finally, the Respondent argues that the impugned meeting the subject of the proceedings not having taken place, the prayer for an order of *certiorari* has been overtaken by events and is unavailable to the Applicant even if an amendment is allowed.

8. For their part, the Interested Parties have supported the Preliminary Objection by the Respondent. They assert that the Applicant being an unincorporated society has no capacity to bring proceedings to court – **See Football Kenya Federation -Vs- Kenyan Premier League Ltd & 4 Others [2015] eKLR.** That such body must sue in the names of its bonafide members.

9. On the question whether the impugned letter is amenable to judicial review, the Interested Parties, argument was that judicial review remedies are discretionary and that where illegality, irregularity or unreasonableness by an officer, to the prejudice of the Applicant is not shown, no orders will issue. Thus where such orders could be unnecessary the court would not issue them – **See Fredrick Masaghwe Mukasa -Vs- Director of Public Prosecutions & 3 Others [2016] eKLR**.

10. That the impugned letter issued on 8th February 2016 under Section 38 of the Societies Act was not a decision prejudicial to the Applicant or society. And besides, the convening of a meeting was under the principles of natural justice as envisaged under Article 47 and 50 of the Constitution. The Interested Parties takes issue with the timing of the application for leave to amend and asserted there had been undue delay on part of the Ex-parte Applicant.

11. In opposing the Preliminary Objection and urging its application for leave to amend, the Ex-parte Applicant stated that the Preliminary Objection does not meet the threshold of a Preliminary Objection as set out in **Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd [1969] EA 696**. It was argued that the real questions is not *locus standi* but misdescription of the Ex-parte Applicant, itself a bonafide mistake and curable technical hitch. That the Respondent and Interested Party will not be prejudiced if the amendment is allowed. The Ex-parte Applicant relied on the case of ***Arjan Sigh Hira Singh Matharu -Vs- Italia Construction Co. Ltd and Another [1964] E.A.***

12. According to the Ex-parte Applicant, limb 2 of the Preliminary Objection is a factual matter not suited for argument on a preliminary objection. The Ex-parte Applicant asserts that the impugned letter is subject to and amenable to Judicial Review proceedings, saying that even notices are amenable to such proceedings. In his response the Respondent sought to distinguish capacity from misdescription and submitted that the objections raise pure points of law.

13. I considered the rival arguments by the parties regarding the Preliminary Objection and the Notice of Motion filed on 22/11/2016. Three questions require determination; firstly whether the Preliminary

Objection herein raises pure points of law, whether there is merit in any of the points of law and lastly, whether the Notice of Motion for leave to amend should be allowed or not.

14. As to what constitutes a proper Preliminary Objection the Court of Appeal of East Africa stated in **Mukisa Biscuit Manufacturing Co. Ltd -Vs- West End Distributors Ltd [1969] EA 696** as follows:

> **"…..a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit….."**

15. I note that the Respondent and the Interested Parties advisedly did not address the court on the second limb of the Preliminary Objection, which in my view is a matter of fact. The said matter is admitted by the Ex-parte Applicant through the affidavit in support of the application for leave to amend and in oral submissions before me. Thus the agreed position is that there does exist a society known as **Narok Muslim Welfare Society** which was the intended Applicant. That effectively disposes of the 2nd limb of the Preliminary Objection.

16. With regard to the 3rd limb of the objection, I would agree that it touches on the substance of the Substantive Motion and involves matters of fact in dispute, as for instance whether or not the impugned letter has been overtaken by events and how the said letter prejudices the Ex-parte Applicant. Factual material on both sides would have to be examined in light of the applicable law to determine whether indeed the said letter is amenable to judicial review. The third limb of the Preliminary Objection in my view does not qualify as a pure point of law and cannot be entertained at this stage.

17. That leaves us with the first limb of the Preliminary Objection which is that the Applicant lacks the capacity to institute these proceedings. This objection is based on Section 41 (1) of the Societies Act which is in the following terms:-

> **"Where a society is charged with an offence under this Act or any rules made thereunder, the society may appear by a representative, who may enter a plea on behalf of the society and conduct the society's defence on its behalf."**

This Section refers to an offence but infact no provision in the Act allows a society to sue or be sued in its own name.

18. Narok Muslim Welfare Association whether misdescribed or not, as urged by its counsel, is an unincorporated society. The society has no capacity to sue in its own name. Ditto **Narok Muslim Welfare Society** which the Ex-parte Applicant's lawyer has conceded to be the correct description or name of the intended Applicant Society. See Football **Kenya Federation –Vs- Kenya Premier League Ltd & 4 Others [2015] eKLR** and **Eritria Orthodox Church –Vs- Wariwax Generation Ltd [2007] eKLR**.

19. Therefore, with respect, the Ex-parte Applicant's answer that all that is required is an amendment of the name of the Applicant as sought in the application for leave to amend, is not a good answer to the objection raised. The real question here is the capacity of the society not misdescription. The substitution of the name Narok Muslim Welfare Society in place of the present name cannot cure the lack of capacity by the society to sue in its own name. Besides, already the **Narok Muslim Welfare Society** through its representatives **Ahmed Bashir Gele, Onoro Ole Nkaiwuatei** and **Hassan Lemeria Ole** have come on board.

20. It is my considered view that the amendment proposed by the Ex-parte Applicant cannot cure the capacity defect on the part of the current Applicant. Whereas this court is loathe to exalt technicality over substance an issue of legal capacity to bring or defend a suit is not a mere technicality. It goes to the root of the entire pleading or cause. Thus the invocation of Article 159 of the Constitution cannot aid the Applicant in this case.

21. I associate myself with the sentiments by **Githua J** in **HCA No. 128 of 2013 Peter Taracha & Anor -Vs- Holiness Church & Anor [2016] eKLR**, where the court stated:-

> **"I have carefully gone through the entire *Societies Act* Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in *John Ottenyo Amwayi & others V Rev. George Abura & others HCCC No. 6339 of 1990* when he stated as follows:-**
>
> ***"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names …."***
>
> **In *Kiserian Isinya Pipeline Road Resident Association & others V Jamii Bora Charitable Trust and Another Civil Appeal No. 307 of 2006* Hon. Justice Alnashir Visram (as he then was) relying on several authorities including the case of *Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank HCC No. 5116 of 1992* (O.S) struck out an appeal with costs on grounds *inter alia* that it had been lodged by appellants whose majority consisted of unincorporated entities which did not have capacity to sue. In the *Free Pentecostal Fellowship in Kenya case (supra)* Justice Bosire (as he then was) expressed himself in the following terms :-**
>
> ***"The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.***
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> ***In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name".***
>
> **……. It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law."**

22. Similarly I have come to the conclusion that the suit herein is incompetent and the proposed amendment cannot redeem it. I therefore order that it be struck out entirely, with costs to the Respondent and Interested Parties.

Delivered and signed at Naivasha, this **24th** day of **February, 2017.**

In the presence of:-

Mr. Gichuki holding brief for Mr. Karanja Mbugua for the Applicant

Miss Ndegwa for the Respondent

Mr. Chege Kamau for Interested Parties

Court Assistant - Barasa

C. MEOLI

JUDGE