REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

JUDICIAL REVIEW NO. 8 OF 2015

1. IDRIS SHEIKH ABDULAHI ODOW

2. MUKTAR BUNDIT.....APPLICANTS

VERSUS

1. FARAH ABAILLE GALEF

2. MOHAMED AMIN.....RESPONDENTS

3. SIYAT SHEIKH MOHAMED

4. ALI GUREL

RULING

A Notice of Motion dated 14th August 2015 seeking leave to file judicial review proceedings was filed by the applicants. I certified the application as urgent and ordered that it be served for interparties hearing. After service, and by consent of counsel for the parties, the application proceeded by way of written submissions.

The applicant's counsel J.O. Otieno & Company filed written submissions on 15th October 2015.

The respondent's counsel M/s. Paul Mugwe & Company filed a replying affidavit sworn on 22nd September 2015 by Farah Abaile Omar. Counsel also filed written submissions on 12th November 2015.

During the hearing of the application, the applicants counsel Mr. Otieno argued that the leave was sought in exercise of the courts powers under section 8 of the Law Reform Act (Cap. 26) and Order 53 of the Civil Procedure Rules. Counsel submitted that under Article 11 (1) of the Constitution of Kenya 2010, culture was described as the foundation of the Nation and as such was protected by the Constitution. Counsel added that the court under Article 23 (1) of the Constitution had jurisdiction to determine issues on alleged infringements or violation of rights committed under Article 11. Counsel emphasized that they had filed documents showing the clear history on how the applicants operated in matters of election of their leaders.

Counsel argued that the court had the final decision after hearing the parties, and submitted that the 1st respodnent had no blood connection with the Aluiyan clan and therefore could not be their leader. He stated that though the replying affidavit stated that African culture did not recognize democracy, in

matters of leadership there had to be broad participation of people affected, as envisaged in the Kenya Constitution 2010.

Mr. Nyaga for the respondents submitted that leave be declined to file judicial review proceedings. Counsel submitted that the application was defective as it was filed through a Notice of Motion rather than a Chamber Summons. Secondly, it was also not heard exparte. Both of those were fundamental defects. Counsel relied on number of court cases and stated that the requirement for leave was to weed out unmerited applications. Counsel felt that the Aluhyan/Afwa clan elections was not an issue for judicial review nor, was it a statutory or administrative decision that could be considered by the judicial review court.

I have considered the application and submissions both written and verbal on both sides.

Though Mr. Nyaga for the respondent has argued that the application is defective because it was being heard interpartes, such cannot be a defect. The law requires that the application be made exparte. The law also allows the court to order that the application be heard interpartes. The provisal to Orders 53 Rule 1 (4) of the Civil Procedure Rules 2010 is clear on this and states as follows:-

> ***Provided that where the circumstances so require, the judge may direct that the application be served and heard interpartes before the grant of leave."***

The court herein ordered that the application be served for interpartes hearing. That was not a defect on the application.

A lot of detail has been given on both sides in documents filed and written submissions, on how the clans in the Somali community elect their leaders and how the 1st respondent was said to have been elected to lead the Aluiyan clan. Several clans and sub clans have been mentioned. Whether the election of the 1st respondent as leader was regular or irregular, this court cannot make the decision at this preliminary stage.

The important thing to understand is that this is an application for leave to file judicial review proceedings. Judicial review proceedings are proceedings brought against public institutions or public officials acting in exercise of their official power. Where they exceed their power or they act and they don't have such powers, or they refuse to act where they have a duty to do so, or where they act unprocedurally and unfairly then there could be reason to bring judicial review proceedings for the court to grant relief to those affected by the actions or in actions of those public institutions or public officials. See the case of ***KURIA & 3 OTHERS VS. ATTORNEY GENERAL 2002 (2) KLR 69.*** Judicial review proceedings are not brought against private individuals or individuals acting in a private capacity.

In the present case, none of the respondents is said to be a public official nor to be a public institution or a representative of a public institution. They are all private individuals. Clan matters are private matters which are in the purview of private litigation, when disputes arise. They cannot be put in the bracket of judicial review proceedings, which are directed at correcting excesses of exercise of power by public officials.

Since the leave sought herein to institute judicial review proceedings is not directed at any public official or institution, it will be futile for this court to grant leave to institute judicial review proceedings herein. I will thus dismiss the application on that account.

In addition to the above, the reliefs sought in the application for leave do not appear to be what is envisaged under Order 53 of the Civil Procedure Rules that is certiorari, prohibition, and mandamus. I am aware that the Constitution enlarges the reliefs that can be sought in judicial review proceedings. However seeking a relief for a stay directed at Mr. Farah Abaile Galef from participating in all decision making forums of sub clans of the Aulyahan Clan, is not a relief that can be sought under judicial review proceeding. Seeking declaratory orders that the election of Farah Abaile Garef as spokesman and representative of Afwa sub clan was inconsistent with the Constitution, is also an order that cannot be

granted in judicial review proceedings.

If the applicants wanted to file a Constitutional petition claiming violations of Constitutional rights and requiring a declaration to remedy the same, they should have done so rather than coming to this court through the judicial review procedure.

I fully agree with what was stated in ***MEIXNER & ANOTHER VS. ATTORNEY GENERAL [2005]2 KLR 189*** that the purpose of leave is to filter out frivolous applications. In my view the requirement for leave is also to filter unmeritorious applications such as the present one, as there is no complaint raised against any public official or institution.

I find that the application for leave herein to file judicial review proceedings is unmerited. It does not meet the threshold for granting such leave, as it is not directed against public officials or institutions. I dismiss the application and decline to grant the leave sought with costs to the respondents.

Dated and delivered at Garissa this 26th day of April 2016

GEORGE DULU

JUDGE