



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 12 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW

PROCEEDINGS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

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

AND

IN THE MATTER OF THE KIRINYAGA COUNCIL OF ELDERS BY-LAWS ON ELECTIONS

BETWEEN

REV. JACOB NJOGU GACHANJA.....APPLICANT

AND

KIBUGI KATHIGI.....1ST INTERESTED PARTY

MUGO NYAGA.....2ND INTERESTED PARTY

NAHASHON MUGO KABEU.....3RD INTERESTED PARTY

STEPHEN MBUITU NGARI.....4TH INTERESTED PARTY

JOSEPH MUKONO.....5TH INTERESTED PARTY

PETERSON MAINA GICHOYA.....6TH INTERESTED PARTY

NELSON NGARI KAMANGARA.....7TH INTERESTED PARTY

RULING

1. **REV. JACOB NJOGU GACHANJA**, the applicant herein has moved this honourable Court in a substantive motion dated 24th November, 2015 under **Sub section 1A, 1B, 3A** of **Civil Procedure Act** for the following Judicial Review orders:

i. An order of certiorari to bring into this court for purposes of quashing a 2nd respondent's letter dated 5th November, 2015 that confirmed the named interested parties in this application as the bona fide office bearers of Kirinyaga Council of Elders (hereinafter to be referred to as the society).

ii. An order of mandamus to compel the 2nd Respondent to nullify the elections of Kirinyaga Council of elders elections on 25th September, 2015 whereby the interested parties herein were elected as office bearers of the society.

iii. An order of mandamus to compel the 2nd Respondent in this application to ratify and confirm the office bearers of the society elected on the 25th September, 2015 at an election overseen by the applicant herein.

iv. An order of prohibition restraining the Interested Parties from convening executive committee meetings, taking over the offices, assets and affairs of the society.

v. An order of prohibition restraining the Interested Parties from taking over, changing, operating and/or interfering in any manner howsoever with Kirinyaga Council of Elders Account Number 2025681994 Barclays Bank Kerugoya Branch and Account Number 01134272131200 Co-operative Bank also Kerugoya Branch.

2. The Applicant has moved this honourable court for the above remedies on the following grounds namely:

a. That Kirinyaga Council of Elders is a registered society having been registered on 22nd January, 2010 vide certificate No. 31366 issued by the Registrar of Societies in the Office of the Attorney General (the 1st Respondent herein.)

b. That the society has a constitution that was registered with the 2nd Respondent on 22nd January, 2010 that permits the society to formulate by laws to govern it and among the by laws formulated is by-law 18 which deals with election of office bearers of the society.

c. That there was a dispute that arose in respect to office bearers and that the 2nd respondent directed that elections be conducted which was properly done as per the by-laws according to the applicant but that the Interested Parties formed a splinter group and conducted their own elections that was recognized by the 2nd respondent vide a letter dated 5th November, 2015.

d. That the 2nd respondent did not give reasons for its decision to recognize the rival group (the Interested Parties herein)

e. That the action of the 2nd Respondent was ultra vires the constitution and the by laws of the society.

3. The Applicant has supported the above grounds through his own affidavit sworn on 24th November, 2015 where he has deposed that he is a member of and the acting secretary General of the society having been confirmed on 31st July, 2014. He has deposed that the 2nd Respondent instructed him through a letter dated 15th September, 2015 (exhibited as Exhibit JNG 6 in his affidavit) that elections be held under the society's by laws No. 18 of 2015. He has further added that the elections were conducted but the same was boycotted by the Interested parties who conducted a parallel elections. The Applicant has deposed that his protests to the Registrar did not elicit positive response as the 2nd Respondent went ahead and recognized the interested parties as the bona fide officials of the society.

4. The Applicant's case

The Applicant's case is based on the statement of facts dated 13th November, 2015 filed together with the application for leave to challenge the decision by the 2nd respondent to recognize the results of the elections of the officials to the society by a splinter group that is represented by the interested parties herein. The Applicant contends that the elections were called six months earlier than scheduled owing to the fact that the office bearers had been removed due to financial misdeeds and to avoid a vacuum the 2nd respondent called for the elections of new officials. It is the Applicant's case that the elections of the new officials were to be conducted as per its by-laws No. 18 of the society's by laws and that a Notice of Annual General Meeting was duly issued for 25th September, 2015 where elections were held supervised by Returning officer from the Ministry of Gender, Culture, Youth, Sports and Children of the Kirinyaga County.

5. The Applicant contends that a dispute arose over the bona fide office bearers due to a parallel elections held by the interested parties who had as stated above formed a splinter group. The dispute was about how the elections were to be conducted with the Applicant contending that the same were to be carried out in accordance with by law No. 18 as earlier recommended by the 2nd Respondent through correspondences. The Applicant submits that the election method provided under the bylaws was through the delegates system that ensured participation from the grassroots level to the county level. It is contended that the 2nd Respondent through its letter dated 15th September, 2015 gave a seal of approval of that system of elections which is submitted is the system that the applicants followed as stipulated under the stated by laws. In his view, the parallel elections conducted by the interested parties were sham elections as those who took part allegedly included the youth and women. It is also contended that the elections conducted by the interested parties were outside the mandate of the letter issued by the 2nd Respondent in its letter dated 15th September, 2015 besides violating the society's by laws No. 18 and that there was no other way to hold the elections other than as provided by the law No. 18.

6. The Applicant has submitted that by accepting the results of elections of the interested parties that were done contrary to its directives the 2nd Respondent acted with bias and in his view such a demonstration of bias can be mitigated by an order of certiorari. It is further submitted that the 2nd Respondent should have notified the Applicant not to adhere to its by-laws in the elections and that failure to notify him frustrated his expectations which in his view is contrary to the rules of natural justice.

7. The Applicant has further contended that the 2nd Respondent did not grant them a chance to be heard and apparently heard the interested parties after telling the Applicant and his team to go and wait for communications on its decision on who between the two teams were to be recognized as bona fide officials of the society.

8. The Applicant has faulted the 2nd Respondent for making a decision that suggested in his view unfair treatment to their returns and has asked this Court for an order of mandamus to compel the 2nd Respondent to ratify the same and confirm that theirs is the duly elected office bearers. The following decision has been cited by the Applicant in support of his case.

(1) R -Vs- Kenya Association of Music Producers and 3 others ex parte Pubs entertainment and Restaurants Association of Kenya [2014]eKLR.

9. The Respondent's Case

The 2nd Respondent has opposed this application through a replying affidavit by one of its counsels Joseph L. Onyango sworn on 25th February, 2016 and written submissions done through Brenda Mwangi learned counsel who also appeared for the 1st and 2nd Respondent in this application. The 1st and 2nd Respondents have contended that the application is incompetent and defective.

10. According to the Respondents, the society was registered vide certificate of registration number 31366 dated 22nd January, 2010 and that there have been changes of office bears of the society as

indicated but which is not an issue in this application. What is worthy of a mention is that the Respondent has stated that the Applicant has been acting secretary of the society since 7th September, 2012 to the time of the changes that brought about the controversy that is now the subject of this application. The Respondents have contended that the officials comprising the Applicant as acting secretary, 2nd Interested Party as the acting chairman, and 3rd Interested Party as the Treasurer have been having wrangles on issues to do with leadership and the management of the society.

11. The Respondents have further deposed that following various meetings with stakeholders including the Applicant and the interested parties herein, they resolved to have the society convene an Annual General Meeting on 25th September, 2015 at Kutus Catholic Church and talked the Applicant to issue notices to that effect to all the members of the society.

12. The Respondents have wondered why the Applicant later on 3rd September, 2015 raised objections to the elections slated for 25th September, 2015 only to decide to hold the same in an unknown venue contrary to the notice of the Annual General Meeting which he himself had signed and issued. They have faulted the Applicant for misleading the County Director of Gender to go and supervise separate elections instead of the planned elections held at Kutus Catholic Church.

13. The Respondents have justified their recognition of the elections returns presented by the interested parties because in their view the same was held at the agreed venue as per a joint committee meeting held on 26th August, 2015 and the fact that the elections were supervised and conducted by the Independent Electoral and Boundaries Commission.

14. The 2nd Respondent has deposed that its decision was based on its administrative duty and was carried in good faith and that it could not ratify a list of officials who were elected on a wrong venue. It distanced itself with the wrangles in the society submitting that it has no interest on whoever gets elected as an official of the society.

15. The 2nd Respondent denied the claims by the Applicant that he was not accorded a chance to be heard submitting that the two factions were heard and their representations considered before a decision contained in the letter dated 5th November, 2015 was reached. It was also contended that the 2nd Respondent does not operate the accounts of the society and that the prohibitory orders sought do not apply to them.

16. The Respondents have further submitted that the Applicant opted on his own volition to skip the meeting at Kutus Catholic Church out of malice and ill motive in order to frustrate the proper running of the society. It is submitted that the orders of mandamus, certiorari and prohibition are unavailable to the Applicant as he has failed to demonstrate that the process to recognize the Interested Parties as bona fide elected officials of the society was tainted with illegality, irrationality or any procedural impropriety.

17. It is the Respondents' case that the elections of the Applicant and his team was not sanctioned or conducted in manner agreed after long consultations with all the parties concerned. The Respondents have submitted that an order of mandamus does not look at the merit of a decision but rather on the process itself and cited the case of **Municipal Council of Mombasa -Vs- Republic & Umoja Consultants Ltd. [2002] eKLR** to support their contention.

18. It is the Respondent's contention that the Applicant's application must fail because in their view the Applicant has failed to demonstrate that the decision of the Respondents was tainted with illegality and procedural impropriety to warrant judicial review order and cited an authority in the decision of **Republic -Vs- KRA & Anor Exparte Tradewise Agencies [2013] eKLR** to back up their contention. It is contended that for the same reason the orders of certiorari and prohibition does not lie.

19. **(c) The Interested Parties Case**

The Interested Parties have also opposed this application through a lengthy affidavit sworn on 24th November 2015 by the 1st interested party Mr. Kibugi Kathigi who deposed that he had authority to plead on behalf of the other interested parties. The 1st interested party has given a history of the various wrangles rocking the society since 2014 and appears to heap much of the blame to the Applicant herein. However, what is relevant to this application is that the interested parties have supported the sentiments of the Respondents.

20. The 1st interested party has deposed that the 2nd Respondent called for elections of new officials as the term of the former officials was to expire on 7th September, 2015 and has given a comprehensive steps and procedures undertaken by the executive committee mandated to convene the Annual General Meeting and ensure that all the modalities were adhered to. It is the Interested Parties case that the date and venue for the Annual General Meeting was agreed to be on 25th September, 2015 at Catholic Church Kutus and a copy of the Notice of the Annual General Meeting dated 4th September, 2015 has been exhibited in the replying affidavit of Kibugi Kathigi. It is further deposed that the venue and the date of the Annual General Meeting among other modalities for the Annual General Meeting were agreed upon at a meeting convened by the 2nd Respondent in his office and that the Applicant was present in that meeting. In his view the 2nd interested party has contended that everything went on smoothly in so far as the planned Annual General Meeting was concerned until the Applicant started referring himself as Chief Executive Officer and started quoting bylaws which in his view were non-existent at the time as the same had never been discussed or approved during any Annual General Meeting preceding the scheduled Annual General Meeting of 25th September, 2015. They submitted that they did not recognize the bylaws and that the same were not binding for want of ratification and adoption by members of the society.

21. The interested parties have accused the Applicant for harbouring ulterior motives by going against a notice he himself signed by holding a parallel meeting at unknown venue when all the relevant authorities had been notified to turn up at Kutus Catholic Church where the Annual General Meeting took place and elections held. They further contested the recommendation contained in the 2nd Respondent's letter dated 15th September, 2015 contending that the recommendation were not binding to the members of the society.

22. The Interested Parties have contended that they presented their returns to the 2nd Respondent simultaneously with the Applicant and denied that the 2nd Respondent heard them separately and according to them their elections were recognized because they were lawful and procedural and denied the Applicant's claim that they were favoured by the 2nd Respondent.

23. The Interested Parties have opposed the prayers sought in this application arguing that the said reliefs cannot override the interests of the members and that the 2nd respondent should not be compelled to do an illegality which in their view is recognizing the elections done irregularly and using bylaws which they insist were not in force at the time.

24. It is submitted that the 2nd Respondent carried out its administrative duty of recognizing what the Interested Party considers properly conducted elections of themselves as officials and that both factions were heard and given an opportunity of making their representations before the 2nd Respondent arrived at the decision to confirm the Interested Parties as bona fide elected officials.

25. **Issues for Determination**

This application and the responses of the Respondents and the Interested Parties have crystallized the following issues for determination:

- i. Whether the decision of the 2nd Respondent contained in a letter dated 5th November, 2015 was legal, proper and done within the administrative duties of the 2nd Respondent.

ii. Whether the letter dated 15th September, 2015 authored by the 2nd Respondent was binding to the society and its members.

iii. Whether the prerogative orders of certiorari, mandamus and prohibition is available to the applicant.

26. (i) Whether the letter dated 15th September, 2015 was binding to the society.

The Applicant's major grievances in this application are centred around two letters dated 15th September, 2015 and the one dated 5th November, 2015, the latter being the main basis for this application.

To begin with the letter dated 15th September, 2015, it is apparent that the 2nd Respondent wrote the letter addressed to the Applicant recommending the manner in which the elections were to be held that is in accordance with bylaw No. 18. The bylaws have been contested here by the Interested Parties on the grounds that the bylaws were not binding to the society as the same had not been adopted or ratified by the members.

27. I have looked at the legality of the recommendation contained in the letter dated 15th September, 2015 and have noted that the same is questionable. Under **Section 29 (1)** of the **Societies Act Cap. 108**, the law provides guidelines on when and how Annual General Meetings are to be held. The law provides as follows;

“Every registered society shall, at least once in every year, hold a general meeting to which its members shall be invited and shall at such meeting –

a. Render a full and true account of the moneys received and paid by the society such account being audited in accordance with the rules of the society and

b. Cause to be elected or, appointed all such officers, trustees and auditors and where applicable such committee as are required in accordance with the constitution and rules of the society.”

The powers of the registrar in so far as Annual General Meetings are concerned are limited to just ensuring that the meetings are held as per the law and the constitution and rules regulating the society. Under **Section 31** of the same Act, the registrar has powers to call for the complete copy of the constitution and rules of the society and also complete copy of the officers elected, minutes of such meetings and the number of meetings, audited accounts etc. The Registrar under the law does not have power to recommend or prescribe the manner in which meetings are to be conducted and even less the election methods to be adopted in such meetings. This is because it is a pre requisite (under **Section 19**) and **Rule 2** of **Societies Rules, 1968** for every society to have a constitution as provided in the schedule to the Act and it is such constitution and regulations that guide societies in their various meetings.

28. I have looked at the constitution of the society herein exhibited by the Applicant as exhibit JNG 2 and under **Article 8 (2) (vi)** thereof, the committee of the society is given the mandate to set the agenda and the modalities of the meetings among other duties and it is on the light of that apparently the meetings of 7th August, 2015 and 5th September, 2015 seemed to have been held. I have looked at the minutes of those two meetings as exhibited by the 1st Interested Party in his replying affidavit as exhibit “KK/8” and “KK/19” and noted that the executive committee among other things adopted to use queuing system in the elections of office bearers in the coming elections of 25th September, 2015. The Applicant appended his signature to the resolutions that also included the agreed venue of the Annual General Meeting (Kutus Catholic Church Hall). The minutes of those meetings suggested that the election method had been used before to elect the office bearers of the society which was in 2012. He cannot therefore turn back and say that the agreed method of elections was as per the contested bylaw No. 18. I also agree with the Interested Party that the Applicant's purported notice dated 16th September, 2015 contravened the society's constitution. The notice does not disclose the venue for the Annual General Meeting besides

that it quoted a bylaw which was yet to be adopted and ratified by the members of the society to give it legal backing.

29. The Interested Parties have sworn an affidavit that the contested bylaws have not been adopted or ratified by the members. This has not been denied. I have looked at the bylaws exhibited by the Applicant as exhibit JNG7 and did not find any evidence of adoption or ratification by the society. The applicant has not annexed minutes of when the bylaws were done and adopted and I agree with the Interested Parties that the bylaws are in the absence of adoption and ratification not binding to members. At best they remained a recommendation (I do not find anything wrong with the by-laws) and perhaps that is why the 2nd Respondent should have recommended that the same be considered at the next Annual General Meeting. It was however, wrong for the Deputy Registrar to the 2nd Respondent to appear like he was suggesting that a bylaw that was yet to be ratified and adopted by the society be used. I also find it odd that the same office appeared to have created a non-existent office of a chief executive officer of the society. Nonetheless it is the Interested Parties who felt aggrieved by this and that grievance is not relevant in this application as this Court is addressing the grievances brought forward by the Applicant in instituting these proceedings. In light of the above this Court finds that the 2nd Respondent acted beyond its mandate in its letter dated 15th September, 2015 and for that reason, the contents of that letter were not binding to the society. That could have perhaps informed the decision made by the Respondent later which appears to have completely disregarded and rightfully so its letter dated 15th September, 2015.

30. Whether the decision vide Respondent's letter dated 5th November, 2015 was proper and done within administrative duties of the 2nd Respondent

The Applicant in his statement of facts in support of his challenge of the 2nd Respondent's decision to confirm the Interested Parties as bona fide officials faulted the 2nd Respondent for not giving reasons why it chose what he termed as the splinter group (read interested parties) over his faction and yet the results of both elections were presented on the same day (28th September, 2015).

I have considered the contents of the affidavits by the Applicant, 2nd respondent's representative and the 1st Interested Party and what is pertinent is that the elections of 25th September, 2015 was agreed by the parties in this application save that the Applicant had initially expressed his reservations in holding elections in the month of September, 2015. This is as per his letter dated 3rd September, 2015 exhibited by the 2nd Respondent as exhibit "JL 08". The reservations and opposition to the elections being held was however, overtaken by the subsequent decisions/resolutions reached after the meetings held by the society on 4th September and 5th September, 2015 as per the minutes exhibited as "JLO10" and "JLO11" by the affidavit sworn by Joseph Onyango on 25th February, 2016. In those meetings attended by the Applicant among other officials it was agreed and resolved that the Annual General Meeting be held on 25th September, 2015 at Kutus Catholic Church Hall at 8 a.m. A Notice of the Annual General Meeting was duly issued and signed by the officials of the society including the Applicant as the Acting Secretary General as per exhibit JLO10 referred to above. The Annual General Meeting was duly held on 25th September, 2015 at Kutus Catholic Church and elections held supervised by Independent Electoral and Boundaries Commission as deposed by the 2nd Respondent as per exhibit JLO12 in the affidavit of Joseph L. Onyango.

31. The 2nd Respondent has deposed that the Applicant had on 3rd September, 2015 vowed not to take part in the elections of 25th September, 2015 as scheduled which it found surprising considering the preparations and the earlier meetings and resolutions arrived at as per the minutes referred to above. I have noted that the Applicant and his group held parallel elections at an unknown venue at Kutus. This was clearly not only contrary to the earlier notice issued but a contravention of the law and the society's constitution. A venue of an Annual General Meeting is a necessity and an important matter in affairs of any registered society going by the provisions of **Section 29 (1)** of the **Societies Act** (Cap 108 Laws of Kenya). Members have to be notified in advance where such important meetings concerning the society are held. It is really a matter of conjecture as to where exactly the meeting the Applicant and his group

attended was because the Minutes of the meeting just indicate that the meeting was held at Kutus and Kutus Town fairly sizeable with many buildings and open spaces including a bus stage terminus. So one is justified to ask where exactly the meeting took place notwithstanding the presence of a county official of the Ministry of Gender, Culture and Sports? I note that the Applicant in his application and documents filed has not disclosed this important information despite the fact that both the Interested Parties and the 2nd respondent in their respective affidavits faulted the Applicant for not disclosing the venue of their purported Annual General Meeting. It is against this background that I find the 2nd Respondent's decision contained in its letter dated 5th November, 2015 justified. The 2nd Respondent in all fairness could not have been expected to confirm elections of officials that were elected in an unknown venue whereas there were valid elections conducted in a specified venue as per a Notice of Annual General Meeting convening the said meeting. In my view the 2nd respondent's administrative action was proper and lawful given the circumstances. I do not find any basis that the action taken was tainted with bias because no evidence of the same has been presented in this application.

32. Whether the orders of certiorari, mandamus and prohibition are available to the Applicant.

The Applicant in his application claimed that the 2nd Respondent's decision contained in the letter dated 5th November, 2015 was tainted with bias and irrationality. At the hearing of the application, the Applicant introduced a new ground which was that the decision flew in the face of natural justice as the 2nd Respondent made the decision without hearing him or according them a chance to be heard. It is however, important to note that in an application for Judicial Review under **Order 53 rule 4 (1)**, an applicant is precluded from relying on any other ground for the relief sought apart from grounds set out in the Statement of Facts filed together with the application for leave. I have gone through the grounds set out in the statements dated 13th November, 2015 from (a) to (y) and nowhere did the Applicant state that he was not given a chance by the 2nd Respondent to be heard. I have considered the replying affidavits and the submissions made by both the 2nd Respondent and the Interested Parties and I am satisfied that the Applicant was given a chance to make his representations. The 1st interested party told this Court that they met with the 2nd applicant in the office of the 2nd Respondent where each group presented its report. So apart from the fact that the ground was not pleaded, I nonetheless do not find basis that the Applicant was not heard or given an opportunity of being heard.

33. It is true that where bias is established, a judicial review order is available to an aggrieved party. This is because those charged with administrative duties should exhibit administrative impartiality in discharge of those duties or functions. The rule against bias is founded on the legal maxim that "No man can judge in his own cause." The 2nd respondent has however, distanced itself against the allegation of bias by submitting that it had no interest on whoever was elected as an office bearer of the society. The applicant on his part has not laid any basis for the perceived bias of the 2nd Respondent. No evidence has been tendered to show that the decision made vide the letter dated 5th November, 2015 was tainted with spite by the 2nd Respondent to the Applicant and his group. There is no evidence tendered to show that the 2nd Respondent harboured any interest on who the office bearers of the society would be. This Court finds no evidence of bias in the said decision to warrant this Court's intervention on that ground.

34. This Court is in agreement with observations made in the decision quoted by the Applicant in the case of **R -Vs- Transition Authority & Another Exparte Kenya Medical Practitioners, Pharmacists and Dentist Union & 2 others [2013] eKLR** where the court cited with approval the decision in **Council of Civil Servants Union -V- Minister for the Civil Service [1985] AC 2** where the following observations were made:

"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 in law in the process of taking or making the Act, the subject of the complainant. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality....."

Irrationality is where when there is a gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

Applying the above principles on the issues raised by the Applicant in his application particularly on the question of alleged bias, irrationality and impropriety of the 2nd Respondent's decision, it is clear that an order of judicial review cannot lie.

35. On the remedy of certiorari, it is pertinent to note that this remedy is used by courts to bring a decision of a tribunal or a public body for purposes of investigations to establish if the same is valid and not *ultra vires* or made outside the jurisdiction or the legal mandate granted to such tribunal or public body. So where a decision is found to be *ultra vires* arbitrary, capricious and unconstitutional as observed in the Applicant's quoted case of **Kenya Country Bus Association & 8 others -Vs- Cabinet Secretary For Transport and Infrastructure & 5 others [2014] eKLR** an order of certiorari would issue to quash such a decision but in the present case I am persuaded by the contention and submissions of the Respondents that their decision was legal, proper and made within the powers or confines of the **Societies Act Cap. 108 Laws of Kenya**. The Applicant has not demonstrated that the decision contained in the letter dated 5th November, 2015 was *ultra vires* or arbitrary in any way.

36. The Applicant has prayed for an order of mandamus to compel the 2nd Respondent to recognize his list of officials presented to them. This Court has expressed its reservations on how those elections were conducted. They were conducted in an unknown venue and the members of the society had not been notified of any other venue a part from Kutus Catholic church Hall where the proper elections were conducted. An order of mandamus is a prerogative remedy used to compel a public authority that has failed in its statutory duty to perform its duties to the citizens. An order of mandamus is the only effective means of enforcing such body to carry out its duties under an act of parliament or its regulations. The Applicant herein opted to stay away of a properly convened meeting and chose to attend an illegal parallel meeting held in an undisclosed venue. An order of mandamus is a discretionary remedy and in my view the Applicant is undeserving of that remedy.

37. I am also in agreement with the 2nd Respondent's submissions that Judicial Review does not concerned itself so much with the merit of a decision but the process to reach that decision. The 2nd respondent has cited the case of **Municipal council of Mombasa -Vs- Republic & Another [2002] eKLR** where the Applicant sought for orders of prohibition to strip the Respondents from revising its levies to the traders and residents of Mombasa. The Court held that an order of prohibition can only be granted to prohibit a decision that is yet to be made and that the order of prohibition could not issue because a decision had already been made. But what was pertinent in that decision was that a court sitting on a Judicial Review is not concerned with the merits of the decision being challenged but with the decision making process.

In this case, this Court first finds no merit in the Applicant's contention that the decision made by the 2nd respondent was not fair or irrational and secondly the process leading up to the decision made by the 2nd Respondent has not been seriously challenged. An order of prohibition cannot lie in such circumstances.

In the end the long and short of this is that this Court finds no merit in the Notice of Motion dated 24th November, 2015 for the reasons aforesaid. The application is dismissed with costs to the Respondents and the Interested Parties.

Dated and delivered at Kerugoya this 26th day of September, 2016.

R. K. LIMO

JUDGE

26.9.2016

Before Hon. Justice R. K. Limo J.,

Court Assistant Naomi Murage

Miss Kuria holding brief for Kinyanjui for the applicant.

Respondent absent.

Kibugi Kathigi and 6 Interested Parties present.

COURT: Ruling signed, dated and delivered in the open court in the presence of Miss Kuria for the Applicant and the interested parties in person present.

R. K. LIMO

JUDGE

26.9.2016