REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2016

REPUBLIC.....APPLICANT

AND

REGISTRAR OF SOCIETIES.....1ST RESPONDENT

WINNIE N. SHENA

ALFRED OBUYA OBENGO

JACINTA MOKI.....2ND RESPONDENTS

MUKULU N. KARIUKI.....3RD RESPONDENT

HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

EX- PARTE APPLICANTS -

LYDIA CHERUBET (INTERIM CHAIRPERSON)

JOASH OCHIENG (INTERIM SECRETARY) AND PRICILLA

NTHENYA (INTERIM TREASURER) OF NATIONAL

NURSES ASSOCIATION OF KENYA

AND

JEREMIAH MAINAH.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Motion on Notice dated 3rd May, 2016, the *ex parte* applicants herein who instituted these proceedings as officials of the National Association of Kenya (hereinafter referred to as "the Association"), seek the following orders:

1. **THAT an Order of Certiorari be issued to remove into this Court and Quash the letter dated 2nd March, 2016 written by the 3rd Respondent.**

2. **THAT an Order of Mandamus do issue to Order the 1st and 3rd Respondents either by themselves or through their recognized agents or officers to reinstate the names of the interim officials as contained in the letter of 26th February, 2016 as the recognized officials for The National Nurses Association of Kenya.**

3. **THAT an Order of Prohibition do issue restraining Respondents herein either by themselves or agents from**

interfering in any manner with the work of the interim officials named in the letter dated 26th February, 2016 in the management of the National Nurses Association of Kenya

4. **THAT the Costs of this Application be provided**

***Ex Parte* Applicant's Case**

2. According to the applicant, a dispute has been existing in the leadership of the association for a long time which dispute led to different cases being filed in different Courts by different parties or factions claiming to be the legal representatives of the members of the Association. In order to have these disputes resolved amicably an arbitration process was instituted where meetings were held involving the warring groups or factions in which proceedings, the 2nd Respondent was a party and participated voluntarily. It was deposed that through the said arbitration it was agreed that interim officials be appointed to manage the affairs of the Association with a view to conducting elections by October this year for the purposes of bringing new officials in the office who could bring unity amongst the members of the association. According to the applicant this decision did not block the 2nd respondents from contesting for the available positions at the time of elections.

3. Pursuant thereto, in a meeting held on 10th February, 2016 at Sarova Panafric Hotel the ex-parte applicants were appointed into the office as interim officials to put election board into place in preparation for the elections to be conducted by October this year. Prior thereto, a meeting was held on 8th January, 2016 in which the 2nd Respondent participated and never raised any issue with regard to the said arbitration and reconciliation meeting.

4. It was averred that after the appointment of the interim officials returns were filed in line with an arbitration report with the Registrar of Societies who acknowledged the same and confirmed the names of ex-parte applicants as officials of the Association. However, thereafter and unknown to the ex-parte applicants the Respondents removed the names of the interim officials without giving the ex – parte Applicants any hearing or notification before action and condemned the ex-parte applicants unheard by writing the letter dated 2nd March, 2016. It was contended that the names of interim officials were removed from the office unilaterally by a letter dated 2nd March, 2016 which letter was also copied to Kenya Commercial Bank which was not a party to the process an action which, in the applicants' view, can only prove collusion on the part of the Respondents as Registrar could not copy a letter to the Bank if there was no undue influence and/or collusion.

5. The Applicants averred that due to the illegal actions of the Registrar it has become difficult for the wrangles to end hence the need for seeking the intervention of this since the Respondents do not even have a recognized National Executive Council hence they cannot purport to be in the office legally. The Applicants therefore held the view that it is in the interest of justice that the Respondents be restrained from interfering with the management of the association in order to preserve the ends of justice and also to take care of the interest of the Applicants. In their opinion, no prejudice will be caused to the Respondents if this Application is allowed as they will get a chance to contest for the seats if they so wish and none of them will be barred from participating in the elections which are due in October.

6. The Respondents, it was contended cannot, due to their actions and conduct, make a sound decision in this matter since they have exhibited favouritism and have acted in bad faith. Further, the Respondents' motive is not known as they have acted in bad faith and have taken the law into their own hands by not following the well laid down procedure in violation of the law as they have acted against the rules of natural justice. It was the Applicants' position that the actions of the Respondents are *ultra vires* hence this Court ought to allow this application in the interest of justice.

7. The 4th Respondent was accused of having failed in his capacity as the legal adviser of the Government to give guidance and legal advise to the 1st and 3rd Respondents and as such is liable for his failure to carry out his statutory duties as mandated by law.

8. The Applicants averred that when they received the letter dated 2nd March, 2016 they wrote to the Registrar who failed and /or neglected to respond to the issues raised in their said letter. According to them, the Respondents do not have respect for the rule of law as witnessed from the way they have handled this matter.

9. The Applicants contended that the composition of the National Executive Council is stated under Article 7 of the constitution of the National Nurses Association of Kenya.

10. It was submitted on behalf of the applicants that since under Order 40(4)(2) of the ***Civil Procedure Rules*** an ex-parte injunction can only be granted for a period of 14 days and can be extended only once for another period of 14 days, the Order referred to or being relied upon by the 2nd Respondents is null and void. The same is therefore incapable of being enforced or implemented and as such there is no order in existence which the Respondents could rely on in support of their contention that there was material non-disclosure. It was also submitted that the ex-parte applicant is not a party to any of the alleged proceedings and/or the purported order and there is no evidence that the Order was served upon the ex-parte applicants.

11. To the applicants, *res judicata* does not arise since the matters in question herein are not the same as the ones which were raised in those other cases as new matters including arbitration occurred at a later date and in any event the parties to the proceedings are not the same.

12. It was submitted hat since the 2nd Respondents participated in and did not register any objection to the process, she was estopped from going against any resolution passed through the process.

13. According to the applicants, from the pleadings before this Court it is apparent that the Registrar did not act in good faith since it entered the arena with the intention of assisting the 2nd Respondent instead of being neutral. According to the applicants, the manner and circumstances under which the Registrar copied letters to Kenya Commercial Bank without being requested and /or asked to do so is suspect and a clear indication that he opted to do more than what he was required to do and without authority hence exceeded his mandate. To the applicants, from the acts and conducts of the Registrar there is a demonstration of insincerity, lack of honesty and neutrality in the circumstances yet the law requires public officers to act beyond reproach and to carry out their mandate without any favouritism.

14. According to the Applicants, section 19(1) of the ***Societies Act*** Cap 108 states that "*the Constitution or rules of every registered Society or exempted society formed after the commencement of this Act shall provide, to the satisfaction of the Registrar, for all the matters specified in the schedule to this Act and shall not be amended so that it ceases so to provide*." To the applicants, the amended Constitution of the National Nurses Association of Kenya has provided for mechanism to be used in electing its officials. Article 16 of the amended constitution provides for National Election Committee which should be constituted by NEC nine (9) months prior to election date. Article 16 (B) (III) is also clear of the duties of the National Election Committee which includes identifying, engaging and commissioning returning officers who shall issue successful office elect leaders with certificates after all contestants have signed validated election results. It was therefore submitted that from the foregoing that there is nothing that the Respondents can show this Court on how they were elected into the office in line with the provisions of the amended Constitution and in any event they cannot even name their nominees or the persons who presided over their election.

15. To the Applicants, if there was no election in line with the provision of the Constitution then it follows that the Respondents are illegally trying to put themselves to the office through back door which should not be allowed. To them, a court of Law cannot protect or shield someone who has placed himself into an office illegally.

16. They therefore urged the Court to allow the application to enable due process to be followed which can bring back sanity to the society as this is the only way of stopping the wrangles in the association.

17. It was submitted that having effected the changes the Registrar could not move again arbitrarily by writing a letter dated 2nd March, 2016. Since the Order of 9th October, 2015 which the Registrar relied on was an ex-parte Order which could not go beyond 14 days as specified in Order 40 Rule 4(2) of the Civil Procedure Rules, it was contended that the same order was not in force. Based on Articles 47 and 50 of the Constitution, I was submitted that the ex-parte applicant was not given any hearing before the action taken by the Registrar and as such the actions of the Registrar were unfair and condemned the ex-parte applicant unheard.

18. In support of their submissions the applicants relied on section 18 of the ***Societies Act*** which provides as follows:

> *1.* ***If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.***
>
> *2.* ***If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.***
>
> *3.* ***A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.***

19. By not adhering to the above provisions, it was contended that the actions of the Registrar amounted to an abuse of the Court process.

20. It was submitted that the acts of the Respondents have been tainted with illegality and unfair treatment. Further, the Respondents exceeded their mandate and there were several irregularities which warrant the granting of the Order of Certiorari.

21. In support of the submissions the applicants relied on **Kenya National Examination Council –vs- Republic, Exparte Geoffrey Gathenji & 9 Others, C/A Case No.266 of 1996, High Court at Nairobi (Nairobi Law Courts) Judicial Review 138 of 2010, Miscellaneous Application No. 318 of 2013, Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530.**

1st, 3rd and 4th Respondents' Case

22. In response to the application the 1st, 3rd and 4th Respondents filed the following grounds of opposition:

> **1. That applicants' are guilty of non-disclosure of material facts and dishonesty relating to a temporary injunction existing in Kisumu, Chief Magistrates Court, Civil Case No. 557 of 2015, Winnies Shena & 3 Others vs. Jeremiah Maina & 5 Others which orders barred the convening of any meeting with respect to the exempted association, National Nurses Association of Kenya. The Applicants' failed to disclose the information which**

they had knowledge of.

2. The Applicants' were given a fair hearing by the Respondents' on various dates between February and March Prior to the decision of the 1st Respondent rendered on 2/3/2016 withdrawing the confirmation issued earlier vide the letter dated 26/2/2016.

3. The 1st respondent's action of withdrawing the confirmation of the applicants' by the letter dated 2///3/2016 was in compliance with the court orders in Kisumu, Chief Magistrates court, civil case No. 557 of 2015, Winnie Shena & 3 Others vs. Jeremiah Maina & 5 Others. The 1st respondent therefore exercised her powers within the confines of law.

4. The Applicants' have sued the 3rd respondent in her personal capacity for rendering a decision in her official. The 3rd respondent is indemnified under Section 52 of the Societies Act, Cap 108 from any suit for performing her official mandate. Her name should be expunged from the record.

5. The applicants' are abusing the court process by engaging in endless litigation which lacks merit and should be denied the discretionary orders of this honourable court.

23. Apart from the said grounds the said respondents filed an affidavit sworn by **Mukulu N. Kariuki**, a Chief State Counsel in the Office of the Attorney General and Department of Justice in charge of Societies Section.

24. According to the deponent, the ex parte applicants are misrepresenting themselves as officials of National Nurses Association of Kenya (NNAK) when they are not officials. It was averred that the 1st Respondent withdrew a confirmation letter dated 11th June, 2015 that had confirmed the ex parte applicants as officials of the Association in compliance with court orders issued in Kisumu HCC No. 557 of 2015.

25. It was contended that whereas the 1st respondents action of rescinding the confirmation letter issued to the ex parte applicants is the main subject matter of this suit, the ex parte applicants' conduct of misrepresenting themselves to members of the public and government officials as officials of the association by using the letter head of the Association and official stamp will greatly prejudice the issues before the court if they are not stopped by this Court.

26. To these respondents, the ex parte applicants' conduct is illegal as they are purportedly acting as officials of the association in total disregard of the law and this Court should not allow them to break the law and has the discretion to issue orders to put an end to the illegal conduct. It was further contended that the ex parte applicants are seeking an equitable remedy whilst they come to court with unclean hands by misrepresenting the true facts to members of the public and government bodies which is an illegality in law and they should be denied all remedies by the court.

2nd Respondents' Case

27. According to the 2nd Respondents, the Notice of Motion is Res-Judicata since the issues being raised were determined in Judicial review case No. 144 of 2015 and Judicial review No. 99 of 2016. It was averred by he 2nd Respondents that when they filed in Court Judicial review No. 99 of 2016 which was determined on 11th March, 2016 and served the Respondents, it became apparently clear to them that it was not possible for them to claim to have purported to hold an Arbitration to overturn a Court decision without preferring an appeal or setting aside the same. It was averred that from the date when judicial review No. 99 of 2016 was in Court on 11th March, 2016, the current ex-parte Applicants kept quiet until 12th April, 2016. It was contended that the applicants cannot pretend not to have known about the intended and subsequent cancellation of the letter dated 26th February, 2016 yet they knew about the Court case being judicial review No. 99 of 2016. To the 2nd Respondents, this application is basically an appeal through the back-door in order to overturn the decision of 21st August,2015 which determined the Judicial review case No. 144 of 2015 and dismissed the same on 21st August,2015 and fully addressed the issues which are raised herein, and are also raised in Petition 184 of 2016 filed by **Jeremiah Maina** in the Constitutional Court of Nairobi on 9th May,2016 prayers Numbers; 2 and seeking to stop the 2nd respondents from running the affairs of the office/Nurses Association and to freeze the accounts.

28. The Court was therefore urged to dismiss the application as the applicants were not being candid with the Court and failed to disclose in their pleadings that the issues being raised were before the Court on 11th March, 2016 in JR.99 of 2016, which they were well aware of.

29. The 2nd Respondents averred that by the time the Judicial review application No.144 of 2015 was proceeding before the **Honourable Justice Weldon Korir**, they were already in office discharging their duties pursuant to the elections of 8th May, 2015 and the extract dated 11th May, 2015. However the applicants on 20th May, 2015 purported to have held a NEC meeting without any authority at all, and in defiance of Law and order and purported to have expelled the 2nd Respondents from office. It was the 2nd Respondents' contention that the ex parte applicants herein are strictly agents of **Jeremiah Maina** and acting under cover upon his instructions attended the said meeting of 20th May, 2015.

30. It was contended that what the applicants are challenging is the capacity of the defendants to hold office and discharge their functions as office bearers which is a matter already determined in JR.144 of 2015.

31. According to the 2nd Respondents, there is no vacuum in the leadership of the National Nurses Association of Kenya to warrant the orders sought by the Ex-parte Applicants who are illegally masquerading as officials of the National Nurses Association of Kenya. To the 2nd Respondents, if this directive contained in the letter dated 26th February, 2016 is implemented, it will result in serious crisis in the administration of the affairs of the National Nurses Association of Kenya. It was contended that the decision of 1st and 3rd respondents as contained in the letter dated 26th February, 2016 is wrong unjust, unreasonable and illegal and was made in bad faith and contrary to the law. The said decision I was contended that amounts to total interference tainted with vested interests which is illegal and procedurally improper. Further the said decision was and is not anchored on any law currently known within the ***Societies Act*** or the ***Nurses Act*** or the Constitution and is therefore null and void. It was the 2nd Respondents' case that unless the prayers sought by the Ex-parte Applicants are denied and the Ex-parte applicants made to pay costs , the 2nd respondent and its members , as well as the Kenyan public would be prejudiced resulting in miscarriage of justice.

Interested Party's Case

32. According to the interested party, National Nurses Association of Kenya was established 48 years ago on 4th June, 1968 and issued with an exemption certificate Number 7772 by the 1st respondent. It was averred that for the said period the association was running well until the 1st and 2nd respondent started a conspiracy to defraud the association on 4th February 2015.

33. According to the interested party, from the pleadings, there are two interim officials one elected via notice of SGM for 8th May, 2015 and the other appointed by NEC on 10th February, 2016.

34. After setting out what in his view is the factual background of the dispute herein the interested party averred that the only remaining question is whether this Honourable Court can be held at ransom by persons who walk in a courtroom waving documents fraudulently obtained claiming to be genuine without supporting documents and refer to a ruling they admit that its tainted with acts of perjury.

Determination

35. I have considered the foregoing.

36. Before delving into the matter on merit, the applicants seem to have been of the view that judicial review orders can issue against the 2nd Respondents who are individuals sued in their capacity as persons purporting to be officials of the Association. Judicial review application is a public law remedy hence private individuals are generally not expected to be respondents in such proceedings unless they are exercise powers of a public nature. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194, Hancox, JA** as he then was held:

> **"The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of certiorari might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation."**

37. It was accordingly held in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998,** by the Court of Appeal that *Certiorari* covers every case in which a body of persons of a public as opposed to private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.

38. It follows that it was therefore not in order to join the 2nd respondents in these proceedings as respondents. They could, however, be joined as an Interested Party since Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides:

> ***The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.***

39. However, the joinder of the 2nd respondents in these proceedings did not render the proceedings incurably incompetent. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

40. It follows that the misjoinder of the 2nd respondent in these proceedings is not fatal to the application though it is an issue this Court may take into consideration when it comes to the exercise of its discretion on costs.

41. This is a classic case where the Court ought to revisit the circumstances under which the Court exercises its judicial review jurisdiction. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

> **"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 of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such 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 the 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."**

42. In this case the parties herein have bombarded this Court with issues revolving around facts as to who between the applicants and the 2nd respondents are the properly elected or appointed officials of the Association. In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application….. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced**."

43. To embark on the process through which the purported elections of the applicants and the 2nd Respondents were conducted would necessarily entail an investigation into the merit of the dispute since the Court would be obliged to inquire into how the elections were conducted and who participated therein. Judicial review however, is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

44. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60;*** R vs. Secretary of State for Education and Science *ex parte* Avon County Council (1991) 1 All ER 282, at P. 285.

45. The matters which the applicants and the 2nd respondents have adumbrated before this Court are matters which will require that certain findings be made on merits which findings may well amount to the making of certain declarations. However, where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review and since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal, the ***Civil Procedure Act*** does not apply. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**

46. Judicial review applications only determines such issues as whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where the parties to a judicial review application have embarked on a voyage through which the Court would be required to make determinations on merits such course is not available to the judicial review Court and the Court would decline to permit itself to be dragged along that path and instead leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

47. In this case it is my view that the real dispute before this Court revolves around the jurisdiction of the 1st Respondent and whether the 1st Respondent has the powers to alter a registration already effected and if so under what circumstances.

48. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law. See **R vs. Barnet London Borough Council Ex Parte Nilish Shah [1983] 1 ALL ER 226** at **240.**

49. Section 18 of the ***Societies Act***, Cap 108 Laws of Kenya provides as follows:

> ***(1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.***
>
> ***(2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.***
>
> ***(3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.***

50. It is therefore clear that there is no express power conferred on the Registrar under the said provision that empowers him to alter the registration already effected by him save where a Court of law orders otherwise. See **Republic vs. Registrar of Societies & Others ex parte Zimman Settlement Scheme Misc. Appl. No. 318 of 2013**.

51. In this case the Registrar's position is that the registration of the applicants was made when there in fact existed a Court order in force restraining such registration. The applicants in this case however contend that the alleged Court order had in fact lapsed hence it did not exist. In my view the Registrar ought to have invoked the powers conferred upon him under section 18 of the Act and directed the Association to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute. This the Registrar did not do. Had he done this all the parties would have appeared before him and he would have been in a position to determine whether or not the alleged Court order did in fact exist before he acted in the manner he did. By so acting the Registrar also clearly violated the provisions of Article 47 of the Constitution as read with section 4 of the ***Fair Administrative Action Act, 2015***.

52. The Respondents argued that the applicants are guilty of material non-disclosure since they did not disclose *inter alia* the existence of the Court orders in the said Kisumu Suit. The law on this issue is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was appreciated by **Ibrahim, J** (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242** where the court held that:

> **"It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy)."**

53. I also associate myself with the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others (2013) eKLR** that:

> **"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."**

54. However, what is material and what is not must depend on the particular circumstances of the case. The issue was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

"It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement…In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus pentitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed…In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so…It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

55. It must therefore be emphasised that mere non-disclosure however does not automatically deprive an applicant of the benefit of the ex parte orders. As appreciated hereinabove, the Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed. In this case, since it is alleged that the decision made by the 1st Respondent was without jurisdiction hence a nullity, such decision would be null and void *ab initio* and non-disclosure cannot cure such an illegality. In other words, this Court's decision would not have been any different even if the existence of the said proceedings was disclosed. It is therefore my view and I so find that nothing turns upon the said non-disclosure.

56. The 2nd Respondents have contended that if the directive contained in the letter dated 26th February, 2016 is implemented, it will result in serious crisis in the administration of the affairs of the National Nurses Association of Kenya. As was held in **Resley vs. The City Council of Nairobi [2006] 2 EA 311**:

"In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the

valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

57. In High Court in Misc. Application No.220 of 2005 in the matter of **Republic vs. Evans Gicheru (Hon) & 3 Others exparte Joyce Manyasi** it was held that (i) the remedy of judicial review is not concerned with the merits or demerits of the decision in respect of which the application for Judicial review is made, but rather, it is concerned with the decision making process itself, and if that process is flawed, the decision reached is equally flawed and will not be allowed to stand; (ii) that where a regulation is couched in mandatory terms, it demands strict compliance. Non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof.

58. Before I depart from this judgement, it is clear from the affidavits sworn on behalf of the 2nd Respondents that the same were anything but an epitome of impeccable, elegant or paragon drafting. It is with due respect a perfect lesson on how not to draw an affidavit and were a gross violation of the rules relating to the drafting of affidavits. As held by the Court of Appeal in **Pattni vs. Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269**:

"an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply. Hearsay evidence and legal opinions are for exclusion… Where the portions complained of are fraught with argumentative propositions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out".

59.In my view, parties and counsel ought not to turn affidavits, which is evidence and which ought to be restricted to factual matters, to submissions on opinions. The said offensive affidavits were in great measure seriously faulty. They were in many respects quarrelsome, argumentative, expressive of legal conclusions and opinions, surmises and doctrinal assertions; broad accusations and defences; statements of rules and assertions of their breach without supportive factual data. Affidavits must deal only with facts which the deponents can prove of their own knowledge. An affidavit is not a platform for dissemination of philosophical ideals, for the exposition of ideals, the propagation of opinions, dogmatic assertions, heightened counsel and soothsaying prophesy. It is not a medium for testing personal animosity. It is not a dissertation on the Constitution, and it is not a discourse on the law. It is to be confined to facts as the deponent is able of his own knowledge to prove, or in interlocutory proceedings, it may further be in the alternative set out statements of information and belief but show the sources and grounds of the information and belief respectively. See **Adam & 6 Others vs. Alexander & 2 Others Meru HCCC No. 81 of 1993 [1993] KLR 446.**

60. I must also point out that the parties before me have perfected the practice of solving their disputes in Courts rather than by way of internal mechanisms in their constitution. This Court does not relish being turned into a forum at which disputes of private members associations are resolved since it is not the duty of the Court to run associations or societies. As a result of several suits filed by the members of the Association herein the Courts in this Republic have been denudated by several cases which could have been resolved by the Association simply conducting elections. As a result, the members of the Association have hogged unto themselves the limited time available for the Courts to resolve disputes thereby denying other litigants their fair portion of the judicial resources.

61. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice…We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."

At page 493 of the same case *Lord Templeman* delivered himself thus:

…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be

achieved by assisting the judge."

…….

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

…..In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice… The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellant. All these in our view constitute abuse of process."

62. This was the position adopted by **Nyamu, J** in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

"In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time."

63. If the members of the Association cannot run their affairs in an orderly manner in accordance with the rules and regulations which they themselves set for the conduct of their business, may be it is time the Registrar invoked the powers conferred upon that office under section 18 of the ***Societies Act***.

64. All in all it is clear that the Registrar had no powers to unilaterally vary its records in the manner he did and its action must be quashed.

65. It follows that I find merit in the Notice of Motion dated 3rd May, 2016.

Order

66. I therefore issue the following orders:

1. **An Order of Certiorari removing into this Court for the purposes of being quashed the 1st Respondent's decision made vide the letter dated 2nd March, 2016 written by the 3rd Respondent which decision is hereby quashed.**

2. **An Order of Mandamus directed to the 1st and 3rd Respondents compelling them to reinstate the names of the interim officials as contained in the letter of 26th February, 2016 as the recognized officials for the National Nurses Association of Kenya.**

67. Although the applicants also sought restraining orders against all the respondents some of whom ought not to have been respondents in the first place, it is clear from what I have stated hereinabove that that remedy is not available in these proceedings.

68. Taking into account the misjoinder of the parties each party will bear own costs of these proceedings.

69. Orders accordingly.

Dated at Nairobi this 28th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Were for the exp applicants

Miss Ndegwa for the 1st Respondent

Mr Jaoko for the 2nd Respondents

Mr Jeremiah Maina the interested party in person

CA Mwangi/Gitonga