



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 46 OF 2016**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW  
ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF: THE WAKF COMMISSIONER ACT CAP 109**

**BETWEEN**

- 1. ALI SAID MOHAMED AL-MANDHRY**
- 2. MOHIDDIN MOHAMED MOHIDDIN**
- 3. NAAMAN MOHAMED NAAMAN**
- 4. HAMMAD MOHAMED K. MAZRUI.....APPLICANTS**

**VERSUS**

- 1. THE HON. ATTORNEY-GENERAL**
- 2. THE WAKF COMMISSIONERS.....RESPONDENTS**

**AND**

- 1. PROF. HAMADI IDDI BOGA**
- 2. SHIKH JUMA NGAO**
- 3. ZUBEIR NOOR HUSSEIN**
- 4. NAGIB SHAMSAN**
- 5. SHARIFF HUSSEIN AHMED**
- 6. MWANAKITINA BAKARI (DR).....INTERESTED PARTIES**

**RULING**

1. In their Notice of Motion dated 23<sup>rd</sup> June, 2016 and filed on 27<sup>th</sup> June, 2016, the ex parte Applicants sought the following orders –
  - a. an order of certiorari to bring into this court and quash the decision of the Respondents appointing the Interested Parties as Commissioners of the Wakf Commissioners of Kenya as contained in the Kenya Gazette Notice Number 31256 of 28<sup>th</sup> April, 2016
  - b. costs of the Application be provided for.
2. The application was based upon the grounds and statutory statement filed in the application for leave and the affidavit in support thereof, and upon the further affidavit and other grounds to be adduced at the hearing.
3. On 22<sup>nd</sup> June, 2016 when the application for leave to commence judicial review proceedings was granted, the court also ordered that leave granted do operate as a stay. The hope then expressed was that the parties who share the same faith, would come to an amicable settlement and have a consent entered settling the matter. In the event no amicable settlement was reached and the court asked counsel for the two parties, and the Interested Parties to file their skeletal arguments and authorities.
4. In the event again, counsel preferred to rely upon their pleadings, including for the ex parte Applicants, the Statutory Statement and Affidavits Verifying the Facts of Ali Said Mohamed Al-Mandhry both sworn on 20<sup>th</sup> June, 2016 and the annexures thereto, and the Supplemental Affidavit of the said Ali Said Mohamed Al-Mandhry sworn and filed on 28<sup>th</sup> October, 2016.
5. For the two Respondents reliance was placed upon the Replying Affidavit of Eunice J. Sawe Senior Deputy Solicitor-General within the Office of the Attorney-General, the First Respondent sworn and filed on 25<sup>th</sup> July, 2016, and contending that there was due consultation in the appointment of the Wakf Commissioners.
6. For the Interested Parties there was the Replying Affidavit of Nagib Shamsan sworn and filed on 27<sup>th</sup> July, 2016, contending that the Deputy Solicitor-General, that there was consultation before the appointment of the Interested Parties as Commissioners of the Wakf Commissioners of Kenya.
7. In addition there were grounds of Opposition/Objection by Dr. Mwanakitina Bakari dated and filed on 27<sup>th</sup> July, 2016 contending that the appointment of the Interested Parties was in accord with Section 6 of the Wakf Commissioners Act, [Cap 106, Laws of Kenya], and which Section sets out the membership and manner of appointment of the Wakf Commissioners of Kenya.
8. Counsel for the Respondents filed a List of Authorities dated 26<sup>th</sup> October, 2016, where other authorities though not listed were supplied by counsel, and these latter, include the decision of this court in Nakuru being **MURAYA MWANGI & 495 OTHERS vs. THE MINISTER FOR PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY AND 2 OTHERS**, [2014] eKLR, the three Judge Bench in **AMOS KUIMO & 2 OTHERS vs. THE CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT** [2014]eKLR and **PATRICK KABUNDU vs. THE EXECUTIVE IN CHARGE OF TOURISM DEVELOPMENT & CULTURE, COUNTY OF MOMBASA** (Misc. Application No. 27 of 2015) and the case of **MUMO MATEMU vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE** [2013]eKLR, all concerning the interpretation of the constitution and the issue of public participation. I shall refer to the other authorities in the course of this Ruling.
9. The issue raised by the ex parte Applicants herein is whether there was **participation** by the public in the appointment of the Wakf Commissioners. In answer to this basic issue, the starting point is what does the relevant law say, and what is the relevant law?
10. The relevant law here is the Wakf Commissioners Act, (Cap 109, Laws of Kenya), Section 6 of which

says –

**6(1) There is hereby constituted a body to be known as the Wakf Commissioners of Kenya which shall consist of eight persons, of whom –**

- a. one shall be the Provincial Commissioner of Coast Province, who shall be ex officio member;**
- b. one shall be the Chief Kadhi, who shall be ex officio member;**
- c. one shall be a Muslim appointed by the Minister, on the nomination of the Provincial Commissioner of the Coast Province;**
- d. five shall be Muslims appointed by the Minister from a panel of names submitted by the Provincial Commissioner of the Province after taking into consideration, muslim opinion in relation thereto;**
- e. every Commissioner appointed under paragraph (c) or paragraph (d) of sub-section (1) shall hold office for a period of three years unless he sooner resigns or, for good cause, he is removed by the Minister, but shall be eligible for appointment;**
- f. any vacancy among the Commissioners appointed under paragraphs (c) and (d) of sub-section (1) shall be filled by some person appointed by the Minister in the same manner as the person, whose vacancy is to be filled was appointed.**

11. The appointment of the Provincial Commissioner and the Chief Kadhi are straight forward enough. This is because these are existing offices, though the appellation or title of **Regional Coordinator** has replaced that of **Provincial Commissioner**. The problem lies in how to determine the appointment of the other Commissioners in conformity with the national values and principles of governance enshrined in Article 10 of the Constitution. Article 10 provides –

**(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

- a. applies or interprets this Constitution;**
  - b. enacts, applies or interprets any law;**
- or**
- c. makes or implements public policy decisions.**

**2. The national values and principles of governance include—**

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**
- c. good governance, integrity, transparency and accountability; and**
- d. sustainable development.**

12. The complaint by the ex parte Applicants is that there was no participation of the muslim community in the nomination of the one Commissioner by the Regional Coordinator for appointment by the Minister

responsible for Wakf Commissioners, as required by Section 6(1)(c).

13. The ex parte Applicants also complain that there was no public participation in the submission of names of five muslims by the Regional Coordinator of the Coast Region for appointment by the Minister or how the muslim opinion at the Coast was obtained before the names were submitted to the Minister for appointment at Wakf Commissioners.

14. The question of public participation has been a subject of intense judicial discussion not only in post-apartheid South Africa but also in this country. There are now many judicial opinions on the question of public participation. For instance sending SMS to a few select friends or supporters to a meeting at a posh suburban facility would not be facilitation to public participation. In **JOHN MURAYA MWANGI & 501 vs. MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION & INTERNAL SECURITY & 4 OTHERS [2014]eKLR**, cited with approval in **AMOS KUIMO & 2 OTHERS vs. THE CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT [2014]eKLR** the court said –

**“The concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms –**

- i. the concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office;**
- ii. the right to be engaged in public debate and dialogue with elected representatives at public hearings;**
- iii. the duty to facilitate public participation in the conduct of public affairs;**
- iv. ensuring that ordinary citizens the “hoi polloi”, the “lala hoi” have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs But this begs the question on the methods or mechanisms for achieving public participation in the conduct of political and economic affairs of the country.”**

15. The obligation to facilitate public involvement is a constitutional imperative. It enhances the national principle of good governance as a national value. The issue was considered in the case of **THE LAW SOCIETY OF KENYA vs. THE ATTORNEY-GENERAL [2016]eKLR** where the court reiterated that the principle of public participation does not mean that every person must be heard to establish public participation, or that the hearing must be oral. In paragraph 227 of its Judgment the court states as follows –

**“227.The law however is not that all persons must express their views or that they must be heard and that the hearing must be oral. Similarly, the law does not require the proposed legislation must be brought to the attention of each and every person wherever that person may be. What is required is that reasonable steps be taken to facilitate the said participation. In other words, what is required is that a reasonable opportunity be afforded to the public to meaningfully participate in the legislative process. Therefore even in cases where there are public meetings the mere fact that a particular person has not been heard does not necessarily warrant the whole process being nullified.”**

16. In the case in point, how does the Regional Coordinator of the Counties in Coast Region, reach and obtain and consider **“Muslim opinion”** as required by Section 6(1)(c) and (d)? That question is answered by the Replying Affidavit of Eunice J. Sawe, paragraph 20 where she depones that the ex parte Applicants were themselves aware of the discussions at different levels of recruiting Wakf Commissioners, and had warned against any precipitate action on the part of the Minister (the Attorney-General).

17. The question is also answered by the Replying Affidavit of Nagib Shamsan which clearly shows that there was consultation among diverse muslims and muslim organizations at the Coast including, Masjid Mswalani Residents and Worshipers, an individual Abdulkadir Abubakar was nominated to discuss on review of the Wakf Commissioner Act 1951, the Chairman of Mwijabu Mosque Trust whose properties are said to be under the Wafk. There is also the letter of Sheikh Amani Hamisi, and other participants listed in the letter of Ali Sahlan Said of Masjid Mswalani Residents and Worshipers dated 21<sup>st</sup> July, 2016. Initially there is the letter from the Mwijabu Mosque Trust by Mr. A. O. Bashir MBS, DCI.

18. I have considered carefully the issues raised by the ex parte Applicants' in their letter of 14<sup>th</sup> August, 2015 addressed to the Attorney-General and copied to the Regional Coordinator among others. There is no reason to think that the Minister or the Regional Coordination failed to take into account the concerns of the ex parte Applicants in nominating the six new Commissioners. I also note that among the six were three Commissioners whose terms were renewed in terms of Section 6(2) of the Wakf Commissioners Act, and nominated no doubt after considering Muslim opinion on their suitability to continue serving as Wakf Commissioners. The other three new Commissioners include a lady **Mwanakitina Bakari** who brings gender balance in accordance with Article 27(1) and (8) of the Constitution on equality and gender balance.

19. It is thus clear to me that there was wide consultation, and the ex parte Applicants cannot explain away these consultations for the appointment of new Commissioners.

20. As the new Commissioners are tasked to fast-track the reforms on the Wakf Commissioners Act, they must consider the views of the ex parte Applicants including –

1. the sensitive nature of the Wakf Commissioners Act and its crucial functions;
2. the importance of the Commissioners role in safeguarding Islamic Property Trust (Wakfs), and the benefit derived therefrom for the intended recipients;
3. constitutional obligations regarding the sanctity and freedom of religion and preservation of property;
4. the binding nature of pre-independence treaty signed by His Excellency Jomo Kenyatta regarding and over the coastal strip and the sacred provision therein to protect the rights of its Muslim residents including the historical institution of the Wakf Commission;
5. the fact that the stakeholders of the Wakfs are not happy with the purported report conveyed to participants that raise grave and unproven allegations against the Wakf Commissioners;
6. the stakeholders to participate in developing consultation in the appointment of Wakf Commissioners.

21. There is therefore much-work-in progress for the Wakf Commissioners, and stalling them from that work would not be for the benefit of the Applicants or the beneficiaries of the Wakfs. Besides the issue of public participation there are other grounds for issue of an order of certiorari. The appointments having been made in accordance with the clear provisions of Section 6 of the Wakf Commissioners Act.

22. For all those reasons, I find no merit in the Notice of Motion dated 23<sup>rd</sup> June, 2016, and dismiss the same with a direction that this being public interest litigation, each party shall bear its own costs.

23. There shall be orders accordingly.

**Dated, Signed and Delivered at Mombasa this 17<sup>th</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Khatib for Applicants

Mr. Munzyu holding brief Aboubakar for 6<sup>th</sup> Interested Party

No Appearance for Respondents

Mr. Kaunda Court Assisrant