



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 115 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

**FREEDOMS UNDER ARTICLES, 27, 32, 35, 36, 43,47, 48 AND 50 OF THE CONSTITUTION OF
KENYA 2010**

**IN THE MATTER OF CONTRAVENTION TO RIGHT TO FAIR ADMINISTRATIVE
ACTION, EQUALITY AND FREEDOM, HUMAN DIGNITY AND RIGHT TO FREEDOM OF
ASSOCIATION**

AND

IN THE MATTER OF ACCESS TO JUSTICE

AND

**IN THE MATTER OF ULTRA VIRES, PREJUDICIAL, UNWARRANTED, ILLEGAL DENIAL
OF REGISTRATION OF A BONAFIDE ELECTED OFFICE**

AND

IN THE MATTER OF BURUBURU RESIDENTS WELFARE ASSOCIATION, NAIROBI

BETWEEN

DAVID KONCHELLA.....1ST APPLICANT

JOSEPH OCHIEN.....2ND APPLICANT

RUTH WAINAINA.....3RD APPLICANT

RAYMOND KIPCHUMBA.....4TH APPLICANT

DORIS KANARIO.....5TH APPLICANT

ELVIS IRUNGU.....6TH APPLICANT

PHILIP MACHARIA.....7TH APPLICANT

JOSEPH MUTIE.....8TH APPLICANT

AND

REGISTRAR OF SOCIETIES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th April, 2016, the *ex parte* applicants herein seek the following orders:

1. That this honourable court be pleased to grant an order of prohibition directed to the 1st and 2nd respondents their agents, servants or anyone claiming under them respectively from cancelling Buruburu Residents Welfare Association from the roll of societies.
2. That this honourable court be pleased to grant an order of Certiorari quashing the 1st and 2nd respondents decision of declaring the results of the elections dated 6/3/2016 void.
3. That this honorable court be pleased to grant an order of mandamus compelling the 1st respondent to officially receive the annual report and election results to be filed on 24/3/2016.
4. That this honourable court be pleased to grant any other and/or further relief under the terms that it may find fair and just in the circumstances.
5. The costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the applicants, the 1st Respondent, the Registrar of Societies (hereinafter referred to as "the Registrar") through his servants, agents by a letter dated 22nd Feb 2016 issued a mandatory directive for them to carry out an election on or before the 6th of March 2016 which letter was also copied to the office of the sub county commissioner Makadara and the sub county commissioner Embakasi west sub county.

3. It was averred that the Deputy County Commissioner Makadara through a letter dated 4th March 2016 copied to the 1st Applicant, **David Ole Konchellah**, being the incumbent chairman and others, authorized the elections to be carried out on the 6th March 2016 to which letter the Buruburu Residents Welfare Association (hereinafter referred to as "the Society") replied vide a letter dated 24th February, 2016 notifying the 1st Respondent of the acknowledgement and undertaking to carry out the said elections on the preferred date and appointing of **Reverend Walter Nyangweso** as the Returning officer.

4. The applicants averred that on the 25th Feb 2016 they wrote a letter to Kenya Assemblies of God Buruburu requesting for a venue for the election to be held on the 6th March 2016 and on the 24th Feb 2016 they informed the Officer Commanding Station, Buruburu informing him of the elections, venue and requesting for security of the election to be held on the 6th March 2016. Pursuant to that the said

O.C.S issued them with a permit diligently after which they issued a valid notice/memo to all their members regarding the annual general meeting and the elections to be carried out on the 6th March 2016. Pursuant thereto, an Agenda dated 6th March 2016 for the said annual general meeting indicating elections as agenda no. (5) was prepared and issued to all the present members.

5. According to the applicants, the elections were well attended and carried in a free and fair manner and the applicants were validly elected to office in accordance to the principle of universal suffrage. Thereafter, the returning officer **Rev Walter Nyangweso** complied with the Rule 13 of the Societies Rules by filling a statutory form and attaching the list of the newly elected office bearers as well as minutes and annual returns.

6. It was averred that on the 7th March 2016 the applicants' agents visited the Registrar's offices with an intention to file the said documents but an agent of the Registrar in a rude and shocking manner declined to receive the said documents without providing any explanation for her actions or inactions on the ground that the Society's file was not within her reach and could not be traced.

7. Based on legal advice, the applicants contended that the Registrar's failure to receive the said documents amounted to declaring the election exercise carried out on the 6th March 2016 void an actions which the applicants contended was highly prejudicial to us them. They were therefore apprehensive that there was a high probability of being struck out of the roll of societies unlawfully as the newly elected office bearers, of the Society unless the Registrar is compelled to set aside his executive decision of declining to accept the election results and elections report dated 6th March, 2016. To the applicants, the Respondents' actions or inactions were otherwise a violation of fair administrative action, freedom of association and access to information which is a fundamental right under the constitution.

Respondent's Case

8. In opposition the Respondents through a replying affidavit sworn on behalf of the Registrar averred that the Society was registered on the 8th of June, 2001 and issued with a Certificate of Registration Number 20598 with the Society's File Number being SOC/38382.

9. According to the Respondents, the issues as to who are *bona fide* officials of a society are internal matters to be governed by the Society's constitutive Constitution. Further the Respondents do not interfere with internal wrangles of a society as its mandate as the regulator is to ensure that the society complies with the provisions of the **Societies Act**, Cap (108) and its constitutive constitution requirements which govern its operations. It was explained that the Registrar's mandate with regard to elections of officials of a registered society is to receive the Notification of Change of Officials (Form H) together with the accompanying documents that is; the Notice by the Secretary convening the Annual General Meeting, Minutes of the Annual General Meeting duly signed by three officials and a list of members who attended the Annual General Meeting. The Registrar then inspects the documents to confirm that the society has complied with its constitutive constitution and the **Societies Act**, Cap 108 before confirming the new officials.

10. It was contended that on 21st February, 2014, the Registrar received a complaint letter from the 1st *ex parte* Applicant and other persons who claimed to be members of the Society in which the 1st *ex parte* Applicant misrepresented himself as a member of the Society. In the said complaint letter they highlighted several concerns and grievances about mismanagement of the association and misconduct by the officials who were on record then and requested the 1st Respondent to intervene. Subsequently the Registrar directed the Chairperson, one **Mr. Odhiambo** vide a letter dated 25th February 2014 to convene an annual general meeting within 30 days so that the members of the Society could deliberate on the issues afflicting the Society and conduct elections of officials of the Society which according to their constitution were overdue as the Society last held elections in the year 2011 yet they are required to elect new officials every year. No response was however forthcoming from the said **Mr. Odhiambo**. As a result of the failure by the said **Mr. Odhiambo** and the management committee of the society to respond

to the directives by the Registrar contained in the letter dated 25th February, 2014, the Registrar engaged the 1st *ex parte* Applicant and the other complainants in a series of meetings to resolve the issues affecting the Association but it became apparent that the issues affecting the Society could only be resolved if the association held elections.

11. According to the Respondents, the Registrar then directed the 1st *ex parte* applicant via a letter dated 4th April 2014 to convene a special general meeting to conduct elections for new office bearers therein and the 1st *ex parte* applicant wrote a letter dated 15th April 2014 requesting the Registrar to send officials from its office as independent observers of the electoral process that was to be held at Kenya Assemblies of God Buruburu during the special general meeting of 26th April 2014. Subsequently, the Registrar received a complaint letter dated 17th April, 2014 from one **Joseph Gakuya**, who stated that he was the Vice Chairman of the Society and complained about an illegal meeting to conduct elections of the association on 26th April, 2014 by a splinter group consisting of the 1st *ex parte* Applicant and others who were not members of the association. **Mr. Gakuya** also notified the Registrar that they had not received any communication from the Registrar's office.

12. It was disclosed that the Registrar took a longer period to verify the authenticity of the complaint received from **Mr. Gakuya** which raised very serious allegations against the 1st *ex parte* Applicant and his faction. Most importantly the complaint questioned their *locus standi* to conduct the affairs of the Society based on their membership status. By the time the complaint was verified the 1st *ex parte* Applicant and his faction had already been confirmed as officials of the society following the special general meeting held on 26th April, 2014.

13. The Respondents averred that consequently before the Registrar could attempt to resolve the dispute following the complaint lodged by **Mr. Gakuya**; that faction became impatient and the ousted Chairman, **Mr. Odhiambo** proceeded to convene an annual general meeting on 29th June, 2014 to elect officials of the association. However this meeting was declared an illegal meeting by the Assistant County Commissioner, Makadara. With two factions fighting over the leadership of the Society, the Registrar convened several reconciliation meetings from sometime in August 2014 to December 2014 aimed at resolving the leadership dispute of the association and following various all-inclusive mediation meetings with both factions of the association, that is the 1st *ex parte* Applicant's faction and **Mr. Gakuya's** faction; both parties agreed to the formation of a Care taker Committee consisting of six members: three nominated from each of the two warring factions. The Care-taker committee's mandate was to prepare fresh voters register for purpose of conducting new elections and organize for elections.

14. It was disclosed that vide a letter dated 3rd November, 2014, **Mr. Gakuya's** faction responded to the Registrar's letter dated 29th September, 2014 and forwarded its list of three (3) nominees. The Registrar received a copy of a notice dated 30th December, 2015 where the 1st *ex parte* Applicant and **Mr. Gakuya** had jointly convened a meeting of the Joint Executive Committee members. The agenda of the meeting was stated to be for the planning for the association's joint annual general meeting and elections thereon. Vide a letter dated 27th January, 2016 the 1st Respondent received the harmonized members register prepared by the Joint Working Committee which register however had several omissions, typing errors and duplications hence vide a letter dated 11th February, 2016, signed by the Chairman and Secretary of the Joint Working Committee, **Mr. Samuel Muhoro** and **Mr. Phillip Macharia** respectively, a corrected, updated and harmonized register was forwarded to the Registrar. The same was accompanied by a covering letter dated 17th February, 2016 signed by the 1st *ex parte* Applicant and **Mr. Gakuya**.

15. It was averred that after receiving the harmonized members register from the Joint Working Committee, the Registrar then issued directions to the Joint Working Committee to ensure that the association holds elections on or before the 6th of March 2016 as the elections were long overdue due to the existing dispute. It was disclosed that on 7th March, 2016, the Registrar received a letter from the Chairman of the Joint Working Committee, **Mr. Samuel Muhoro**, informing the Registrar that the meeting of 5th March at Holy Trinity Catholic Church hall convened to conduct elections of the

association had been cancelled by the OCS Buruburu. The letter also informed the Registrar that there was another meeting convened by the 1st *ex parte* Applicant scheduled to be held on 6th March, 2016 at Kenya Assemblies of God Church which had also been cancelled. It was also disclosed that the Registrar also received a letter dated 7th March, 2016 from the OCS Buruburu Police Station which notified the Registrar of cancellation of the two purported Buruburu Residents Welfare Association meetings which were to be held on the 5th and 6th of March 2016 citing insecurity reasons. Further the Registrar received a letter from **Mr. Ephraim G. Kanake** of the Kenya Alliance of Resident Associations who attended the meeting of 5th March, 2016 at Holy Trinity Catholic Church Buruburu Phase I who was invited by the organizers of the meeting to be the Returning Officer for the elections. **Mr. Kanake** informed the Registrar that he observed that two factions were strongly operating and managing the association and the Deputy Commissioner was biased by allowing one meeting; the 1st *ex parte* Applicants and cancelling the meeting by **Mr. Gakuya's** faction. He also advised that mediation should precede any successful elections due to underlying issues and distrust.

16. According to the Respondents, the Registrar noted with concern that a problem had arisen as the two factions had planned and proceeded to hold separate meetings on 5th March, 2016 at Holy Trinity Catholic Church and 6th March, 2016 at Kenya Assemblies of God Church Hall Buruburu in total contravention of the directions from the Registrar and agreed recommendations following the many consultative meetings that they organize and plan to hold one meeting of the association.

17. It was therefore the Registrar's position that its action to decline to receive any documents to change officials following the meetings of 5th & 6th March, 2016 were in accordance with the **Societies Act**, Cap 108 as both meetings had been cancelled due to insecurity reasons by the OCS Buruburu Police Station and the factions held separate meetings instead of one meeting contrary to the Registrar's directions. It was the Registrar's case that he was not under any obligation to receive any documents with respect to the two Annual General Meetings which were cancelled by the OCS Buruburu police station, because the meetings were held in defiance of the said cancellation and as such the outcomes of the meetings are a nullity. In his view, the separate elections held by the warring factions of the association are illegal and cannot be accepted. Further there is no threat of de-registration from the Respondents as alleged by the *ex parte* Applicants as the de-registration process under section 12 of the **Societies Act** Cap 108 has not been triggered in any way. Therefore an order of prohibition cannot lie.

18. The Registrar's position was that the Deputy County Commissioner had no authority to authorize elections of the Society to be carried out under the **Societies Act**, Cap 108 as his role is and was limited to providing security. The purported elections held by the *ex parte* Applicant's faction on 6th March, 2016 at Kenya Assemblies of God Church Buruburu under the authority of the Deputy County Commissioner was therefore illegal and as such the order of *mandamus* cannot lie. Similarly, an order of *Certiorari* cannot lie as the decision sought to be quashed has not been attached contrary to the provisions of Order 53 of the **Civil Procedure Rules** 2010.

19. The Respondents therefore took the position that owing to the foregoing, the orders sought in the said Application ought, in the interests of justice and fairness, ought to be refused and the said Application dismissed with costs to the Respondents as it amounts to abuse of court process.

Determinations

20. I have considered the foregoing as well as the submissions filed and the authorities cited.

21. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be

obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

22. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

23. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in

order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

24. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

25. The purpose of judicial review is therefore to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

26. To do that would amount to this Court sitting on appeal on the decision made by the Respondent and as was held by the Court of Appeal 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... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

27. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, that:

“...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a ‘wrong’ decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others*, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”

28. Similarly, 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* and *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282*, at P. 285.

29. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, that:

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30. Section 18 of the *Societies Act* 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.

31. In this case, according to the Registrar, a dispute occurred among the members or officers of the Society as a result of which the Registrar was not satisfied as to the identity of the persons who had been properly constituted as officers of the society. The Registrar therefore proceeded, with the consent of the parties to require the society to undertake an election but instead of conducting a joint election as ordered, each faction decided to conduct its own elections. Whereas this version is disputed by the applicants, based on the conflicting factual scenario, this Court cannot, without taking *viva voce* evidence, find which of the two versions is correct.

32. It cannot be doubted that from a holistic reading of the powers of the Registrar under the *Societies Act*, the Registrar is tasked with the mandate of regulating societies to ensure that they comply with the provisions of the *Societies Act*, Cap (108) and its constitutive constitution requirements which govern its

operations. It is therefore my view that the Registrar must act reasonably in the performance of his statutory mandate. For the Registrar register persons who claim to be officials of a Society without investigating their *bona fides* would amount to promoting anarchy in the manner in which societies are being administered. In **Republic vs. Attorney General & Another Ex parte Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. In that case it was held that the de-registration of the applicants and the registration of main the rivals within two days was indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety.

33. It is therefore my view, that if the Registrar was satisfied that none of the factions had conducted elections in accordance with the law, he was within his rights to decline to approve either of their returns.

34. The Registrar clearly had the power to decide whether or not the application for the registration of the applicants as the officials of the Society was proper and in so deciding it was no doubt exercising his discretion. He was enjoined to consider the material before him and arrive at his decision. That decision could be right or wrong on merits but that would not necessarily warrant the quashing thereof by way of judicial review proceedings.

35. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, it was held:

“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. The court may declare a tribunal’s decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court’s to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.”

40. In **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Civil Application No. 307 of**

2003, Omolo, JA stated as follows:

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

41. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003**, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. As I understand the ex parte applicants the challenge to jurisdiction falls within the second context. However, in **Uganda General Trading Co. Ltd SS. N T Patel Kampala HCCC No. 351 Of 1964 [1965] EA 149**, **Sir Udo Udoma, CJ** expressed himself as follows:

“The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law...The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity.”

42. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. In this case I have not been able to find any evidence regarding the Registrar’s conduct in order to warrant the grant of the order of certiorari. I further find no evidence that the Respondents intend to act unlawfully in order to warrant the grant of the order of prohibition. Without the said prayers, it would be clear that there is no basis upon which the order of prohibition can issue.

43. In this case, as the Registrar clearly had jurisdiction to register officials of the society. In so acting, as the Registrar was exercising a discretion, he could either register the applicants or not and as long as his decision was based on reasonable grounds, he was entitled to it and even if the said decision was wrong on merits, this Court cannot interfere merely on that basis.

44. Having considered the instant application it is my view and I so hold that the Notice of Motion dated 11th April, 2016 lacks merit and the same is dismissed but as this matter concerns the members of a society, in order to avoid further escalation of the dispute and promote reconciliation there will be no order as to costs.

45. It is so ordered.

Dated at Nairobi this 19th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odhiambo for the applicants

Mr Gitau for interested party

CA Mwangi