



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(MILIMANI LAW COURTS)

MISC. APPLICATION NO. 178 OF 2015

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW TO APPLY FOR
PROHIBITION AND CERTIORARI ORDERS**

IN THE MATTER OF EAST AFRICAN NAMDHARI SANGAT

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

BETWEEN

SATVINDER SINGH SIAN

KEWAL SINGH FLORA..... APPLICANTS

VERSUS

THE REGISTRAR OF SOCIETIESRESPONDENT

AND

MANJEET SINGH BHULLER

NARINDER SINGH ROOPRA

DARSHAN SINGH CHANA

(Sued as the officials of the

**EAST AFRICAN NAMDHARI SANGAT SOC/ 903).....INTERESTED-
PARTIES**

RULING

Introduction

1. By an Amended Chamber Summons dated 6th August, 2015, the applicants herein, **Satvinder Singh Sian** and **Kewal Singh Flora**, seek the following orders:

1. Leave be granted to the Applicant to apply for an order of Certiorari directed at the Registrar of Societies/Respondent removing to this honourable court his decision made on 31st December 2014 registering the Interested Parties/Respondents as the bona fide officials of the society herein for purposes of having the decision quashed and new elections ordered forthwith.

2. The said leave do operate as stay prohibiting the current officials from running the affairs of the society-East African Namdhari Sangat until the hearing and determination of these proceedings or further orders of the honourable court.

3. Cost of the application be provided for.

Applicants' Case

2. According to the Applicants, the current officials of **East African Namdhari Sangat** (hereinafter referred to as "the society") have remained in office for the last 25 years by frustrating any efforts to convene an annual general meeting whenever the members have requested for one. It was averred that they have continued to hold themselves as the *bona fide* officials with the full knowledge of the registrar of societies (Respondent) who despite requests to order the convening of the annual general meeting of the society has given it a deaf ear and allowed the said officials to remain in office illegally.
3. To the Applicants, there has not been any accounting and/or accountability on the part of the said officials who have misappropriated the society's funds to the detriment of the society and its members. According to them, the said officials were scheming to dispose of some of the society's assets without the consent or knowledge of the other members and in their own interest which is totally unacceptable and prejudicial to the society and other members.
4. It was averred that the constitution of the society provides that elections must be held annually through an annual general meeting which has not happened for the last 25 years. Further no annual audited accounts have been undertaken for the said period despite insistence by the members and the government relevant authorities. Equally the registration of willing new members has not been undertaken for many years now just because the current purported officials have abdicated their duties to the detriment of the society.
5. It was also contended that the society's assets being IR/CR/209/24/3 3rd Avenue Parklands, IR/CR/209/2748 Keiyo Road and IR/CR/209/7741/136 Kitisuru Road all in Nairobi have been neglected and are in dilapidated state due to neglect and lack of proper maintenance by the said officials which has exposed the same to loss in capital value to the society's prejudice and the said official have never declared the existence of the said assets which is untenable.
6. Following advise by the honourable court to try and resolve the matter amicably out of court in the spirit of alternative dispute resolution, the Applicants advocates wrote to the Respondents advocates in an effort to negotiate an out of court settlement to no avail and hence these proceedings.
7. According to the Applicants, on the 12th July, 2015 the Interested Parties/Respondents after service of these proceedings purported to hold elections without proper notification and without following the proper procedure all intended to defeat these proceedings and steal a match against the Applicants which was not in god faith and is untenable.
8. To the Applicants, the aforesaid complaints constitute serious grounds for institution of these proceedings to avoid further waste of the society's assets and abuse of office by the current purported office holders.

Respondent's Case

9. According to the Respondent, the Society was registered on 29th April 1955 vide Certificate Registration Number 371 under the **Societies Act**, CAP 108 Laws of Kenya. It was averred that in the Month of April 1991, the members of the association elected **Manjeet S. Bhuller** as Chairman, **Narinder S. Roopra** as Secretary and **Darshan S. Chana** as Treasurer and that these officials served the office until November 1997 when elections were held and **Manjeet S. Bhuller**

- and **Darshan S. Chana** were re-elected as Chairman and Secretary respectively while **Kuldeeps S. Seera** was elected as Treasurer. It was deposed that the above named officials served office until November 2006 when elections were held and **Manjeet S. Bhuller** and **Narinder S. Roopra** were elected as Chairman and Secretary respectively while **Darshan S. Chana** was elected as Treasurer.
10. According to the Respondent the officials who were elected in 1991 are the current officials and it is notable that the Chairman of the Society has retained his position for the last 25 years. However the office of the Respondent doesn't interfere with the affairs of any society and that the choice of the members of the society to elect an individual into office for whatever period is left to the autonomy of the members and the Constitution of the Society. However, that the provisions of the Societies Act provide that every registered society must hold General Meetings once a year and amongst the agenda of the Meetings is to cause to be elected the officers of the association and the trustees.
 11. In this case, it was disclosed that the association's constitution under clause 8 (b) (ii) provides that the election of office bearers is one of the agendas of the Annual General Meeting and according to the records of the Respondent while the changes of the officials were last made in the year 2006, the last General Meeting was held on 12th July 2015 after this case was instituted following a Notice of the Annual General Meeting dated 15th June 2015 in which there was agenda for Election of the office bearers, the committee members and trustees.
 12. It was contended that although on 12th July 2015 the members of the association held their Annual General Meeting, no elections were held as mentioned in their Notice.
 13. According to the Respondent the information about the General Meeting was received by the Respondent in good faith and the Respondent was not involved in the said meeting as an observer or any other capacity. It was therefore asserted that the Respondent's office recognizes **Manjeet S. Bhuller, Narinder S. Roopra** and **Darshan S. Chana** as the Society's Chairman, Secretary and Treasurer respectively.
 14. According to the Respondent, since the constitution of the Society does not provide for office term of the officials, it would therefore be implied that the office shall be held for a year to mean that officials are changed at the General Meetings held once a year. In the instant case however, the current officials have been in office for 9 years, more notably that the Chairman has been in office for 25 years. It was averred that if the members of the association convene a General Meeting and hold elections and make changes to the office, the Respondent shall make the changes as made since the Respondent does not any point interfere with the running of any society except where there is a dispute and where there is a dispute as to who the officials of the Society are.
 15. The Respondent maintained that all its actions have been made in good faith, all due diligence was applied at all times.

Determinations

16. I have considered the application the affidavits sworn and filed by the parties herein as well as the submissions on record.
17. It was contended that these proceedings are barred by limitation. Sections 9(2) and (3) of the **Law Reform Act** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time

for appealing has expired.

18. It would follow that if the instant application fell within the ambit of the said rule the application would be out of time. However, in **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 of the ***Civil Procedure Rules*** only applies to the specific formal orders mentioned therein and to nothing else and a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 of the ***Civil Procedure Rules*** would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
19. In my view in order to bar the Court from entertaining proceedings, the provision relied upon must be clear and must entertain no ambiguity. In other words the Court's jurisdiction cannot be taken away by implication and can only be taken away by express words. Therefore where there is ambiguity as to whether the Court is seised of jurisdiction or not the Court ought to opt for a construction that clothes the Court with jurisdiction. This in my view is the rationale behind Article 50(1) of the Constitution which provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

20. As was held in **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau [1960] EA 109.**

“Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.”

21. Whereas this Court appreciates that the jurisdiction of the Court may be limited as provided for under the Constitution and may be restricted by statute, where such limitation or restriction is not express any attempt to imply such interpretation ought to be treated with scepticism.
22. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
23. I accordingly find that the said period of 6 months does not apply to the decision of the Registrar of Societies.
24. However as was held by Nyamu, J (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707**: ***“Speed and promptness are the hallmarks of judicial review.”*** Judicial review, it has therefore been held, acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**
25. Therefore even where the period of 6 months period applies, since the decision whether or not to grant leave is an exercise of judicial discretion, the Court in determining whether or not to grant leave will take into account the delay in making the application and the import and impact of such

delay in the administration of justice.

26. This position was similarly appreciated by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* where the learned Judge pronounced himself as hereunder:

“The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

“[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O’Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision... But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487: “It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass.”

27. In this case according to the Respondent the last change in their records was in the year 2006, 9 years ago. The Applicants have not exhibited any document showing that there was any decision made by the Respondent thereafter and nothing to show that there was any decision made on 31st December, 2014 which can be quashed.
28. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development ex Parte Kaimenyi [2006] 1 EA 353**.
29. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is

designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

30. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
31. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

32. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

33. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable

case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in **Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128** based on *Judicial Review Handbook (3 Ed)* By Michael Fordham:

“A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a “confess and avoid”). The duty of “full and frank” disclosure harks back to the time when permission for judicial review was *ex parte*.”

34. This was the position adopted in **Vania Investments Pool Limited and Capital Markets Authority & Others** (*supra*) in which it was held:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014]eKLR, “In my view, the reference to an “arguable case” in W’Njuguna’s Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

35. In this case, there is completely no iota of evidence with respect to the existence of a decision made on 31st December, 2014. The failure to satisfactorily prove that there exist a decision capable of being quashed in my view shows that the applicants have failed to prove that they have established a *prima facie* case. Whereas the manner in which the Society’s management is being conducted leaves a lot to be desired, there exist options under the **Societies Act** which the Applicants can resort to in order to compel the Respondent to invoke its discretionary powers under the Act rather than by seeking to quash a non-existent decision.

36. It follows that this application is not merited due to the delay involved and due to failure to satisfy me that there exist a *prima facie* case.

Order

37. In the result, the Chamber Summons dated 6th August, 2015 fails and is struck out but in order to show my disapproval at the manner in which the interested parties are conducting the affairs of the Society the costs of these proceedings are awarded to the applicant to be borne by the interested parties.

38. It is so ordered.

Dated at Nairobi this 18th day of November, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwangi for the Respondent

Mrs Kinara for Mr Gathenji for the interested party

Cc Patricia