



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

JR. MISC. CIVIL APPLICATION NO. 1 OF 2015

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW OF CERTIORARI

AND

IN THE MATTER OF: THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)

AND

IN THE MATTER OF: ORDER GRANTED ON THE 14TH OF JULY 2014 IN MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO. 46 OF 2014 ROBINA C. KIMKUNG & 5 OTHERS (all suing for and on behalf of the Members of the Jesus Celebration Centre) VERSUS REDEEMED GOSPEL CHURCH INC, REDEEMED GOSPEL CHURCH REGISTERED TRUSTEE & 13 OTHERS

AND

IN THE MATTER OF: MAKINDU PRINCIPAL MAGISTRATE’S COURT CIVIL SUIT NO. 392 OF 2014 REV. DR. SAMMY LUNDO & JOHN KWAKE VERSUS PASTOR DAVID KAVITA MALONZA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE MAKINDU PRINCIPAL MAGISTRATE’S COURT

2. THE ATTORNEY GENERAL.....RESPONDENTS

AND

1. REV. DR. SAMMY LUNDO

2. JOHN KWAKEINTERESTED PARTIES

AND

1. BISHOP WILFRED LAI

2. BISHOP CHARLES MUOKI

3. BISHOP MARK KEGOHI

4. BISHOP JAMES KIMEMIA

5. PASTOR JUSTUS KIMEU suing as Registered Trustees of

JESUS CELEBRATION CENTRE.....1ST EX PARTE APPLICANT

KAVITA MALONZA.....2ND EX PARTE APPLICANT

RULING

Introduction

1. Pursuant to the leave granted by this court on 3rd February, 2015, Bishop Wilfred Lai, Bishop Charles Muoki, Bishop Mark Kegohi, Bishop James Kimemia (all suing as Registered Trustees of Jesus Celebration Center) and Pastor David Kavita Malonza moved the court vide a Notice of Motion filed on 10th February 2015 in which they seek the following:

- i. An **order of certiorari** to bring into the High Court for the purposes of quashing the proceedings in the Principal Magistrates Court at Makindu in Civil Suit No. 392 of 2014: Rev. Dr. Sammy Lundo & John Kwake versus Pastor David Kavita Malonza.
- ii. Costs.

2. The Application is supported by the Affidavit of PASTOR JUSTUS KIMEU sworn on 10th February, 2015, the Statutory Statement dated 2nd February, 2015 and Affidavit of BISHOP CHARLES K. MUOKI sworn on 2nd February, 2015.

The Ex-parte Applicants' Case

3. The Ex-parte Applicants' case, in summary, is that the High Court in **Mombasa Constitutional Petition No. 46 of 2014: Robina C. Kimkung & 4 Others vs. Redeemed Gospel Church Inc & 15 Others** (hereinafter "Petition No. 46 of 2014") granted, on 14th July, 2014, an order to restrain Redeemed Gospel Church Inc. either by itself, its servants, agents and/or employees or representatives from in any way intermeddling with any aspect of the Jesus Celebration Center's activities and/or operations.

4. The ex parte Applicants argue that despite the pendency of Petition No. 46 of 2014 and the existence of the said interim orders of injunction, the Interested Parties proceeded to file in the First Respondent's Court **Civil Suit No. 392 of 2014: Rev. Dr. Sammy Lundo & John Kwake vs. Pastor David Kavita Malonza** (hereinafter "PMCC No. 392 of 2014"), that the orders sought by the Interested Parties in PMCC No. 392 of 2014 if granted, would contravene the High Court order in Petition No. 46 of 2014; that the First Respondent's Court, by entertaining PMCC No. 392 of 2014, acted without jurisdiction since the said jurisdiction is presently being seized of by the High Court in Petition No. 46 of 2014; that if not stayed, the proceedings before the First Respondent's Court will lead to re-litigation of the issues before the High Court in Petition No. 46 of 2014 where constitutional questions of ownership and activities of the First Ex-parte Applicant are at the core.

The Respondents' Case

5. There was no response by the Makindu Principal Magistrate's Court and the Attorne-General, the Respondent herein.

The Interested Parties' Case

6. The Interested Parties opposed the Motion through a Replying Affidavit sworn by SAMMY LUNDO on 6th March, 2015. The Interested Parties state that –

(a) the application is misconceived and untenable as the

First Respondent is competent and has jurisdiction to entertain matters raised in PMCC No. 392 of 2014;

(b) the proceedings and orders made in Petition No. 46 of 2014 do not in any way affect Redeemed Gospel Church at Kasemeni or its property being Plot No. 1898 Ngandani Settlement Scheme, the subject matter of PMCC No. 392 of 2014.

7. The Interested Parties contend that the Ex-parte Applicants do not have the *locus standi* to bring this cause since they claim to be registered trustees of Jesus Celebration Center (hereinafter “JCC”) which is a non-registered church under the Societies Act. They aver that since JCC is not registered, it was not competent to form a trust capable of giving the Ex-Parte Applicants legal standing before this court.

8. The Interested Parties submitted that the Ex-parte Applicants have not sufficiently demonstrated that they should be granted an order of certiorari. The Interested Parties relied on the case of **REPUBLIC vs ISAAC THEURI GITHAE & ANOTHER [2007] eKLR** where it was held that:

“The purpose and purview of judicial review proceedings is confined to the decision making process. The Court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he has been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach.”

9. The Interested Parties submitted that the First Respondent had jurisdiction to entertain PMCC No. 392 of 2014 and did not deny the Ex-parte Applicants audience nor did it fail to observe the rules of natural justice as against the Ex-parte Applicants.

The Rejoinder by Ex-parte Applicants

10. In response to the issue of *locus standi* (or lack thereof), the Ex-parte Applicants submitted that although they are not parties to Petition No. 46 of 2014, they have a direct interest in the proceedings therein. While relying on the case of **REPUBLIC vs. LIVERPOOL CORPORATION EX-PARTE LIVERPOOL TAXI FLEET OPERATORS ASSOCIATION [1972] 2 All ER 589**, the Ex-Parte Applicants submitted that the relief of certiorari lie on behalf of any person whose interests may be prejudicially affected by what is taking place.

The Issue for Determination

11. In my view, the main issue for the court's determination is whether this case meets the judicial review threshold to warrant the intervention of the court through judicial review remedy of certiorari.

Analysis

12. In the case of **KENYA NATIONAL EXAMINATION COUNCIL vs. REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS [1997] eKLR**, the Court of Appeal held that an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. Similarly in the case of **REPUBLIC vs. ISAAC THEURI GITHAE, supra** it was stated that the court may make a judicial review intervention only where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably.

13. The issue to be considered in this matter is whether the First Respondent had jurisdiction to entertain suit PMCC No. 392 of 2014. I have looked at the Plaintiff in PMCC No. 392 of 2014 which is exhibited as annexure "PJK 9" in the Affidavit in support of the Motion. The claim in that suit was that the Defendant therein, Pastor David Kavita Malonza, had breached the constitution of Redeemed Gospel Church by decamping from that church and seeking to move with members of the church to a new church and attempting to transfer the property of the church to another church. The Plaintiff therein sought injunction to restrain the Defendant from committing the said breaches. The nature of that suit was clearly within the jurisdiction of the magistrate's court. The Ex-parte Applicants have not demonstrated that the magistrate lacked either statutory or pecuniary jurisdiction to entertain the suit. They have failed to show that the magistrate did not have power to preside over the proceedings and grant interim orders of injunction.

14. The mere fact that there was pending before the High Court in Petition No. 46 of 2014, issues which the Ex-parte Applicants perceive to be related to the issues raised in PMCC No. 392 of 2014 does not, in my view, oust the jurisdiction of the First Respondent. It would have been a different case if there was an order staying the proceedings in PMCC No. 392 of 2014 yet the magistrate ignored the same and proceeded to handle the matter. As it is, there was no order barring the magistrate from proceeding with the matter and therefore the question of acting in excess of jurisdiction does not arise.

15. On the issue of rules of Natural Justice, the Ex-parte Applicants were not parties to PMCC No. 392 of 2014. They could not have been involved in the proceedings therein. They cannot rely on breach of the rules of Natural Justice to seek an order of certiorari since they did not participate in the proceedings in PMCC No. 329 of 2014. Their only recourse could have been to either apply to be enjoined in PMCC No. 329 of 2014 or apply to the High Court in Petition No. 46 of 2014 for an order to stay proceedings in the lower court pending determination of the Petition.

16. In the case of **REPUBLIC vs. PRINCIPAL MAGISTRATE'S COURT MURANG'A & 4 OTHERS EX-PARTE MILKA NYAMBURA WANDERI & ANOTHER [2013] eKLR**, the High Court stated that:

"It is trite law that judicial [re]view orders are issued against a public body on grounds of illegality, procedural impropriety and irrationality."

17. The Ex-parte Applicants do not complain that the magistrate acted illegally, unprocedurally or irrationally. Although the Ex-parte Applicants claim that the magistrate acted without jurisdiction, they did not give reasons why the magistrate did not have jurisdiction. The mere fact that the issues in the lower court are also pending in the High Court does not, per se, oust the jurisdiction of the lower court.

18. The complaint by the ex Parte Applicants' is against the Plaintiffs in Makindu Principal Magistrates Court Case No. 329 of 2012 for filing that case despite the pendency of Petition No. 46 of 2014. That cannot be a complaint against the magistrate's court. In entertaining the proceedings in the case, the magistrate did not act *ultra vires*. He acted within the scope of his power granted to him by law and therefore no element of illegality was established by the ex parte Applicants.

19. In addition ex parte Applicants failed to establish that the magistrate acted unprocedurally as he heard an application which had been procedurally brought.

20. For those reasons, the ex parte Applicants have failed to establish any grounds for the grant of the judicial review remedy of certiorari, the ex parte Applicants' Notice of Motion dated and filed on 10th February, 2015 is hereby dismissed with an order that each party shall bear its own costs.

21. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 16th day of November, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Dr. Khaminwa for Applicants

Mr. Steve Adere for Interested Parties

Mr. Silas Kaunda Court Assistant