REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 434 OF 2013

REPUBLIC ..... APPLICANT

VERSUS

REGISTRAR GENERAL.....1ST RESPONDENT

JAPHETH MWANTHI ..... 2ND RESPONDENT

EX-PARTE: **REV. JAMES PAPA**

JUDGEMENT

Applicant's Case

1. By a Notice of Motion dated 18th December, 2013 filed in this Court on the following day 19th December, 2013, the *ex parte* Applicant herein, **Rev. James Papa**, seeks the following orders:

   1. An Order of Prohibition do issue against the Registrar General barring him/her from registering the 2nd Respondent as the new head of the Independent Presbyterian Church following unlawful elections just concluded.

   2. An order of Mandamus do issue requiring the 2nd Respondent to duly announce in all churches fresh dates of election to various offices within the Independent Presbyterian Church.

   3. The costs of this application be provided for.

2. The application was grounded upon the Statement filed herein and the supporting affidavit sworn by the *ex parte* applicant on 5th December 2013.
3. According to the applicant, he is a member of the Independent Presbyterian Church of Kenya (IPC) registered as a Society under the ***Societies Act*** and the Church Constitution has created the office of the Synod which Constitution also creates the office of local church session to oversee the running of each local church congregation.
4. It was deposed the 2nd Respondent herein was until the year 2011 head and pastor of a congregation known as Kalisasi local church which is a congregation of the Independent Presbyterian Church and is overseen by the local church session known as IPC Kalisasi Church Session. In the applicant's view, the second Respondent is a man who speaks lot of lies, claims to hold a doctorate degree in theology from a Theological College in the United States, a fact which he knows not to be true and has failed to clear his name of the allegations of having a child out of wedlock despite a court case filed against him.

5. It was further averred hat it is a well-known fact and a matter of public knowledge that the 2nd Respondent is an amorous man engaged in extra marital affairs and that his conduct was the subject in Kitui (Children's Court Case No. 5 of 2001) in which case an order of the court was issued requiring him to submit himself for a DNA test to determine the paternity of the minor but he failed, refused, declined and/or ignored the said order of the court.
6. It was deposed that the 2nd Respondent was overseeing election, which has not been sanctioned by the constitution of the church and that though the 2nd Respondent was expected to inform and/or announce to all the more than 140 branches of the church about election, he failed to do so rendering election unlawful. It was therefore contended that in conducting and or overseeing election processes prior to notification, the 2nd Respondent had denied many congregants opportunity to contest for various positions within the structure of the church.
7. According to the applicant, the 2nd Respondent ignored an attempt by the reconciliation committee that called on the warring membership of the church to stop infighting.
8. It was further averred that the 2nd Respondent has been at the helm of Church (IPC) by way of manipulation and intimidation and that his failure to lead by example has created wide division in the church with various factions engaging in all manner of acrimonious actions.
9. In a supplementary affidavit sworn by the applicant on 2nd April, 2014, he asserted that he was a member of the IPC Church and that whereas he and other members resigned from the IPC executive committee they did not resign from IPC church hence still a member of the said church and have always participated in the affairs of IPC Church and had an interest in them as a member of the church. He however denied having renounced the jurisdiction of the synod but reiterated that the 2nd Respondent's moral uprightness is questionable.
10. While re-asserting that the 2nd Respondent failed and/or neglected to announce the date of election to all IPC Churches therefore denying the would be candidates various position a chance to participate in the elections, he contended that the 2nd Respondent only announced elections on the churches that favour his leadership therefore locking the would be contenders from other churches the opportunity to participate in the elections which was against the will and the spirit of the IPC Constitution hence the registration of the 2nd Respondent is illegal and against the court order issued on the 20th December 2013 and served on upon the 1st Respondent on the same date.
11. It was averred that it is IPC Church which was exempt from registration but not its officials and that is why the 1st Respondent issued a letter registering the 2nd Respondent and other office bearers as the newly elected officials. It was deposed that the 1st Respondent was served with court order on 20th December, 2013 while it was served with a notification of change of the officer bearers dated 24th February, 2014, way after the Applicant had served an order barring the 1st Respondent from registering officials from the 2nd Respondent. It was therefore the applicant's potion that the registration of the officer bearers including the 2nd Respondent by the 1st Respondent is illegal, unlawful and against the court order.
12. In the submissions filed on behalf of the applicant, it was contended that mandamus can issue against the 2nd Respondent to call for elections as the purported elections were done in contravention of the IPC Constitution. According to the applicant the registration of change of office bearers was done way after the 1st Respondent received court barring him from registering the 2nd respondent. It was therefore contended that the 2nd Respondent's action was in bad faith, bias, procedurally ultra vires and unreasonable hence the orders sought ought to be granted.

1st Respondent's Case

13. In opposition to the application the 1st Respondent filed a replying affidavit sworn by **Joseph L Onyango**, a Deputy Registrar General and a Senior State Counsel in the Attorney General's office in charge of the Societies section on 12th March, 2014.
14. According to the deponent, the Applicant's application is both bad in form and substance thus it is incompetent and an abuse of court process.
15. He deposed the Applicant's subject society was first exempted from registration by the Registrar

of Societies on 16th March 1964 as Independent Presbyterian Church and that the 2nd Respondent herein was elected in office on the 6th December 2013 for a period of three (3) years as stipulated in the society's constitution as indicated in the notice of change of officers. Further, the General Secretary of the society on the 24th February 2014 filed with them a notice dated 28th September 2013 informing all the members of the subject society about the impending synod elections to be held from the 2nd to the 6th December 2013 at Nautha IPC, Mwingi and similarly as required by law the General Secretary of the society on the 24th February 2014 filed with them a copy of minutes dated 6th December 2013 confirming the election of the new office bearers of the subject society.

16. It was contended that the 1st Respondent does not interfere in the management of the Societies, nor does his office cast aspersions on the conduct of members or of the office bearers thereof and the same can only be determined by the Society's internal dispute resolution mechanisms or by courts of Law.
17. It was his view that an order of prohibition cannot issue as prayed for because the office of Registrar acted in good faith while discharging his statutory mandate by receiving the notification of change of officers hence this application is abuse of the court process, without merit and a waste of the courts time, and ought to be dismissed with costs to the Respondents.
18. It was submitted on behalf of the 1st Respondent that the order for prohibition sought has already been surpassed by events following the registration of the 2nd Respondent before the institution of these proceedings. In the 1st Respondent's view the application was bad in law and an abuse of the Court process.

2nd Respondent's Case

19. On his part the 2nd Respondent opposed the application vide grounds of opposition dated 30th January, 2014 filed the same day in which it was stated:

1. **The application is bad in law and does not comply with the mandatory legal requirements of Order 53 Civil Procedure Rules 2010.**
2. **The *Ex parte* Applicant lacks capacity to bring the application as he is not a member of IPC Church.**
3. **The application lacks merit and is brought too late in the day.**
4. **The application is scandalous vexatious and an abuse of the process of court.**

20. In opposition to the application the 2nd Respondent swore a replying affidavit on 28th February, 2014 the gist of which was that he was already the moderator having been registered on 16th December, 2013; that he legally announced the elections as required by the Church's constitution; that the applicant is not a member of the Church but belongs to another church which church is different from the subject church; that the application has been overtaken by events; that there are no moral hurdles in his way; and that the applicant had no participated in the election shaving denounced the jurisdiction of the IPC over him.
21. In his supplementary affidavit sworn on 14th April 2014, the 2nd Respondent reiterated that the Applicant and his group removed themselves from the government of IPC Watchmen where, the Applicant is Moderator and a whole government of the church is established and that the IPC Watchman is a complete church organization with its own Synod called watchmen Synod as the highest church organ headed by the Applicant.
22. It was his view that there was no evidence he ever refused to take any DNA test; that he was ever served or knew anything about the case mentioned; that any sanctions were taken when he declined to comply with court orders; of any relevance or relationship between the photographed child at all and the alleged case or any affidavit sworn to show that child and asserted that giving he photograph of the child, whoever he is an abuse of that child's rights. He asserted that he neither knew the child in pictured exhibited nor was aware of the alleged court order.
23. According to the 2nd Respondent all IPC churches were informed of the election date and notice and/or information given to the relevant authorities and contended that though excepted they

always notify the office of elections and office bearer and have done that for all elections including the last ones.

24. The 2nd Respondent's position was that the notification of the office bearer was done on 16th December, 2013 and not 24th February 2014 as alleged and that what was filed on 24th February 2014 was a letter search and not notification of elected official. Accordingly, the registration having been done on 16th December 2013 before the order was served and not on 24th February 2014, the application has been overtaken by events.
25. On behalf of the 2nd Respondent it was submitted that being a private citizen the judicial review orders sought cannot issue against him.
26. It was submitted that the application was overtaken by events and that the applicant in any case ought to have sued the Registrar of Societies and not the Registrar General. Not being a member of the subject church it was submitted that the applicant had no locus to institute these proceedings.
27. According to the 2nd Respondent the 1st Respondent is not required to check moral fitness of the officials of a society.

Determinations

28. I have considered the application, the affidavit sworn both in support of and in opposition to the application and the submissions filed.
29. The first issue for determination is whether the orders sought herein can issue against the 2nd Respondent. As was held in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**:

> **"The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land Registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual."**

30. 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 & 9 Others Nairobi Civil Appeal No. 266 of 1996 [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."**

31. It is therefore clear that the Court in an application for prohibition only prohibits an inferior tribunal or body from continuing with proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. With respect to mandamus the same is meant to compel the doing of some particular thing therein specified which appertains to his or their office and is in the nature of a public duty where the person or body on whom the duty is imposed fails or refuses to perform the said duty. Here the 2nd Respondent is neither a public body nor has it been alleged that there is any public duty placed on him. The decision to call for elections of a private society cannot in my view be said to be a public duty since the said elections only affect those who are members of the church and not the general public.
32. It follows that prayer 2 of the instant application does not lie in the circumstances of this application.
33. With respect to the orders of prohibition sought against the 1st Respondent such orders only lie where there is excess of jurisdiction or absence of it or a departure from the rules of natural justice but 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. In this application it is not contended that the 1st Respondent is acting in excess of his jurisdiction or that there is want of jurisdiction on his part in registering the 2nd Respondent. Further it has not been contended that the applicant lodged an objection to the registration of the 2nd Respondent with the 1st Respondent as provided under the ***Societies Act*** and that the applicant was never heard. The applicant simply contends that the 2nd Respondent's moral standing does not permit him to head the church. That in my view is not a matter which this Court can determine based on the scanty evidence before the Court. There is no proof that the child in question if he exists was conceived by the 2nd Respondent. Such an issue would require *viva voce* evidence for a determination to be made either way and that course is beyond the scope of these proceedings.
34. The other ground is that the elections in question were called unprocedurally. Having found that the orders sought herein cannot lie against the 2nd Respondent who called the sad elections, the actions of the 2nd Respondent cannot be transplanted onto the 1st Respondent so as to issue the orders sought against the 1st Respondent.
35. It was contended that the elections in question were conducted in breach of the existing court order. Suffice to say that that was not one of the grounds in the statement filed herein. That being the position under Order 53 rule 4(1) of the ***Civil Procedure Rules***, this Court is precluded from relying on such ground to uphold the instant application.

36. It is clear that the dispute herein revolves around internal management of the Church. The Court ought not even in ordinary civil litigation intervene in such matters unless it is alleged that the Constitution of the Church is being contravened since the Court ordinarily ought not to be called upon to deal with domestic matters. See **Rev. George M Njuguna vs. Rev. David Gitari & Another Nairobi HCCC No. 2647 of 1995** and **Grace Namai & Others vs. Manasses Kuria Nairobi HCCC No. 1362 of 1994**.

37. It must be appreciated that judicial review deals with public law disputes and should not be invoked as an avenue of settling purely private or domestic disputes appropriate to civil courts as long as such avenues are efficient, convenient, beneficial and effectual. As was held by **Hancox, JA** (as he then was) in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194**:

> **"The fact that the employer is a body corporate, sustained by public funds and contributions does not, *ipso facto,* render the rights it has and the duties of which it owes its employees as of a public nature. They are ordinary private rights of contract between an employer and his employee since there is no reason why an individual who is the employee of a public body be clothed with such exceptional legal rights. They are exceptional because the ordinary litigant has to go through the due process of the courts, suffer its delays and so on while prohibition on the other hand is often a speedy procedure. Leave can be applied for *ex parte* and once obtained the parties go before the court on a notice of motion with agreed, or virtually agreed facts…The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of *certiorari* might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation**."

38. In **Platt, AJA's** view:

> **"If a matter of public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted to since the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decisions...But if the matter is truly a private matter, then a civil suit would be appropriate."**

39. Having considered the foregoing, it is my view and I so hold that this application is unmerited.

Order

40. Consequently the Notice of Motion dated 18th December, 2013 fails and is dismissed with costs.

Dated at Nairobi this day 22nd of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Kioko for the 1st Respondent and holding brief for Mr. Bosek for the Applicant

Cc Patricia