



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc. Application No. 309 Of 2013

IN THE MATTER OF APPLICATION BY THE APPLICANTS CHARLES NYAMWANGE OTEMWA, CHARLES MWANGI NGUMI AND MICHAEL NGUGI KARANJA FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

EX PARTE.....REPUBLIC

IN THE MATTER OF CAP 108 SOCIETY ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

CHARLES NYAMWANGE OTEMWA

CHARLES MWANGI NGUMI

MICHAEL NGUGI KARANJA.....APPLICANTS

VERSUS

THE REGISTRAR – GENERALRESPONDENT

AND

FRANCIS KIBE WANGACHA.....1ST INTERESTED PARTY

BENEDICT ITIGO.....2ND INTERESTED PARTY

BEDAN MWANGI.....3RD INTERESTED PARTY

JULIUS KANYIRA.....4TH INTERESTED PARTY

MAINHO MAIRU.....5TH INTERESTED PARTY

JUDGEMENT

1. By an amended Motion on Notice dated 3rd February, 2014, the *ex parte* applicants herein, **Charles Nyamwange Otemwa, Charles Mwangi Ngumi and Michael Ngugi Karanja**, seek the following orders:
 1. **That this Honorable Court be pleased to issue an order of Certiorari to bring before this court and quash the decision of the Registrar General to register the 1st to 5th interested parties as bona fide officials of Githu Zimma Society.**
 2. **That an order of mandamus to compel the Registrar General to register the applicants as the bona fide officials and office bearers of Githu Zimma Society.**
 3. **An order of prohibition to prohibit the Registrar general from tampering or otherwise altering the list of officials of Githu Zimma Society otherwise than in accordance to the provisions of Cap 108 Societies Act.**
 4. **An order of certiorari bringing into the High Court and quashing all purported dealings or undertakings by 1st to 5th interested parties in their alleged capacity as officials of Githu Zimma Society.**
 5. **Costs of this application.**

Ex Parte Applicant's Case

2. The application was supported by a supporting affidavit sworn by **Charles Nyamwange Otemwa** on 23rd August, 2013, who deposed that he was the chairman of the *bona fide* legal Chairman of **Githu Zimma Society** (hereinafter referred to as the Society).
3. According to the deponent, he was in possession of letter from the Registrar acknowledging and evidencing the officials and office bearers of the Society as:- Chairman – **Charles O Nyamwange**, Secretary – **Collins Wasonga Awand**, Treasurer – **Margret Njeri Wanyoike** save that the name of **Collins Wasonga Awanda** has since been replaced with that of **Charles Mwangi Ngumi**.
4. He further deposed that whereas the said persons were the elected *bona fide* members of the Society, sometimes in the month of May 2013 year the Registrar General purported to illegally replace the said team of office bearers with the 1st to 6th interested parties herein which action according to him was not only immoral but contravene the provision of Cap 108 of the **Societies Act**.
5. It was contended that in the said month the members neither had any election nor did they appoint any new officer bearers hence the decision of the registrar General does not only contravene the law but was malicious and capricious.
6. There was a further affidavit sworn by the said deponent which with due respect was very poorly drafted grammatically as to render it totally incomprehensible.

Respondent's Case

7. In response to the application the Respondent filed a replying affidavit sworn by **Joseph L. Onyango**, a Deputy Registrar General and a senior principal State Counsel in charge of Societies on 2nd September, 2013.
8. According to him, the Applicants ceased to be officials after the society held its properly convened general meeting which confirmed the interested parties into the office.
9. He deposed that the letter relied upon by the applicants as confirming them in the office was overturned by a subsequent letter dated 22nd March, 2013 after it was brought to the attention of the Respondent that the Applicants were in the office illegally through misrepresentation and fraud as.
10. Prior to the said confirmation the applicants ere given an opportunity to justify their stay in the office which they failed to do hence there is no vacuum in the leadership of the society.

Determination

11. I have considered the issues raised in this application. The applicants' case is that the Respondent

registered the interested parties as officials of the Society when the later were neither elected nor appointed as such. On the other hand the Respondent's position which position was taken by the interested parties is that the initial registration of the applicants was perpetrated by fraud and misrepresentation.

12. It is not alleged that the Respondent had no jurisdiction to effect the said registration. To the contrary it is the mandate of the Respondent to register officials of a society. The Respondent contended that the applicants were afforded an opportunity of being heard before the impugned decision was made but the applicants declined to make their representations. In fact in the undated further affidavit sworn by **Charles Nyamwange Otemwa** herein there is no express denial that the applicants were given an opportunity of being heard. Rather, the applicants' position is that their failure to attend the meeting called by the Respondent did not validate the Respondent's action. I am in the circumstances not convinced that the Respondent's decision was made in breach of the rules of natural justice.
13. Taking the facts as deposed by the applicants, this Court is not convinced that the material disclose such unreasonableness on the part of the Respondent in the decision taken as to render the same irrational.
14. It is my view that the issues raised in this application are issues that revolve around contested facts as to who between the applicants and the interested parties are the properly elected or appointed officials of the Society and as to whether or not there was fraud committed by either of the parties. Issues of fraud, it has been held cannot be properly resolved by way of affidavit evidence as they require oral evidence tested by way of cross-examination. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application..... Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

15. To embark on the process through which the interested parties were purportedly elected would entail an investigation into the merit of the dispute since the Court will be obliged to inquire into how the elections were conducted and who participated therein. To determine the issue whether the interested parties are members of the Society will similarly entail perusing such documents as the register of members and the various membership documents. Judicial review however, is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held 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.”

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

17. The matter which the applicant seeks the Court to determine would necessarily require that certain findings be made on merits which findings may well amount to the making of certain declarations. However, where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review and since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal, the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. See *Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.*
18. Judicial review applications only determines such issues as 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
19. Accordingly, I find no merit in the amended Motion on Notice dated 3rd February, 2014.
20. Before I conclude this judgement I note that the application was not properly intitled. A substantive Notice of Motion in these kind of proceedings is usually brought in the name of the Republic as the applicant and not the parties themselves who are usually the ex parte applicants.

Order

21. Consequently, the order which commend themselves to me and which I hereby grant is that the amended Motion on Notice dated 3rd February, 2014 be and hereby dismissed with costs to the Respondent and interested parties.

Dated at Nairobi this day 9th of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

The interested parties in person

Cc Richard