REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 287 of 2011

IN THE MATTER OF: AN APPLICATION BY BISHOP ABSOLOM NDUNGO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE SOCIETIES ACT, (CHAPTER 108 LAWS OF KENYA) AND THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT (CHAPTER 151 LAWS OF KENYA)

BETWEEN

ABSOLOM NDUNGO…….……APPLICANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

THE REGISTRAR GENERAL
(OFFICE OF THE ATTORNEY GENERAL)…….....…RESPONDENTS

KENYA REDEEMED CHURCH through BISHOP ALLAN NJERU, PASTOR CYRUS JOGOO AYUB

& PASTOR ANDREW MURAGE

As Chairman, Secretary & Treasurer……..……..2ND RESPONDENT

RULING

1. By a Notice of Motion dated 1st December, 2011 filed in this Court on the same day, the 2nd Respondent, **The Kenya Redeemed Church**, seeks the following orders:

1 That this application be certified as urgent and service of the same be dispensed with in the 1st instance.

2 That this Hon. Court be pleased to order that KENYA REDEEMED CHURCH be joined herein as a RESPONDENT through its duly registered officials BISHOP ALLAN NJERU, CYRUS JOGOO AYUB and ANDREW MURAGE as the chairman, secretary and treasurer of the church as a 2nd Respondent.

3 That the orders of 21/112011 granting stay of decision to cancel the applicants licence to celebrate marriage pending the hearing and determination of substantive application for Judicial Review BE VACATED IMMEDIATELY/RIGHT AWAY for having been issued through misrepresentation, misleading and concealment of material facts before the court.

4 That these proceedings be stayed and/or be struck out without any directions at the stage they are at for being a GROSS ABUSE OF THE COURT PROCESS,FRIVOLOUS & VEXATIOUS of the extreme since they have no basis in Law and fact.

5 That the costs of this application be provided for and be borne by the applicant.

2. The said Motion is supported by an affidavit sworn on 1st December 2011 by **Bishop Allan Njeru**. According to him, he is the founder of Kenya Redeemed Church way back in 1971 before which he was a member of Full Gospel Church of Kenya. On realising that he had a call from God to preach he broke away from Full Gospel Church of Kenya and registered the said Redeemed Church in 1972. The applicant, according to him joined the Church in 1984 and was anointed and ordained as a pastor. He deposes that he personally applied for the applicant's licence with **Pastor Andrew Murage** who is the church's treasurer so as to be celebrating marriages from the office of the Registrar General. According to him the Registrar General does not issue licences to individuals but after recommendation of respective churches and conversely cannot cancel the same without recommendation by the concerned church hence the donor of the licence is the church on whose recommendations the Registrar acts. According to him, on 8th April 2011 the applicant was excommunicated from the church in accordance with the Leadership & Governance of the Rules of the church which decision was communicated to him hence he ceased to be a Bishop, member or even pastor in the church. This action was taken after sensing that the applicant was up to no good and he was asked to return the properties of the church. Instead of doing so, he started filing cases and on realising that the applicant was not ready to go peacefully the Registrar was notified to revoke or cancel the applicant's licence pursuant to which the Registrar issued a Gazette Notice of 4th November 2011. According to the deponent, under both the Societies Act and the ***African Christian Marriage & Divorce Act*** the court does not have the jurisdiction on judicial review hence the entire proceedings are an abuse of the court process, frivolous and vexatious hence these proceedings are instituted by misrepresenting facts, concealing material facts and/or misleading the court. By granting the orders sought, it is contended, that the court will be compelling the church to take back the applicant who is abusing the process by instituting several cases. The orders sought herein, it is contended, shall only affect the church and not the Respondents and yet it is trite that a court of law ought not to issue orders that affect a party not named in the proceedings. Staying the cancellation of the licence, according to the deponent, is tantamount to the court telling the church to take back the applicant when he is unwanted.

3. It is further deposed that the applicant was expelled from the church pursuant to the resolution of the Annual General Meeting on 22nd December 2011 after which the church filed its annual returns indicating the Vice Chairman as **John Njenga Kamau**. Since the applicant 'a name nolonger appears in the records of the Registrar as a member he should not force himself on the church.

4. In opposing the application the *ex parte* applicant swore a replying affidavit on 5th December 2011 in which he deposes that according to the records held by the Registrar of Societies he is the vice chairman of the Kenya Redeemed Church and the cancellation of his licence affects not only his rights but the rights of the congregation. It is his contention that he joined the said church in 1972 and served as its chairman when **Bishop Allan Njeru** was elected to Parliament and faithfully served the church. In his view these proceedings are lawful, legitimate and procedural given the action of the Registrar. He avers that at the time of bringing these proceedings he was unaware that the Registrar had been directly influenced by the said Bishop and other members of the Church Executive Board and that he was not given an opportunity to respond to the allegations hence the decision was geared towards favouring on group. According to him the cases pending in court are legitimate and will be decided on their own facts. In his view, the licence to celebrate marriage is issued to an individual and not an institution and ought not to be interfered with.

5. In his supplementary affidavit sworn on 23rd February 2012, the applicant avers that he has served in Kenya Redeemed Church since 1973 and has never received any warning letter or been reprimanded. According to him contrary to the constitution of the church there was no notice of the Annual General Meeting and hence the same was contrived to defeat justice and circumvent the due process in light of the pending court cases. To him the Registrar in breach of his obligations has taken sides in the disputes and accepted fraudulent returns while well aware of the pending disputes. Since the correct procedure his not been followed in removing him from the church he is still a member thereof and the church has no legal power to cancel licences to celebrate marriages which power is statutorily donated to the relevant registrar who cannot exercise his discretion at the behest of a church leader. It is his contention that the licence to celebrate marriages is given to an individual Minister and not to a church. It is his position that the registrar cancelled his licence without finding any fault or breach on his part but due to malicious pressure from **Allan Njeru** yet the said **Allan Njeru** and the entire membership of the Kenya Redeemed Church are subject to the provisions of the Societies Act under which the Church is registered.

6. I have considered the submissions filed on behalf of the parties herein. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The first issue for consideration by the Court is the circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. Order 53 Rule 1(4) of the Civil Procedure Rules provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

7. It is therefore clear that an order that the leave granted do operate as a stay may only be granted in cases where leave granted is with respect to application for prohibition and certiorari. There is, therefore, no discretion to grant stay under Order 53 where what is sought and granted is only leave to apply for *mandamus*. Accordingly, in **Re: Justus Nyangaya and Social Democratic Party Nairobi HCMA 1132 of 2002 Nyamu, J** (as he then was) held that at leave stage it cannot be ordered that leave to apply for a *mandamus* order do operate as stay because logically there can be nothing to stay in respect of the leave for mandamus unlike orders of certiorari and prohibition where such leave can if ordered by a Judge operate as stay. In this case, the stay sought is pursuant to the application for leave to apply for an order of certiorari, mandamus and prohibition hence it follows that the prayer for stay was competently before the Court. Where, however, the decision sought to be quashed has been implemented leave ought not to operate as a stay. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

8. This position arises from the fact that once a decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. Where, therefore the stay is in respect of the grant of leave to apply for prohibition, it must be emphasized that prohibition by its very nature looks to the future hence where the impugned decision has already been implemented prohibition is not the best remedy to seek. See **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.**

9. However even where the leave is granted to apply for certiorari and prohibition it was held in **Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995** that in an application for leave to apply for judicial review and stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous. Therefore where the outcome of the judicial review might be in a manner contrary to the conclusion reached by the inferior tribunal, stay of proceedings should be granted as it might lead to an awkward situation.

10. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

11. Those then are the principles under which the Courts do exercise their discretion in granting an order for stay. However, it is not in doubt that such an order, if granted *ex parte*, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances nolonger warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the *ex parte* stage when the stay was granted does not justify the grant either by non-disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted. This is due to the fact that Courts do not grant orders of stay as a matter of course and where the Court is in doubt, the Court is now at liberty to direct that the prayer seeking the stay be heard inter partes even in cases where the leave has been granted.

12. In this case it is contended by the 2nd respondent that the *ex parte* applicant failed to disclose certain material facts such as the existence of other cases and the fact that he was nolonger a member of the Church.

13. The *ex parte* applicant's case is that the Respondent herein had abused his power and acted unlawfully in purporting to cancel his licence. Whereas the 2nd respondent has attempted to merge the grant of licence to the membership of the church in question a reading of section 7 of the ***African Christian Marriage and Divorce Act***, Cap 151, Laws of Kenya, does not seem to support that line of argument. That section does not state that the minister licenced thereunder must be attached to that particular church. However, the said provision seems to state that for one to be licenced one must first and foremost be a minister since the section provides for licensing of "any minister". The word "minister" is however, not defined although "licensed minister" is. ***Black's Law Dictionary***, 9th Edition at page 1086 defines "minister" at the relevant part as "a person acting under another's authority; an agent". In our scenario the use of the word "minister" may mean an agent of the Minister rather than a church official. Whether or not the *ex parte* applicant is such minister is the subject of these proceedings and cannot be decided at this stage of the proceedings.

14. The *ex parte* applicant's position is that his degazettement was undertaken on ulterior and malicious motives engineered by the 2nd respondent rather than at the discretion of the respondent. If that contention turns out to be true, it may well amount to abuse of the discretion.

15. The respondent's position that the stay of the cancellation of the *ex parte* applicant's licence amounts to imposing the *ex parte* applicant on the church cannot be entirely correct since in light of the provisions of section 5 of Cap 151 under which a marriage may be celebrated under the said Act in any place of public worship, whether or not such place of worship is licensed under section 7 of the ***Marriage Act***. Without making any conclusive finding at this stage it would seem that the contention of the *ex parte*

applicant that his licence is not pegged on the church may well be correct.

16. In my view, the mere fact that there exist cases between the applicant and the 2nd respondent does not necessarily render these proceedings in which the applicant is questioning the decision making process of the respondent vexatious or frivolous. As was held in **Republic Vs. Land Disputes Tribunal Court Central Division And Another *Ex parte* Nzioka [2006] 1 EA 321:**

"Judicial review is about fair treatment and for it to remain relevant now and in the future it must each out to enhance democracy and public morality – it has a glorious role and future and in this role it has a partner in the Constitution and as partners the two must keep almost the same pace. The steps must be made in the actual hearings on merit and the threshold is certainly unsuitable. The court must throw away the procedural chains of the past and Civil Procedure Act and the rules should not apply to judicial review. These matters are not straightforward, simple or as plain as they are sometimes intended to be and a summary approach should only be in the plainest of cases only, to save valuable judicial time, and to avoid hampering public administration with unmeritorious claim and also to prevent public bodies from being harassed by irresponsible applications, to prevent the court's time being taken up by busybodies and finally to remove uncertainty in which public bodies 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…At leave stage the court is being asked to exercise a judicial discretion on material available and it is largely a filter stage while the discretion at the second stage is different."

17. Accordingly, since there is no specific prayer for setting aside the leave granted herein and since in my view the stay granted pursuant thereto does not necessarily compel the 2nd respondent to permit the *ex parte* applicant to conduct church services within their premises, I am not convinced that the stay granted herein ought to be vacated.

18. In my view had the parties herein fixed the substantive motion for hearing the same may well have been disposed of by now. Dealing with an application seeking to set aside leave, the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** expressed itself as follows:

"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

19. In my view the foregoing sentiments apply *mutatis mutandi* to an application such as the instant one where the 2nd respondent are seeking to set aside the stay granted pursuant to leave.

20. Accordingly, I find no merit in prayers 3 and 4 of the Notice of Motion dated 1st December 2011 which is hereby dismissed with costs to the applicant.

Dated at Nairobi this day 26th of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Nyaribo for Mr. Wambugu for the applicant and Miss Kenyani for the Respondent.