



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 309 OF 2013
IN THE MATTER OF GITHU ZIMMA SOCIETY
AND
IN THE MATTER OF CAP 108 SOCIETES 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
EX PARTE REPUBLIC.....6TH INTERESTED PARTY
RULING

1. By a Notice of Motion dated 23rd August 2013 filed on 26th August 2013, the *ex parte* applicants

herein, **Charles Nyamwange Otemwa, Charles Mwangi Ngumi and Michael Ngugi Karanja**, seek the following orders:

1. **THAT this Application be certified urgent and heard exparte in the first instance.**
2. **THAT leave be granted for the applicant herein to commence judicial review proceedings for the Grant of the orders of mandamus prohibition and certiorari and that on the leave in two above does operate as a stay, staying all actions by 1st to 6th interested parties herein with regard to the alleged functions or capacity of Githu Zimma Society.**
3. **THAT the Court does in the interim stay all function of Githu Zimma Society.**
4. **THAT the Court does in the interim stay all suit both pending and fresh ones pending the outcome of the proceeding herein.**
5. **THAT the cost of this Application be provided for.**

EX PARTE APPLICANT'S CASE

2. The application is supported by a supporting affidavit sworn by **Charles Nyamwange Otemwa**, who deposed that he was the bona fide legal Chairman of Githu Zimma Society (hereinafter referred to as the Society).
3. According to the deponent, he is 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 for the fact that the name of **Collins Wasonga Awanda** has since been replaced with that of **Charles Mwangi Ngumi**. According to him these are the bona fide members of the society. However sometimes in the month of May this year the Respondent purported to illegally replace the said team of office bearers with the 1st to 6th interested parties herein an action which according to him is action is not only immoral but contravene the provision of the **Societies Act** (hereinafter referred to as the Act). In the said month, it is deposed the members did not have any election neither did they appoint any new officer bearers hence the Respondent's decision does not only contravene the law but is malicious and capricious to say the least.
4. It is further deposed by the said deponent that they are apprehensive that the said officials might entangle the society with their dealings as the society basically deals in allocation of land to her members hence the commencement of these proceedings. In support of his intention the deponent exhibited copies of the correspondence between the Society and the Respondent.
5. It is the deponent's view that the action by the Respondent is threatening the prosperity of their members and is partisan.

RESPONDENT'S CASE

6. In response to the application the Respondent filed a replying affidavit sworn by **Joseph L. Onyango**, the Deputy Registrar General and a senior principal State Counsel in charge of societies.
7. According to him, the application is fatally defective, incurably incompetent and liable to be struck out as it is not based on any evidence upon which the Court can act and further the leave of this Court was not properly sought hence the entire application is a gross abuse of the process of the Court, is ill conceived and brought in bad faith since all the requisite procedures and due process of the law were followed.
8. According to him the applicants herein ceased to be officials after the Society held its properly convened general meeting which confirmed the interested parties into office. According to him the letter of confirmation relied upon by the applicants was overturned by a subsequent letter after it was brought to the attention of the Respondent that the Applicants were in office illegally through misrepresentation and fraud as the alleged meeting that elected the applicants into office was not properly convened as per the provisions of the Act and the Society's Constitution. It is deposed

that prior to the confirmation of the interested parties herein the applicants were given an opportunity to justify their stay in office which they failed to do. To him there is currently no vacuum in leadership and the society cannot be held at ransom and neither can its functions be stayed on account of a few greedy individuals. In his view the applicants are mere busybodies whose intentions are to waste the court's time as the Respondent acted within the law in recognising interested parties as bona fide officials of the Society and that the Applicants have failed to demonstrate how the Respondent's decision to recognise the interested parties as office bearers has prejudiced them.

9. In his view, while the Respondent is not aware of any other pending suits, it is averred that the Respondent has always acted in good faith and within his statutory mandate in dealing with the issues of the society and that all procedures were adhered to hence the orders sought herein ought to be refused and the application dismissed with costs to the Respondent.

INTERESTED PARTIES' CASE

10. In opposition to the application, **Benedict Odhiambo**, swore a replying affidavit on 3rd September 2013. According to him, he is the Secretary of the Society who are the known squatters and possessors of the suit property.
11. According to the deponent, the allegations made by the applicants herein are baseless and indeed vexatious and frivolous as the applicants have never at anytime been members/officials of the Society. In his view, the Applicants have sworn a false Affidavit by claiming that they do possess the valid Certificate of registration which assertion is ludicrous because the valid certificate is in the possession of the interested parties, who are the bona fide officials of the said society. According to the deponent, the Applicants herein are merely busy bodies who are hell bent on disrupting the affairs of the society and that the said individuals have been regularly summoned by the Respondent to clarify their claims/allegations that they are officials for the Society but they have blatantly failed to Honour the said summons, leaving the Registrar General without any option but to fully confirm the interested parties herein as the Bona fide officials of the society.
12. It is therefore the interested parties' position that orders sought herein should not be granted as the same would be aiding the applicants to benefit from an illegality, and will in turn override the decision made by the Registrar General who has the ultimate Authority in matters relating to Societies.

DETERMINATION

13. I have considered the application, the affidavits both in support of and in opposition to the application as well as the rival submissions and this is the view I form of the matter.
14. On 26th August 2013, **Hon. Lady Justice Mumbi Ngugi** granted the applicant leave to commence judicial review proceedings. However the learned Judge as she was properly entitled to do under Order 53 rule 1(4) of the Civil Procedure Rules directed that the issue whether or not the grant of leave would operate as stay be heard inter partes. Accordingly, this ruling is only concerned with the determination whether the said leave ought to operate as stay of the proceedings in question.
15. First and foremost it is clear that the application was not properly intitled. As was held by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563**, an application for leave ought to be intitled as hereunder:

In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition

And

In the Matter of Kenya Ports Authority Act

And

In the Matter of the National Environmental Management and Co-ordination Act 1999.

16. This was in line with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal Civil Appeal No. 63 of 1959 [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intitled:

“In the matter of an application by (applicants) for leave to apply for an order of Certiorari and

In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal.”

17. It follows therefore that the intitlement of the present application is not entirely correct. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

18. I, however, must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs. It must be remembered by the parties that proper intitlement of applications both for leave and the substantive Motion helps in minimizing confusion at the appellate level hence the need to properly intitle the proceedings.

19. 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. [Emphasis mine].

20. In my view “proceedings in question” refer to the proceedings in respect of leave is sought. In this case the proceedings in question must of necessity refer to the proceedings which led to the interested parties being registered as officials of the Society.

21. However the order which the applicants are seeking is staying all actions of the interested parties and all suits pending and fresh ones. That in my view is not the stay contemplated under Order 53 rule 1(4) which is usually for a limited period of time. To grant the orders staying the actions of the interested party with regard to the functions or capacity of the Society without putting into place mechanisms through which the Society can conduct its business is likely to bring the transactions and activities of the Society to a standstill. The intention of stay under Order 53 rule 1(4) is to preserve the subject of the proceedings and not to destroy it which would be the effect of granting the stay in the manner sought by the applicants.

22. It must always be remembered that 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 judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court’s discretion being judicial and must therefore be exercised on the basis of evidence and sound legal principles.

23. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction and some of them are that the decision sought to be quashed has been implemented leave ought not to operate as a stay;

that in considering whether the said leave ought to operate as a 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; that the objective of granting stay is to ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application; that 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; that it is however not appropriate to compel a public body to act and that a stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005; Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995; Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.

24. As I held in Miscellaneous Application No. 363 of 2013 In Re: Meridian Medical Centre;

“...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.....It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

25. In this case it is clear that the Respondent has already registered the interested parties as the officials of the Society. As was held in George Philip M Wekulo vs. The Law Society of Kenya & Another (supra) where the decision sought to be quashed has been implemented leave ought not to operate as a stay.

26. Apart from that I have perused the record herein and I have been unable to find a Notice of Motion. If the same was not filed in compliance with **Mumbi Ngugi J's** decision herein, the applicant would have failed to comply with the orders of the Court hence would not expect favourable exercise of discretion.

27. Having considered the prayer that the grant of leave herein do operate as a stay, it is my view that the stay along the terms sought cannot be granted and secondly as what is sought to be stayed has already been implemented that prayer is unmerited at this stage. Accordingly I decline to grant the said prayer.

28. The parties ought to speedily fix the Motion for hearing assuming the same was filed and for some reason is not on record.

29. The costs of the application will be in the cause.

Dated at Nairobi this day 18th of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kenyatta for 7th interested party

Mr Okemwa for Mr Munyasia for 1st to 6th interested parties