



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 378 OF 2009

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION
AND MANDAMUS**

AND

IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA

AND

IN THE MATTER OF PUMWANI RIYADHA MOSQUE COMMITTEE

AND

**IN THE MATTER OF THE NOTICE REF. NO. SOC/13769 DATED 8TH JUNE 2009 AND
LETTER DATED 16TH JUNE 2009**

BY THE REGISTRAR OF SOCIETIES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF SOCIETIES.....2ND RESPONDENT

	1)	HAMADI M. MUNYI	}
	2)	ALI ABDULMAJID AHMED	}
	3)	AHMAD IMAN ALI	}
4)	ABDUL KARURI MWANGI	}3 RD RESPONDENTS
	5)	ABDULLAH IDDI	}
	6)	ISSA MOHAMED	}
	7)	ABDI M. MBITHUKA	}

EX PARTE:

**ATHMAN MPONDA, RAMADHAN RAJAB RIITHO, HUSSEIN KIPLANGAT NENE
CHAIRMAN, TREASURER AND**

TRUSTEE RESPECTIVELY OF PUMWANI RIYADHA MOSQUE COMMITTEE

RULING

The ex parte applicant's application dated 20th July, 2009 seeks the following orders:

- “1. An order of certiorari to remove into this court for purposes of quashing a decision contained in the letter dated 16th June, 2009 by the Registrar of Societies.**
- 2. An order of mandamus compelling the 2nd respondent to revoke a letter dated 16th June, 2009 to the extent that the decision recognizes new officials of Pumwani Riyadhha Mosque Committee purportedly elected on 7th June, 2009 is illegal and contemptuous of court order dated 29th June, 2009.**
- 3. An order of prohibition, prohibiting the Registrar of Societies from recognizing, assuming office and/or registering the officials purportedly elected on 7th June, 2009.**
- 4. Costs of this application be provided for and awarded to the applicants.”**

The application was premised on the following main grounds:

- The Registrar of Societies acted in total and flagrant disobedience of a court order dated 29th June, 2009.**
- The Registrar of Societies has already recognized officials who have not been elected in accordance with the Constitution of Pumwani Riyadhha Mosque.**

- **The Registrar of Societies' action aforesaid is undemocratic and against the principles of natural justice.**
- **The Registrar of Societies made his decision without affording the other parties an opportunity of being heard.**

The application was supported by a statutory statement and an affidavit filed by **Athman Mponda** for and on behalf of the other ex parte applicants, hereinafter referred to as **"the applicants"**. Mr. Mponda stated that in **Nairobi HC Miscellaneous Application No. 100 of 2009**, Wendo J ordered that elections for Pumwani Riyadhha Mosque Committee be held within 45 days from 22nd May, 2009 when the ruling was delivered. An order was extracted and served upon the Registrar of Societies, hereinafter referred to as **"the Registrar"**. The Registrar directed the applicants to conduct elections within 14 days from 8th June, 2009. Consequently, a notice of Annual General Meeting dated 8th June, 2009 was issued. The elections were scheduled to be conducted on 28th June, 2009 at 2.00 p.m. at Pumwani Social Hall. The said notice was received at the offices of the Registrar of Societies on 12th June, 2009.

The deponent further stated that by a notification of change of officials to the Registrar dated 8th June, 2009, the interested parties in Miscellaneous Application No. 100 of 2009 purported to have held elections on 7th June, 2009 and sought to have the Registrar recognize them as the newly elected officials of the said Committee. Similar attempts had been made by the same group earlier. The applicants added that by a letter dated 11th June, 2009 by Messrs Kinoti & Kibe Company Advocates to the Registrar, the said advocates sought to have the purported new officials registered.

The applicants further stated that the Registrar, by a letter dated 16th June, 2009 addressed to Ahmad Iman and Athman Mponda withdrew the letter dated 8th June, 2009 which directed the calling of elections and instead recognized the officials who had purported to hold elections without directions from the Registrar. It was contended that the Registrar acted contrary to the law and his actions are unreasonable, unfair, undemocratic and contemptuous of the court order and did not act judiciously. The applicants further stated that since the officials now recognized by the Registrar were not duly elected by members, there is a real danger of them misappropriating, depleting and mismanaging the Society's resources and failing to foster the objectives of the Society.

The 2nd respondent filed a replying affidavit that was sworn by **Joseph Onyango**, an advocate of the High Court of Kenya who is engaged as a Deputy Registrar General and as Senior Principal State Counsel in charge of Societies. In his view, this court has no jurisdiction to hear and determine the application herein. He further stated that the application is fatally defective as leave of the court was not properly sought and obtained and the ex parte applicants have no *locus standi* to institute the proceedings.

Mr. Onyango further stated that the Registrar acted in strict compliance with the court directions contained in the ruling delivered by Wendo J on 22nd May, 2009. The court had directed that all parties do comply with the directions of the Registrar which were contained in a letter dated 30th January, 2009 to all parties. The court had further directed that elections be conducted in accordance with the constitution of Pumwani Riyadhha Mosque within 45 days from the date of the said ruling.

The deponent further stated that the Registrar received a notification of change of office bearers in the prescribed manner and in compliance with the Societies Act. The Registrar performed statutory duty of receiving the said notice and effected the appropriate change of officials of the Society. By so doing the Registrar acted diligently and in good faith and within her statutory mandate, Mr. Onyango stated.

The 3rd respondents filed a replying affidavit that was sworn by **Abdul Karuri**. He stated that Athman Mponda, Ramadhan Rajab Ritho and Hussein Kiplangat Nene are not the Chairman, Treasurer and Trustee respectively of Pumwani Riyadhha Mosque Committee. He stated that Hussein Kiplangat Nene is a former trustee of the society and has no *locus standi* to prosecute this application. He added that the letter of 8th June, 2009 was issued in breach of the ruling and order of 22nd May, 2009.

The deponent further stated that the notification dated 8th June, 2009 was issued by officials of the society upon elections being held in accordance with the order of the court made on 22nd May, 2009 and there were no irregularities as alleged. He further stated that when the Registrar wrote the letter dated 15th April, 2009 this court had not made its verdict in Miscellaneous Application No. 100 of 2009.

The 3rd respondents averred that the Registrar acted properly and in accordance with the law and the Society's Constitution in withdrawing his letter dated 8th June, 2009. They denied that there was any problem in the running of the Society and said that since they took office there were no more wrangles in the Society.

Parties filed their submissions which I have carefully perused.

The first issue for consideration and determination is whether the applicants have *locus standi* to institute these proceedings. I agree with the 3rd respondent's counsel that when the application for leave to commence these judicial review proceedings was placed before Dulu J, he must have considered the issue of *locus standi* before he granted the leave. And even if it were to be argued otherwise, I still think that the applicants have sufficient interest in the matter since they are members of Pumwani Riyadhha Mosque, the Society, and are aggrieved by the impugned decision of the 2nd respondent. They are also directly affected by the said decision. In **A.G. (GAMBIA) vs NJIE [1961] 1 ALL ER 540**, Lord Denning held:

“The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busy body who is interfering in things that do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”

With respect I think the applicants fit the above description of aggrieved persons.

The respondents raised issues about the inclusion of the 3rd respondents as parties to these proceedings. The applicants' advocate conceded that it was a mistake to refer to the 3rd respondents as such instead of referring to them as interested parties but added that such error is not fatal to the application. I agree. The so called 3rd respondents are the current officials of the Society and their election is being challenged. They ought to be heard before any orders affecting them are made. Ideally, they ought to have been joined as interested parties after grant of leave. However, joinder or misjoinder of parties or their misdescription cannot invalidate an otherwise competent application. See **Order 51 rule 10(2)** which states that:

“(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

The court must also take into account the provisions of **Sections 1A and 1B** of the **Civil Procedure Act** which stipulate that the overriding objective of the Act and the rules made thereunder is to facilitate just, expeditious, proportionate and affordable resolution of disputes governed by the Act.

Furthermore, **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** provides that justice shall be administered without undue regard to procedural technicalities. The aforesaid mistake does not therefore render this application incurably defective.

The substantive issues raised in this application are closely related to the ruling delivered by Wendo J on 22nd May, 2009. In that matter, Lela Yusuf, Aziz Marabaksha Juma and Delali Kimathi Kandora had filed an application seeking an order of certiorari to remove into the court and quash notices dated 5th February, 2008 and 30th January, 2009 by the Registrar. They sought an order of prohibition to prohibit the Registrar from executing the said notices. For reasons that were well set out in the ruling, the substantive motion was struck out for being incompetent. However, the court, upon realizing that there was a state of confusion reigning at the said mosque, made an order that:

“Let the parties comply with the directions of the Registrar and call for elections to be conducted in accordance with their constitution within the next 45 days.”

It was therefore expected that in accordance with the provisions of the constitution of the Pumwani Riyadhha Mosque (the Society), elections for its office bearers would be held within 45 days from the date of the ruling. However, it appears that the elections were held on 7th June, 2009 in which the 3rd respondents were elected.

Paragraph 8(b) of the **Society’s Constitution** states as follows:

“The Annual General Meeting shall be held not later than August in each year. Notice in writing of such general meeting, accompanied by the annual statement of accounts and the agenda for the meeting shall be sent to all members not less than 21 days before the date of the meeting and where practicable by press advertisement not less than 14 days before the date of the meeting.”

If a 21 days’ notice was required before an annual general meeting is held, the earliest date that meeting could have taken place was 12th June, 2009. That being so, the elections held on 7th June, 2009 did not comply with the requirements of the Society’s Constitution and also violated the aforesaid court order.

The Registrar was well aware of the orders made by Wendo J. On 8th June, 2009 the Registrar wrote to the Chairman and Secretary of the Society and referred to the said ruling of 22nd May, 2009. He directed that elections be held within 14 days from the date of his letter. The scheduled elections were to be supervised by the District Officer, Pumwani Division, or his authorized representative.

On the same day, 8th June, 2009 a notice of Annual General Meeting was given stating that elections will be held on 28th June, 2009 at 2.00 p.m. at Pumwani Social Hall.

On 16th June, 2009 **F.S.M. Ng'ang'a, Senior Deputy Registrar General**, wrote to the Society making reference to his earlier letter of 8th June, 2009 directing the calling of elections. He said that the Registrar had withdrawn the letter due to the following reasons:

“The court had directed the calling of elections in accordance with earlier directions of the Registrar in her letter dated 30th January, 2009. The elections to be called within 45 days from the date of order. The order was issued on 29th May, 2009. There was therefore no need of issuing other directions. pursuant to the court order, the registered Secretary issued a notice of meeting dated 22nd May, 2009. The meeting was to be conducted on 7th day of June 2009. Minutes of the meeting were received in the Registrar’s office on 8th June 2009. The Registrar is satisfied that the meeting was in order and in compliance with the court order therefore the Registrar recognizes the following as officials:

**Chairman – Hamadi M. Munyi
Vice Chairman – Ali Abdulmajid Ahmed
Secretary – Ahmad Iman Ali
Assistant Secretary – Abdul Karuri Mwangi
Treasurer – Abdalla Iddi
Assistant Treasurer – Issa Mohamed
Organizing Secretary – Abdi M. Mbithuka”**

That letter is the subject matter of this application. The respondents submitted that the letter does not contain any decision capable of being quashed because the said letter merely recognized a given state of facts pursuant to the exercise of an obligation imposed by **Section 17** of the **Societies Act**. I do not agree with that submission.

The Registrar had given directions that elections be conducted within 14 days from 8th June, 2009. Although that was in contravention of the Society’s Constitution which required a notice of 21 days, by his letter dated 16th June, 2009 the Registrar made a decision of withdrawing the earlier notice which he had given and pursuant to which elections had been scheduled for 28th June, 2009. He also decided that the persons elected on 7th June, 2009 were the Society’s genuine officials. The reasons which he gave are not convincing as they do not correctly interpret the court ruling aforesaid. The court could not have directed the Society to hold its elections in a manner that was contrary to its Constitution, for example, by giving less than 21 days’ notice. The Registrar ought not to have approved the names of the purported officials who were elected in a manner that was contrary to the court ruling and the Society’s Constitution.

The Registrar acted *ultra vires* her powers in her letter of 16th June, 2009 by purporting to withdraw her earlier directions contained in the letter of 8th June, 2009. She had no power to vary the Constitutional requirements of the said Society or give directives that were contrary to the said court order. It is also apparent that the Registrar recognized the 3rd respondents as the duly elected officials of the Society without giving the ex parte applicants an opportunity of being heard on their grievance. An order that is *ultra vires* or made outside one’s jurisdiction as in this case ought to be quashed by an order of certiorari which I hereby do.

In view of what I have stated hereinabove and having granted the order of certiorari as sought by the applicants, the order of mandamus that was sought against the 2nd respondent must also be granted. The Registrar should not recognize the 3rd respondents any further as the duly elected officials of the Society since it has been established that they were not elected in accordance with the Constitution of the Society. It is however necessary that the Society elects its officials in the proper manner. As Wendo J

held in the earlier matter, I equally direct that the Society do hold proper elections in strict compliance with **Section 8** of its **Constitution**. The Registrar should ensure that is done.

Considering the nature of this matter I direct that each party bears its own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Kilonzo for Mr. Kimondo for the Ex Parte Applicant

Miss Masaka for Mr. Wachira for the Respodnents