



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 187 OF 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS IN THE
NATURE OF CERTIORARI AGAINST THE**

**REGISTRAR GENERAL BY LAWRENCE MBUVI MUASA AND OTHERS ON BEHALF OF
ATANGWA MULELA CLAN**

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF SOCIETIES ACT LAWS OF KENYA

AND

**IN THE MATTER OF ORDER LIII RULES 3(1) AND (2) OF THE CIVIL PROCEDURE RULES
AND ALL OTHER**

ENABLING PROVISIONS OF THE LAW REFORM ACT AND PROCEDURE

AND

**IN THE MATTER OF CONSTITUTION OF ATANGWA MULELA CLAN AND ILLEGAL
DISSOLUTION OF THE CLAN BY THE REGISTRAR GENERAL**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR GENERAL.....RESPONDENT

AND

1. MUTISYA MWILU)
2. EDWARD MUSYOKA ILUMBA)
3. HARRISON MUTUAL MUTHEKE)..... INTERESTED PARTIES

EX PARTE

LAWRENCE MBUVI MUASA

PAUL MUTOLO

PHILIP MUATHE

TIMOTHY KOLI

JAMES MULWA MBITHI

PHILIP MUTISO

(SUIT ON BEHALF OF ATANGWA MULELA CLAN)

RULING

The ex parte applicants application dated 8th June, 2010 seeks an order of certiorari to quash the decision of the Registrar General dated 15th December, 2009 whose effect is to dissolve the ex parte applicants' society. The application was supported by a statutory affidavit and an affidavit sworn by **Lawrence Mbuvi Muasa**, the Chairman of **Atangwa Mulela Clan**, hereinafter referred to as "**the society**". The contents of the affidavit may be summarized as hereunder:

The society was registered on 26th November, 1999 pursuant to the provisions of **Societies Act, Cap 108 Laws of Kenya**. At all material times the society has been paying and filing its annual returns. In its last

annual general meeting held on 31st December, 2009, the following were elected as its officials:

Lawrence Mbuvi Muasa – General Chairman

Paul Mulwa Mbithi – General Vice Chairman

Philip Mutiso – General Secretary

Paul Mutolo – General Vice Secretary

Timothy Koli – General Treasurer

Philip Muathe – General Vice Treasurer

Before filing the returns for the year 2009 one James Mutisya Mwilu and the interested parties purported to file other returns where they claimed that they were the bona fide officials. Upon filing the false returns the said James Mwilu further filed false resolutions purporting to be genuine ones. The effect of the resolutions was to dissolve the society.

When that information became known to the society, a complaint was made to the Registrar's office and one **Mr. Tom A.O. Ogweno** promised to act on the matter and deferred the confirmation of the dissolution.

Thereafter the society's officials made several unsuccessful attempts to file the returns for the year 2009. They then decided to instruct an advocate so that he could liaise with the Registrar and find out why the officials had been denied an opportunity to file returns. The advocates wrote severally to the Registrar but never got any response.

After sometime the Chairman learnt that vide a letter dated 15th December, 2009 one Joseph Onyango, Deputy Registrar of Societies, had written to the Secretary of the society and informed him that the society had been dissolved as per the minutes of 13th January, 2009 which had been filed by the interested parties. The letter was sent through Post Office Box Number 144 Wamunyu which was not the correct postal address.

The society claims, *inter alia*:

(a) The decision of the said Deputy Registrar was based on fraud perpetrated by the interested parties who filed fraudulent returns.

- (b) **That the Registrar did not give them a hearing.**
- (c) **That the Registrar acted on false information and influence of the interested parties.**

- (d) **The Registrar's decision was misguided, harsh, oppressive and unlawful.**

As a result of the purported dissolution of the society it is unable to pay school fees and debts for its members and perform other activities pertaining to its objectives.

The respondent did not file a replying affidavit. The interested parties responded to the society's application vide a replying affidavit sworn by **Edward Musyoka Ilumba**, who stated that he was the Secretary of the society before its dissolution as per the Registrar General's letter dated 4th March, 2009. As per that letter, the 1st interested party was named as the Chairman and the 3rd interested party as the Treasurer. The said letter was in response to one dated 5th March, 2009 allegedly authored by the Secretary of the society. It is intriguing that the Registrar's letter of 4th March, 2009 was purported to be in response to a letter dated 5th March, 2009!

The deponent further stated that during the term of Lawrence Mbuvi Muasa, since 1999 he had failed to have elections conducted and members of the society decided to hold elections and a special general meeting was convened on 20th November, 2008. On that day, the interested parties were elected as officials of the society. Following the said elections the Registrar of Societies was duly informed about the new officials of the society.

Mr. Ilumba further deposed that by a special general meeting held on 13th January, 2009 the society resolved to dissolve itself and notified the respondent accordingly. The respondent acted on the said resolution and dissolved the society. He denied that there was any fraud on the part of the interested parties as alleged by the applicants.

Lawrence Mbuvi Muasa filed a supplementary affidavit and denied that the society had failed to file its annual returns at any time as alleged by the interested parties. He alleged that the interested parties had unlawfully been tampering with the society's file at Sheria House and a complaint to that effect had been made. He further stated that the interested parties had joined a rival group known as **Atangwa East Africa Clan** after they had caused unlawful dissolution of the society. The registration of the rival group was effected on the same day the society was allegedly dissolved.

Mr. Edward Ilumba also swore a further affidavit and reiterated that he is the one who had been filing the society's returns and not Lawrence Mbuvi Muasa as alleged. He further denied that the interested parties had tampered with the records of the society in any way. He further stated that the dissolution of the society was done in accordance with the laid down procedure and without any deception or fraud. He added that all of the Atangwa sub-clans had unanimously agreed to dissolve their respective sub-clans and form only one society.

Counsel for the parties filed submissions which I have carefully perused.

In highlighting his written submissions, Mr. Mulekyo for the ex parte applicants (the society) stated that since the interested parties belong to a rival society they are not at all affected by the orders sought by the society. On the other hand, the ex parte applicants have a constitutional right to associate and that right ought not to be curtailed unnecessarily. He further submitted that the society plays a vital role in its members' welfare and its deregistration was illegal. He reiterated that the respondent acted improperly by deregistering the society.

Mr. Makau for the interested parties submitted that the application had not met the requirements of **Order 53 rules 1(2) and (3)**. In his view, that rendered the application fatally defective. He further stated that prior to the filing of the application no notice had been served upon the Deputy Registrar of this court. Further, the chamber summons for leave to apply for the orders sought was not drawn in the name of the Republic as the applicant, counsel stated. He sought to rely on the case of **NDETE vs CHAIRMAN LAND DISPUTES TRIBUNAL & ANOTHER [2002] 1KLR 392**.

Regarding the deregistration of the society, counsel submitted that the respondent acted in accordance with the law because the interested parties, being the duly elected officials had presented a resolution for dissolution of the society.

I have considered the rival arguments as stated hereinabove. I will first dispose of the issue regarding the legal defects to the application as pointed out by Mr. Makau. **Order 53 rule 1(2)** requires the application for leave to be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavit(s) verifying the facts relied on. The record shows that the ex parte applicants' application complied with that provision of the law. Secondly, there is a notice that was served upon the Registrar on 25th May, 2010.

Thirdly, as regards the propriety of the application for leave I think Mr. Makau did not properly comprehend the holding in **NDETE vs CHAIRMAN LAND DISPUTES TRIBUNAL & ANOTHER (supra)**. The application for leave is not made in the name of the Republic. The application for leave should be made "**IN THE MATTER OF ...**" Once leave has been granted the substantive motion seeking the judicial review orders is the one which is made in the name of the Republic. But even if the ex parte applicants' application was in the wrong format, as long as the error does not go to the root of the application, by dint of the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** which requires the court to administer justice without undue regard to procedural technicalities, I would have excused such mistake and proceed to determine the matter on its merits. However, I find no fault with the manner in which the ex parte applicants' application was drawn.

Turning to the merits of the application, there is no dispute that the society was duly registered on 26th November, 1999. A certificate of registration **number 19555** was exhibited by the ex parte applicants. When the ex parte applicants realized that the interested parties had filed their returns and minutes of a special general meeting where it was allegedly resolved that the society be dissolved a letter was done to the respondent. In response to the said letter the respondent wrote to the Secretary of the society vide Post Office Box 1040, Kangundo and stated as hereunder:

“RE: IN THE MATTER OF THE PROPOSED DISSOLUTION OF THE ATANGWA MULELA CLAN (KENYA REGION) SOC/36690

Reference is made to the above captioned matter and your letter dated 13th January, 2009.

I wish to inform you that your application for confirmation of dissolution of your society has been

deferred. In view of this therefore the society will be required to hold a Special General Meeting to discuss issues of the dissolution either by the committee by notice of 7 days in writing sent to all members or any member may requisition for Special General Meeting by writing to the Secretary of not less than fifty (50) members and will be required to issue a seven (7) days notice of the meeting to the members. A quorum of 33% should also be maintained at the meeting by the society.

Yours faithfully

Tom A.O. Ogweno

Deputy Registrar of Societies”

The matter of the alleged dissolution of the society, having been brought to the attention of the respondent, due diligence was required of the Registrar before acting on the resolution that had been presented to him. It is clear that the respondent had decided to defer the matter so that he could look deeper into the issue but it appears he did not do so.

There is evidence that the returns for the years 2007 and 2008 had been filed by the officials of the society but for some unexplained reasons the returns disappeared from the society’s file. Whereas the disappearance cannot directly be blamed on the respondent or the interested parties, given the goings on regarding the society this court cannot rule out involvement of the interested parties and some officials in the Registrar General’s office. The ex parte applicants had nothing to gain by such disappearance but the interested parties and some members of the society who wanted the society dissolved had everything to gain by disappearance of the returns so that they could file their own returns in order to achieve the intended purpose.

Whenever an official file or records disappear for unexplained reasons the institution concerned ought to proceed very cautiously before taking any adverse step. That is what due diligence demands. Under **Article 47(1) of the Constitution of Kenya, 2010**, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. As provided under **subsection (2)** thereof, if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action the person has the right to be given reasons for the action.

In this case, the bona fide officials of the society who had been filing returns over the years until differences began to emerge in the society around 2009 or thereabout, had a legitimate expectation that the respondent and officers working under him would safely secure the records of the society presented to the respondent’s office and that no adverse action would be taken by the respondent against the officials or the society without advance reasons being given to them.

Referring to a party’s legitimate expectation, Lord Simon Brown in **R vs DEVON COUNTY COUNCIL ex parte P. BAKER, [1995] 1 ALL ER**, stated:

“...it is the interest rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision”.

Similarly, in **COUNCIL OF CIVIL SERVICE vs MINISTER FOR CIVIL SERVICE [1984] 3 ALL ER 935 at page 949**, Lord Diplock stated that for a legitimate expectation to be thwarted, the impugned decision:

“...must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn”.

Section 12 of the **Societies Act** stipulates the reasons for which the Registrar may cancel or suspend registration of a society. Before he can do so, in his discretion, he is required to give notice in the prescribed form to the society calling upon it to show cause within a period as specified in the notice why its registration should not be cancelled. It is only if the society fails to show cause to the satisfaction of the Registrar within the specified period that the Registrar may proceed to effect the suspension or cancellation of the society. The Registrar’s discretion has to be exercised reasonably and not arbitrarily or capriciously.

The exercise of that discretion must be done very cautiously where the circumstances of a particular matter raise some suspicion regarding the validity of the decision intended to be taken as was the case herein. See **REPUBLIC vs COMMISSIONER OF CO-OPERATIVES ex parte KIRINYAGA TEA GROWERS CO-OPERATIVE SAVINGS AND SOCIETY LIMITED [1999] 1 EA 245**. In that appeal the Court of Appeal criticized the Commissioner’s exercise of his discretion and termed it unreasonable in the circumstances of the case, particularly because he was aware of a pending dispute in the High Court.

There was no evidence that the Registrar called upon the ex parte applicants to show cause as stated hereinabove. It may be argued that ordinarily where a society has resolved to dissolve itself there is no need for such notice to show cause. However, each case must be handled according to its peculiar facts and circumstances. The ex parte applicants had brought to the attention of the respondent the machinations that were going on regarding the affairs of the society including disappearance of official records and that, in my view, ought to have raised a red flag when the respondent received the notice for dissolution of the society.

Article 36 of the **Constitution** states as follows:

“(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that –

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled.”

I am alive to the fact that these proceedings were instituted before the new constitution was promulgated. However, the matter was heard after the new constitution came into operation and this court cannot overlook the relevant principles cited therein. Unless the orders sought by the ex parte applicants are granted, the ex parte applicants’ right to freedom of association will have been denied. On the other hand, the interested parties will not suffer any prejudice if the orders sought are granted because they are members of another society and do not seem to have any interest in Atangwa Mulela Clan, the de-registered society.

In conclusion, it is important to point out that the respondent, though served with this application chose

not to participate in the proceedings at all. That may imply that the respondent has no interest in the matter or has no defence to the issues raised against him by the ex parte applicants.

For reasons as stated hereinabove, the order of certiorari sought by the ex parte applicants is granted as prayed. The respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23rd DAY OF June, 2011.

D. MUSINGA

JUDGE

In the Presence of:

Mr. Makau for the interested parties

Ms Qudros for Mr. Mulekyo for the ex parte applicants

Nazi – Court Clerk