



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Case 100 of 2009**

**MOHAMED LELA YUSUF & 2 OTHERS.....APPLICANTS**

**Versus**

**THE HON. THE ATTORNEY GENERAL & ANOTHER.....RESPONDENTS**

**RULING**

On 18/2/09 Mohammed Lela Yusuf, Aziz Marabaksha Juma and Bilali Kimathi Kandora filed the Notice of Motion of the same date pursuant to leave that had been granted on 13/2/09. In the said Notice of Motion they seek orders that the order of certiorari do issue to remove into the High Court to quash the Notice marked Ref no. Soc/13769 dated 5/2/08 and 30/1/09 by the Registrar of Societies and that an order of prohibition do issue prohibiting the Registrar of Societies from executing the notice Ref. No. Soc/13769 dated 5/2/08 and 30/1/09 by the Registrar of Societies. When granting leave on 13/2/09, the court had directed that leave so granted operates as stay for 30 days. On 20/4/09 the Interested parties Ahmed Iman ali, Hussein Ally, Abdi Mohammed, Ahmed M. Munyi, Ali Abdikalif, Abdul Kerol Mwangi, Abdullah Iddi and Issa Mohammed filed the Notice of Motion seeking orders that the interim order of stay issued on 3/2/09 be set aside, pending hearing and determination of the Notice of Motion dated 18/2/09; that the order of stay and leave granted to be ex parte Applicant on 13/2/09 to institute these Judicial Review proceedings be set aside or discharged and that the Chamber Summons dated 13/2/09 and Notice of Motion dated 18/2/09 be struck out. The grounds upon which this application is brought are found on the face of the application which are inter alia that:

- (1) The applicants had no locus standi under Section 2 and 2a of the Societies Act Cap. No. 8 Laws of Kenya to challenge the notices dated 5/2/08 and 30/1/09 which were addressed to officials of Pumwani Riyadh Mosque;
- (2) That the order of certiorari is statute barred having been filed outside 6 months.
- (3) An order of prohibition can not issue because none of the Respondents can enforce the order;
- (4) That the interim order that had been given by the court on 13/2/09 could not be extended as it had expired on 13/3/09 and elections were carried out on 15/3/09;
- (5) That the interests of the applicants are far out weighted by the other members of the society;
- (6) That in having the orders extended on 6/3/09 the applicants failed to disclose material facts that the orders had lapsed and elections had taken place and that these proceedings have been rendered an academic exercise;

(7) That the Notice of Motion dated 18/2/05 is incompetent because it is not properly intitled and is not brought in the name of the Republic.

Ahmed Iman Ali swore an affidavit in support of the Notice of Motion and stated that the 3<sup>rd</sup> to 8<sup>th</sup> Interested Parties/Applicants are officers of the said mosque having been elected on 15/3/09. That their constitution provides for elections every 2 years and no elections had taken place since 2005. There had been wrangles over leadership and the Registrar wrote the letters of 5/2/08 and 30/1/09 requiring the members to conduct elections. That the applicants are ordinary members of the society. That on 15/3/09, members of the society convened at Pumwani Social Hall for a special General Meeting where they elected new officials to replace Juma Abdalla and Maulidi Abdalla who had resigned.

The returns were filed with the Registrar on 16/3/09 and a notification of change was filed on 16/3/09. That the applicants forged the signatures of the society's account and a report was made to their bankers to freeze the Society's account but the bankers did not do so. That the former Chairman Mr. Mponda is bent on misappropriating the Society's monies. The Interested Parties justify the elections of 15/3/09 for the reason that there were no stay orders in place. That the management of the Society is in confusion and needs to be streamlined.

In reply, Yusuf Lela swore an affidavit dated 4/12/09 in which he alleges that the Interested Parties have concealed some material facts and are not entitled to any orders having flagrantly disobeyed the court's order of 13/2/09. That it is the Interested Parties who have paralysed operations of the mosque. That the Attorney General's representative had not opposed the stay orders and the Interested Parties have not purged their contempt in order to be availed the orders sought in this application.

I have now carefully considered the rival arguments in this application. What is not in dispute is that there are serious wrangles over leadership of the Pumwani Riyadh Mosque and there have been no elections since 2005. That is why the Registrar saw the need for elections and wrote the letters dated 5/2/08 and 30/1/09 requesting that elections be done. The parties before the court must be representing the rival factions.

Before I delve into the merits of the Notice of Motion, I do agree with the Interested Parties that the ex-parte applicant's Notice of Motion is incompetent as it is not properly intitled nor is it brought in the name of the Republic as required of Judicial Review applications. It has been repeatedly held by the courts since the case of **FARMERS BUS SERVICE LIMITED VS. TRANSPORT LICENSING APPEALS TRIBUNAL** (1959) E.A. 779 that all Judicial Review applications are brought in the name of the Republic. The above was buttressed in the case of **JOTHAM MULATI WELAMONDI VS. CHAIRMAN ECK (2002) 1 KLR 486**. I did adopt those decisions in **DANIEL MIGICHI NJOROGE VS. ATTORNEY GENERAL** HCC 386/06. The rationale behind the Republic being the Applicant is simple. That all prerogative writs, now Judicial Review Orders were issued in the name of the crown, now Republic. This is because Judicial Review is a mechanism set up by the state to check the excesses of its officers or public bodies in exercise of their administrative functions. The state steps in place of aggrieved person and brings the claim in its name against the Respondent. Whereas the Chamber Summons application seeking leave to commence Judicial review orders is in the name of the exparte applicant, when the Notice of Motion is filed, the Republic takes over and it is filed in the name of the Republic. An individual can not bring a Judicial Review application in his own name and if he does, the application is rendered incompetent and it is for striking out. This is because the ex-parte applicant lacks the capacity to bring the Application in their own names. The defect in the Notice of Motion can not be cured as there is no proper Applicant before the court and the Notice of Motion must be struck out.

Even before I consider whether or not there are merits in the application dated 20/11/09 brought by the Interested Parties, I think it is important to consider whether or not the Interested Parties could have possibly held elections on 15/3/09 and whether they can be entitled to any orders.

The stay order had been issued by this court on 13/2/09 to last for 30 days. The 30 days must have lapsed on 13/3/09. The Interested Parties contend that they conducted elections on 15/3/09 when the stay orders had lapsed. My question would be, since there were stay orders till 13/3/09 when did the Interested

Parties call or requisition for the meeting. I have seen the Constitution of the Society exhibited as AIA 1, Paragraph 8 provides for General Meetings.

As per the letter of 1/3/09 to the Registrar General what was held was a Special General meeting. Paragraph 8 (c) provides that a Special General Meeting may be allowed for any specific purpose by the committee and notice in writing of such meeting shall be sent to all members not less than 7 days before the date of such meeting. A notice of 7 days could not have been issued during the subsistence of the court order of stay. The orders lapsed on 13/3/09 and the Special General Meeting took place 2 days later. That can not be a Special General meeting envisaged under the Society's Constitution. If they issued any notice before the 13/3/09 the notice was in contempt of this court's order and the Interested Parties would not be entitled to any audience by this court. I have seen a notice of a Special General Meeting (AIA 6) sent to all members calling for a Special General Meeting on 15/3/09. However, in the affidavit of Ahmed Iman he refers to the resignation of Juma Abdalla the then Secretary having taken place on 3/3/09 and that the letter was submitted to the Registrar on 3/3/09. Unfortunately, the date on the Registrar's stamp is not legible. By 3/3/09 the court's order staying the Registrar's letters calling for elections was subsisting and therefore the letter AIA 6 would be in contempt of the court order as it relates to elections. In any event, if this letter was written on 3/3/09 calling for a Special General Meeting once the court issued the order of 13/2/09, the notice of the Special General Meeting was rendered ineffective and if a Special General Meeting was to be held, a fresh notice would have to issue it seems none was issued. The Special General Meeting is either contemptuous if held on 15/3/09 by the Interested Party of this court's order or irregular and conducted contrary to the Society's own Constitution and this court would not ratify an illegal or contemptuous act by giving the Interested Parties any orders.

The upshot would be that the substantive Notice of Motion is struck out for being incompetent but no orders are issued to the Interested Parties for the reasons considered above. However the court realizes the State of confusion reigning at the said Mosque and directs that each party bears their own costs and all parties should go back to the drawing board. 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.

Dated and delivered this 22<sup>nd</sup> day of May 2009.

**R.V.P. WENDO**

**JUDGE**

Present

Mr. Kibe – applicant

Muturi – Court clerk