



**REPUBLIC OF KENYA**

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

**Misc Case 636 of 2005**

**PETERLIS MWANDA ODUK & 2 OTHERS.....PLAINTIFF**

**Versus**

**REGISTRAR OF SOCIETIES & 3 OTHERS.....DEFENDANT**

**JUDGMENT**

This is an application for Judicial Review. The Ex-parte applicants Peterlis Mwanda Oduk, Hesbon Otieno and Pius Odhiambo Gura filed the Notice of Motion dated 23<sup>rd</sup> May 2005 against the Registrar of Societies seeking the following orders:

1. an order of certiorari do issue to quash the decision of the respondent dated 29<sup>th</sup> February 2005 confirming the Interested Parties as the officials of Musanda Holy Ghost Church of E. Africa.
2. An order of mandamus do issue compelling the respondent to effect the registration of the applicants as duly elected officials of Musanda Holy Ghost Church as per the returns filed by the applicants on 27<sup>th</sup> December 2004 or alternatively an order for mandamus compelling the Registrar of Societies to call for fresh elections to be held and supervised by independent representatives appointed by the Registrar.
3. That costs of the application be provided for.

The application was supported by a statutory statement dated 4<sup>th</sup> May 2005 and verifying affidavits sworn by Peterlis Mwanda, Hasborn Otieno and Pius Odhiambo Gura.

The application was opposed and Stephen Ganda swore an affidavit in opposition.

Briefly, the background to this dispute is that both the applicants and the respondents are members of the Holy Ghost Church of East Africa. On 19<sup>th</sup> December 2004, the society held an Annual General Meeting at Kisumu Stadium after about 17 years.

According to the 1<sup>st</sup> applicant Peterlis Oduk, about 3000 members attended the meeting. The former secretary general never read the minutes of previous meetings nor were statements of accounts rendered. As a result, disagreements arose regarding the conduct of the elections. The applicants and some members totalling about 3000 were locked out of the stadium and they went to lodge a complaint with the Officer Commanding Police Station (OCS) Kondele who went to the scene and advised each group to proceed with elections and lodge any complaints with Registrar of Societies.

They conducted their own elections outside the stadium whereby the applicants were elected as officials of the society and they filed their minutes and notification of change of officials with the Registrar on 22<sup>nd</sup> December 2004.

However on 3<sup>rd</sup> March 2005 the applicants found that the Registrar registered 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents as office bearers and the applicants lodged a complaint.

The Registrar wrote back indicating that he followed the advise of the OCS Kondele in reaching his decision and yet he never gave The applicants an opportunity to explain their case. It is the applicants case that the Registrar's decision was biased, he relied on extraneous matters and violated the Societies Act and the constitution and that the Registrar's decision was therefore prejudicial to the society for the society was deprived of duly elected officials to manage its affairs and that the officials, Interested Parties are now using their positions to harass some members.

It is the applicants further contention that the Registrars actions are unprocedural and ultra vires and the refusal to register the applicant as officials has perpetrated the leadership wrangles in the society.

In opposition, Stephen Ganda who describes himself as the secretary general of the society deposed that their Annual General Meeting was held on 19<sup>th</sup> December 2004 after the preparations were made. The supreme council who included the applicants had met on 14<sup>th</sup> November 2004 to agree on the modalities of the elections and it was agreed that only eligible members with National ID cards and members with annual subscription receipts for 2003 would vote; The DC Kisumu would be asked to provide security and a presiding officer; the Registrar would be contacted to provide an observer and that no financial report would be used at the annual general meeting. Upon the DC being approached for a presiding officer, he declined to offer one but advised them to get a neutral person and they got Rev Bishop James Andaro of Jerusalem Christian Homes to be the presiding officer. On 19<sup>th</sup> December 2004 members disagreed over authenticity of some persons who claimed to be members and yet their names did not appear in the register and they had no genuine subscription receipts and the presiding officer barred them from taking part in the elections. The applicants protested and moved out of the stadium and the presiding officer went ahead with the elections. Those who walked out then purported to hold elections outside the stadium and that it being outside the venue the elections were illegal.

According to the respondent, the elections conducted inside the stadium were the proper and lawful elections as the applicants had not renewed membership 1997 as per the society's register and their application therefore lacks merit.

I have considered the rival arguments, submissions by counsel and even the skeleton arguments filed by both counsel.

It is common ground that the Holy Ghost Church of E. Africa held its Annual General Meeting on 19<sup>th</sup> December 2004 at Moi Stadium Kisumu City.

This followed a notice from the Registrar of Societies dated 13<sup>th</sup> July 2004 asking the society to hold its Annual General Meeting as none had been held for the past 17 years and failure to do so would render the society deregistered.

It is also common ground that the said elections were marred by disagreements following the split into two groups with one group holding elections inside the stadium while the other stayed outside.

Both groups do agree to having sought the assistance of the OCS Kondele Police station, Kisumu to ensure law and order was maintained.

The OCS did make his report to the Registrar of Societies as to his observations on the ground. The report is dated 3<sup>rd</sup> February 2005. Although it is not a clear photo copy, what the court can decipher from it is that either faction claimed that the other had fake members but the Officer Commanding Police

Station (OCS) encouraged each group to proceed with the elections and lodge their complaints with the Registrar. However the presiding officer who had been inside the stadium claimed that elections were over as those in the stadium had already done them and the OCS then oversaw the dispersing of the crowds. The OCS concluded that the team that was inside the stadium and which had a returning officer should be seen as the one which carried out the proper elections. This observation by the OCS is what the Registrar in his letter dated 17<sup>th</sup> March 2005 addressed to Hesbon Otieno, had based his decision to Register the respondent's as the duly elected officials of the society. This decision of the Registrar is what is under attack in this application. The question is whether the Registrar failed to follow due process, considered extraneous matters and hence acted ultra vires his powers.

What is the scope of judicial review?

The Supreme Court Practice 1997 Vol 53/1 – 14/6 states

“The remedy of Judicial Review is concerned with resolving not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

The court in a Judicial Review application does not act as a Court of Appeal from the body concerned nor does it interfere in any way with the exercise of any power or discretion which has been conferred on that body unless the discretion has been exercised in a way which is not within that body's or officer's jurisdiction.

In the present case, there is no doubt that the two factions disagreed on the modalities of carrying out the elections. The OCS who was present claimed that each group claimed that the other had people who were not genuine members. Though the OCS told them to proceed, with elections it turned out that those in the stadium were said to have done their elections and had a presiding officer and were taken to be the group that did proper elections.

The Registrar did not however bother to find out from the group which was outside as to why they did not enter the stadium and take part in the elections or whether they locked out as alleged. The Registrar in making the decision did exercise his discretion by considering the decision of the OCS and I believe it was not an extraneous matter to do so, but he had to do so fairly. Failure to listen to both sides before making his decision that affects the society, is in my view, acting unfairly, in the circumstances and I do find that the Registrar did not exercise his discretion judiciously. In fact the way the Registrar made his decision to go by advice of OCS only escalated the wrangles in the Society. The whole process was flawed and the Registrar should not have acted selectively to have one group registered in leadership while the other was left out.

Those in the office could not be said to represent the interests of the whole membership. The Registrars decision breaches rules of National Justice by not hearing the applicants before he went ahead to register the respondents as officials.

In his submissions, Mr. Kajwang, counsel for the Respondents claimed that the applicants had failed to annex a copy of the order that is challenged or under attack and that order 53 Rule 7 was therefore not complied with. Mr. Kwengu directed the court to the letter dated 17<sup>th</sup> March 2005 in respect of Returns of Officials of Musanda Holy Ghost Church of E. African. I am satisfied that the decision that is challenged is annexed to the verifying affidavit (PMO 3) and Order 53 r 7 is therefore complied with and the application is properly before this court.

It was also Mr. Kajwang's submission that Prayer 3 of the Notice of Motion cannot be granted as it is inconsistent with prayer 2 in that the applicants carried out their own elections and the Registrar cannot be called upon to call other elections, when they claim that they conducted proper elections outside the

Stadium. Prayer 3 sought an order of mandamus compelling the Registrar to register the applicants as officials or alternatively an order of mandamus compelling the Registrar to call for fresh elections.

What is the scope and efficacy of an order of mandamus

**HALSBURYS LAWS OF ENGLAND 4<sup>TH</sup> ED VOL 1 para 69** states

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring them to do some particular thing therein specified which appertains to his or their office and is in the nature of a Public duty. Its purpose is to remedy the defects of justice accordingly, it will issue to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual”

The order of mandamus can therefore issue on a person who is bound to perform a certain duty. In the present case, it was the duty of the Registrar to Register the officials who were duly elected. He chose to register one group which in my view, I find to be irregular for the reasons I have given above. He should not have registered either of the groups before establishing how the elections were done by both factions.

The next question is whether it is the duty of the Registrar to call for fresh elections.

As evidenced by the letter dated 13<sup>th</sup> July 2004, from the Registrar of Societies, and para 8 of the society’s constitution, it is upto the society to call for elections. The above letter was advise to the society which had not held its annual general meeting for 17 years to do so. The registrar’s role is advisory as the Registrar’s authority is not derived from an Act of Parliament and an order of mandamus cannot therefore issue against him to call for fresh elections. It is upto the Society to decide on what to do in order to carry out fresh elections or face consequences of deregistration if it does not comply with the Societies Act. So, unless the society carries out fresh elections the Registrar has no officials to register and an order of mandamus cannot issue.

In sum I do find that the prayer for an order of certiorari is merited and I do hereby call up the decision of the Registrar dated 24<sup>th</sup> February 2005 confirming the interested parties as officials of the applicant Church be and is hereby brought up for purposes of being quashed and it is hereby quashed by order of certiorari.

I however find that the order of mandamus is not merited for reasons I have stated earlier in this judgment and that prayer is dismissed. I will order that each party bears their own costs.

Dated and delivered this 30<sup>th</sup> day of June 2006.

R.P.V. WENDO

JUDGE

Read in presence of Respondents

Mr. T.J. Kajwang

Mr. Mgala holding brief for Kwengu for applicants

Ojijo: Court Clerk

R.P.V. WENDO

JUDGE