

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 176 OF 2018

MOSES KANYORO.....1ST APPLICANT
MARY WANJIKU MWANGI.....2ND APPLICANT
SHARON ACHIENG.....3RD APPLICANT
JOB MULEE.....4TH APPLICANT
ROSE AGOLA.....5TH APPLICANT
BUXTON ABWASI.....6TH APPLICANT
KENNEDY BUNYASI.....7TH APPLICANT
WYCLIFFEE INDALU.....8TH APPLICANT
JAIRO WILLIS.....9TH APPLICANT

VERSUS

SOCIAL DEVELOPMENT OFFICER,
MAKADARA CONSTITUENCY.....1ST RESPONDENT
CAMP TOYOYO PROJECT MANAGEMENT COMMITTEE..2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The parties

1. The applicants are constituents of Makadara Constituency in Nairobi County and Members of Camp Toyoyo Management Committee.
2. The first Respondent is an administrative office under the Ministry of EAC, Labour and Social Protection in charge of Makadara Constituency.
3. The second Respondent is a community based organization formed with the objective of management of Camp Toyoyo in Jericho, Makadara Constituency.

The factual Matrix

4. The applicant states that on 27th April 2018, the first Respondent clandestinely convened a meeting of the second Respondent and unprocedurally removed and replaced the applicants as its Committee Members.
5. The applicant states that the first Respondent's action were unprocedural and against the laid down rules and the Constitution of the second Respondent, and, that, the said meeting was only attended by three people, namely, a one Jairo Willis, the treasurer, Wycliffe Indalu, the assistant secretary and Sharon Achieng, the Sub-county Social Development Officer.
6. The applicant also states that no notice of the meeting was issued and the rest of the applicants, though they were committee members, they were not invited for the meeting, not did the first Respondent produce minutes of said meeting or the resolution removing the applicants

from office. Further, the applicants' state the Secretary to the Committee was never informed or invited to the said meeting, and, that, the applicants' tenure of office had not yet lapsed.

Legal foundation of the application

7. The applicants state that the said meeting contravened the second Respondent's Constitution because it lacked the required quorum of five committee members. They also state that they were never informed the reasons for their removal nor were they afforded a chance to be heard. In addition, they state that the first Respondent acted *ultra vires* in causing the said changes, and, its actions violate their constitutional right to a fair administrative action.

The prayers sought

8. The applicants pray for the following orders:-

- a. An order of Certiorari to quash the first Respondent's decision made on the 27th day of April 2018 removing them as committee members of the second Respondent and replacing them with new members.
- b. An order of Prohibition to stop the Respondents, their agents and servants from implementing and/or proceeding with the said decision made on 27th day of April removing and or replace them as committee members of the second Respondent.
- c. That this honourable court be pleased to give further orders and directions as it may deem fit and just to grant.
- d. That the costs of this application be provided for.

Second respondent's Replying Affidavit

9. Sylvia Kiiru, the second Respondent's Secretary swore the Replying Affidavit dated 25th September 2018 stating that the first Respondent has no role in the internal management affairs of the second Respondent, and, that, the election of its officials are governed its Constitution.

10. She further averred that no dispute was referred to the first Respondent to warrant its interference, hence, the allegation that the first Respondent convened a meeting of the second Respondent is baseless and unjustified. She averred that the only mode of assuming office as an official of the second Respondent is by appointment by a stakeholder of the second Respondent every election cycle of two years and any other purported appointment or accession to office as alleged by the applicant is not recognized by the Constitution of the second Respondent.

First and third respondents' Replying Affidavit

11. Julie A. Omolo, the Sub-County Social Development Officer, Makadara Sub-County swore two Replying Affidavits, both dated 12th September 2018, and, both filed on 18th September 2018. The only difference between the affidavits is that one is entitled "1st and 3rd Respondent's Replying Affidavit" while the second is "entitled Replying Affidavit."

12. She deposed that the State Department for Social Protection is mandated to register, coordinate and mobilize community groups, and, that, the office of the Director, Social Development is responsible for dispute resolution emanating from activities of community groups. She averred that the second Respondent is registered as a Community Based Organization under the Ministry of Labour, Social Security and Services, and, due its weak Constitution, as of 27th June 2016, the Sub-County Social Development Officer was receiving complaints on issues revolving around mismanagement of the Project Committee, Change of Account signatories without the approval of Sub-County Social Developments Office and an imminent lapse of tenure of some officials as at 16th November 2017.

13. She also averred that due the change of account signatories without the approval of the Sub-County Social Development Office, the account operation was stopped until the Sub-County Social Development Officer addressed the conflict amicably, thus crippling the Organizations' activities. She stated that the conflict was not resolved because the tenure of the officials expired on 16th November 2017 as per their certificate and needed to have an election to elect new officials. She further deposed that that the National Government Constituency Development Fund, which is mandated to administer the activities of the second Respondent called for elections as per its Constitution, and on 20th February 2017, a meeting was convened whose resolutions were *inter alia* that the *ex-official* member was to be removed as signatory to the Equity Bank, and, that, the CDF fund Manager agreed to do a letter withdrawing as a mandatory signatory, and, that, a new account opened to help in payment of January salaries for stadium staff in conformity with the Constitution.

14. In addition, she averred that following the resolutions, election of new officials was to be the first order of business to revive the second Respondent's activities, and, that, during the meeting held on 6th April 2018, three members tabled their resignation letters, that, is, Moses Macharia Kanyoro, Kennedy Simiyu Bunyasi and Mary Wanjiku Mwangi who are the first, second and seventh applicants in these proceedings. She added that all the members were asked to table their nomination letters by 13th April 2018 since their total membership of nine had reduced significantly.

15. M/S Amolo further averred that by a letter dated 9th April 2018, the Sub County Social Development Officer informed the Fund Manager of the intended way forward and meeting for election once the various stakeholders had handed in their nominees. She also averred that on the same day, the fund Manager withdrew himself as a mandatory signatory to the second Respondent's account and as an *ex official* and requested the same to be effected on the Community Based Organization Constitution with immediate effect.

16. Further, she averred that upon the receipt of all the Nomination letters on 11th April 2018, the Sub County Social Development Officer subsequently instructed the fund manager to inform all the nominees of a meeting for 27th April 2018 vide a letter dated 13th April 2018, and, that, the elections were conducted in accordance with the laid down procedure.

Determination

17. Upon considering the facts presented by the parties, it is evident that a pertinent question arises, that is, whether this is a civil dispute disguised as a Judicial Review application. Unfortunately, none of the lawyers thought of addressing this issue, yet it clearly flows from the facts presented in this case. This being a valid legal point, it would be a failure on my part if I do not pronounce myself on it.

18. It is common ground that the *ex parte* applicants seek Judicial Review remedies. It follows that the rules governing grant of Judicial Review orders must apply. To establish whether the core dispute presented in this case falls within the scope of judicial review jurisdiction, I find it necessary to briefly summarize the core arguments presented by the applicants and the response of the Respondents. A reading of the *ex parte* applicants' pleadings shows that their case stands on the following arguments, namely, that the alleged meeting was convened clandestinely and without notice, that the secretary never attended the meeting and that the applicants' tenure had not lapsed. The other arguments raised flow from these facts.

19. The second Respondent in support of the applicants' case maintains that no dispute was referred to the first Respondent, hence, the allegation that the first Respondent convened a meeting of the second Respondent is baseless and unjustified. The second Respondent also maintains that the only mode of assuming office as an official of the second Respondent is by appointment by a stakeholder of the second Respondent after every two years and any other purported appointment or accession to office as alleged by the first Respondent is not recognized by the Constitution of the second Respondent.

20. The first and third Respondents' argument is that the first Respondent received complaints relating to mismanagement of the second Respondent, among them alleged change of bank signatories. They also maintained that the applicants' tenure of office had lapsed and at least three members resigned. It was their position that there was stakeholder engagement.

21. In support of its position, the first and third Respondents annexed a letter written by the second Respondent's Assistant Secretary raising complaints against the second Respondent's Committee. Among the complaints was an allegation that the second Respondent's Bank signatories had been changed. The letter sought the intervention of the first Respondent to remove the person who had been added as a bank signatory and also to find that the manager was guilty of misconduct.

22. Also annexed to the first and third Respondents' Replying affidavit is a letter addressed to Equity Bank requesting the second Respondent's account to be frozen. In addition, there is a letter from the Deputy County Commissioner, Makadara Sub County confirming that the term of second Respondent's Project Management Committee had lapsed. Also annexed are resignation letters by the first, seventh and second applicants and also letters from various stakeholders presenting their nominees for election to the Committee only to mention but some.

23. A reading of the above summary of the factual allegations by the parties shows that this judicial review application is premised on contested issues of fact. It is basic to law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions.^[1] This position has been upheld in numerous decisions of our superior courts. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*^[2] it was held:-

“55. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

24. Judicial review looks into the legality of the dispute not contested matters of evidence. The version presented by the first and third Respondent and the supporting documents puts into question the *ex parte* applicants' version. To reconcile the diametrically opposed positions, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

25. It follows that the order(s) sought in this application amount to inviting this court to determine contested facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. This case falls totally outside the province of Judicial Review. It is simply a misconceived shortcut designed to obtain orders in an otherwise civil dispute.

26. Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue, which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. This exposition of the law was aptly stated in *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another*^[3] in the following words:-

“That determination necessarily requires that oral and/or documentary evidence be adduced ... In the absence of such evidence, it would be an exercise in futility for this court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a court exercising judicial review jurisdiction under sections 8 and 9 of the Law Reform Act Cap 26 Laws of

Kenya. Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making the said declarations. Here, not only are there factual disagreements, which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings, but there is insufficient material upon which the applicant's case can be sustained." (Emphasis added)

27. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*^[4] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.^[5]

28. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

29. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As stated above, this is not a Judicial Review case but a civil dispute, hence, the Judicial Review orders sought cannot issue.

30. Notwithstanding my findings above, I will proceed to examine whether the applicants have demonstrated any grounds for the court to allow the judicial review orders sought. The applicants' counsel submitted that the purported removal of the applicants as members of the second Respondents was unprocedural, unfair and unlawful and contrary to the society's Constitution. He also submitted that the applicants were never informed of the reasons for their removal in violation of the principles of natural justice. To buttress his argument, he cited *Republic v Minister of State for Immigration and Registration of Persons*^[6] in which the court cited *Onyango Oloo v Attorney General*^[7] which emphasised the duty to act fairly.

31. Counsel also argued that the first Respondent abused its powers in that section 29 (1) (b) of the Societies Act^[8] does not envisage the involvement of the social development officer in election of the official of a society. It was his submission that the first Respondent bestowed upon himself powers not bestowed upon him by the law. In support of this proposition, counsel cited *Republic v Minister of State for Immigration and Registration* and *Republic v Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A JV Bhatt & Company*^[9] for the holding that a statutory body can only do what it is expressly or by necessary implication authorized by statute.

32. On whether the prayers sought should be allowed, counsel cited *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Limited*^[10] which held that judicial review intervention is limited to cases where the decision was arrived at arbitrarily or *mala fides* or as a result of unwarranted adherence to a fixed principle or in order to further ulterior or improper purpose.

33. The second Respondent's counsel submitted that the second Respondent's operations are regulated by the Societies Act^[11] and its Constitution. He cited section 17 of the Act and argued that no notice was issued as required by the said section. He also argued that the Members of the Committee were not nominated from various stakeholder groups as required. Citing section 18 of the Society's Act,^[12] he and argued that the involvement of the first Respondent is premature and in contravention of the act. He relied on *Githunguri Farmers' Cooperative Society Limited v County Council of Kiambu & Kenya Dairy Board*^[13] for the holding that a decision made *ultra vires* is likely to be set aside.

34. The first and second Respondent's counsel submitted that the proceedings calling for the meeting and elections were procedurally done in conformity with the constitution. He submitted that the applicants' tenure of office as shown in their certificates had lapsed, while three members had communicated their resignation. Counsel argued that the orders sought are not warranted and cited *Republic v National Employment Authority*^[14] for the holding that judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. Counsel argued that judicial Review orders are discretionary and the court can withhold them where the requisite grounds exist^[15] and argued that there is no basis for granting the orders sought.

35. The *ex parte* applicants' counsel and counsel for the second Respondent have invoked the Societies Act^[16] in support of their submissions which is misguided and legally frail. This is because, the second Respondent is a Community Based Organization registered under the Ministry of Culture and Social Services. It is not registered under the Societies Act.^[17] It is not a Society or an association within the meaning of the said act. The Certificate of Registration is annexed to the *ex parte* applicant Affidavit and also the first and second Respondents Replying affidavit attest to this. There is a clear distinction in law between an association registered under the Societies Act^[18] and a Community Based Organization.

36. The second Respondent being a Community Based Organization, and having been registered as such, it is not a society within the meaning of the Societies Act.^[19] It follows that the applicant's counsels' arguments based on the said act collapses.

37. It is also common ground that the first Respondent, has the mandate to regulate control and monitor the activities of Community Based Organizations, which is a function falling under its mandate, as the responsible department under the parent Ministry. There is evidence that complaints were presented to the first Respondent and it took the required steps. It is also stated that the tenure of the applicants had lapsed. In addition, it has stated that some committee members had resigned. This was not rebutted. There are documents showing that the nominations were conducted by the various stakeholders as required. As stated above, the assessment of facts requires oral evidence, but, from the material before me, I find no evidence of illegality to warrant the orders sought.

38. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, an improper change of bank signatories has been alleged and complaints were raised touching on the management of the second Respondent. It is also stated that the tenure of the committee members had lapsed. This court has to be careful so as not to replace its views with the views of the officials who have first-hand information on the problems afflicting the second Respondent.

39. This court cannot by a judicial fiat issue an order that has the effect imposing officials to a Community Based Organization who are said to have been removed validly following complaints. Before this court is not an election petition case where the court considers the legality of an election but a judicial review application that must be determined within the limited scope of judicial review jurisdiction.

40. The applicants apply for an order of *certiorari*. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. I have investigated the impugned decision. No material has been presented before me to show that it is tainted with illegality or procedural impropriety.

41. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the first Respondents acted illegally or in excess of their powers.

42. But more important is the fact that prohibition looks into the future. The applicants were removed from office. An order of prohibition is misguided since even if it is issued, it cannot serve any purpose since it cannot stop what has already happened.

43. In view of my analysis herein above, I find and hold that the applicant has not established any grounds for this court to grant the Judicial Review Orders sought. The upshot is that the *ex parte* applicants' application dated 9th May 2018 is hereby dismissed with costs to the first and third Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 17th day of January 2020.

John M. Mativo

Judge.

[1] Counsel cited *Republic vs Land Registrar Taita Taveta District & Another* {2015} eKLR

[2] {2015} e KLR.

[3] {2014} eKLR

[4] {2016} e KLR.

[5] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[6]{2013} e KLR.

[7] {1986-1989} EA 456.

[8] Cap 108, Laws of Kenya.

[9] Nairobi HCMA No. 285 of 2006.

[10] {2018} e KLR.

[11] Cap 108, Laws of Kenya.

[12] Cap 108, Laws of Kenya.

[13] {2015} e KLR.

[14] JR App No. 171 of 2018.

[15] Citing *Nweton Gikaru Githiomi & Another v AG/Public Trustee Nairobi* HC JR No. 472 of 2014, {2014} e KLR.

[16] Cap 108, Laws of Kenya.

[17] Ibid.

[18] Ibid.

[19] Ibid.