



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISC CIVIL APPLICATION (JR) NO. 24 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF SOCIETIES.....RESPONDENT**

**AND**

**1. CHARLES O ODUK**

**2. GABRIEL ONDIFF**

**3. ALFRED O OWAKO**

**4. THOMAS KOYO**

**5. MARTHA N. OMONDI**

**6. RICHARD ONYANGO**

**7. DANCAN O GWARA**

**8. OCHOLA OLONDE.....INTERESTED PARTIES**

**TOM MBOYA MEMORIAL HALL DEVELOPMENT**

**ASSOCIATION REGISTERED TRUSTEE.....EXPARTE APPLICANTS**

**JUDGMENT**

**INTRODUCTION**

1. The ex-parte applicants are the official members of the Tom Mboya Memorial Hall Development Association, whereas the Interested Parties are the alleged individuals (officials listed by the Respondent herein).

2. The applicants moved this court by way of a Notice of Motion dated 23/5/2014 upon leave being granted on 21/5/2014 to file judicial review proceedings. The said leave was to operate as stay of the Registrar's decision effecting the registration of the new purported officials of the society. The supporting affidavits were sworn by Charles Opicho Nyiwuor the Secretary and James A. Akal.

3. It is their contention that the Interested Parties did not follow Article 7(5) of the Association and that the officials were never given a one month notice as provided by section 18(1) of the Societies Act Cap 108. The letter written by the Registrar of Societies dated 4/4/2014 was an *ultra vires* action to direct the officials to convene a meeting and was in breach of the cardinal principle of natural Justice.

**The application**

4. The applicants sought for the following specific orders:

*(a) That this Hon. Court be pleased to issue an order of certiorari to remove to this Hon. Court for purposes of quashing the*

decision of the Registrar of Societies, in registering and/or causing to be registered, the Interested Parties as officials of Tom Mboya Memorial Hall Development Association, as contained in the Notification dated 7.5.2014.

(b) That the costs of this application be provided for.

### **The affidavits**

5. The Secretary to the applicant Mr. Charles Oricho Nyare averred that there was no meeting at all called for the election of persons shown in the Registrar of Societies letter dated 7.5.2014. This was a conspiracy and interference in the management of the Association. There had been a complaint made to the Registrar of Societies on the management of the association. A special general meeting had not been held to address a serious issue.

6. A further supporting affidavit by James A. Akal was sworn on 19/5/2014 who averred that the registration of the new set of officials was organized by MP Nyalı Constituency. The association was to start a university college; a medical centre and a comprehensive insurance cover for all members of the Luo locational welfares in Mombasa. An interim committee was formed to oversee the implementation, which comprised Charles Orwa as the interim chairman and his as the secretary. However, the projects did not get funds and later he received a letter on 7/5/2014 from the Deputy Registrar confirming registration of new officials.

7. The grounds upon which the relief was sought was that the Registrar of Societies acted *ultra vires* and in great violation of the *audi alteram partem* rule.

### **Responses**

#### **Respondent's replying affidavits**

8. The respondent's Deputy Registrar and Senior State counsel Joseph Onyango swore an affidavit and averred that the office received various allegations in form of letters on mismanagement of the society. It can only intervene as mandated by law and on 3/3/2014 they asked the society to convene a special general meeting within 14 days to conduct elections. There was no response and on 4/4/2014 the interim officials were instructed to convene a special general meeting within 14 days from receipt of the letters. The applicants were issued with the said letters in person but failed to act.

9. The interim officials issued a notice convening a special general meeting and attached minutes and the register of the said meeting whereby new officials were elected and were recognized by a confirmation letter dated 7.5.2014.

10. He averred that the office acted in good faith in discharging their statutory mandate and this application was an abuse of the court process and asked it to be dismissed with costs.

11. The interested party filed Notice of Motion application opposing the application dated 23/5/2014 and the order staying the Interested Parties from taking office and asked the court to set it aside. They further denied the averments in the affidavit by James A. Akal who was not a member of the society. Further, that the respondent invoked Section 18(1) and (2) to use its power to ask for a meeting where there was a dispute.

12. Augustine Ogolla swore an affidavit on 3/7/2014 as a member and he averred that elections were duly held after due notice was issued and James Akal had even acknowledged the same in an affidavit filed in Mombasa HCC No. 40 of 2014.

13. Further, that the applicants had been in office since 2007 yet their constitutional tenure per Article 7.2 of the Association's Constitution had lapsed. The three officials who had been issued with certificate of trustee were not members of the Association.

14. He contended, upon advice from his advocate, that the Registrar acted with his discretion and in the interest of all the parties the ex-parte applicants had concealed some material facts by stating falsehoods, which had prejudiced the rights of the Interested Parties.

### **Further affidavits**

15. Further supplementary affidavits were sworn by Paul Onje the member of County Assembly (MCA), Mombasa County Junda Ward denying the allegation that he attended a meeting held at Methodist Hall on 2/5/2014 as stated by Augustine Ogolla in his replying affidavit.

16. Kennedy Michael Lumbe denied the allegation that officials of the association held a meeting on 2/5/2014 although some officials had on 29/4/2014 visited his office at Community Hall and paid for use of the Hall.

17. Also Charles Oricho Nyawoor, the secretary of the ex-parte applicant, swore an affidavit. The deponent Augustine Ogolla had averred that the election took place on 1.5.2014 and the officials confirmed on 2/5/2014 yet his annexures of invitation and minutes read that the election was conducted on 2/5/2014 and 5/5/2014. These alleged minutes and resolutions were never lodged with the Registrar of Societies.

18. Further affidavits showed the list of attendees was duplicated; same names appeared twice but had different signatures.

### **Submissions**

#### **Ex-parte Applicant's submissions**

19. The ex-parte applicant in submitting framed the following issues.

(i) Whether there was a successfully convened meeting as indicated by the Respondent in his Notification dated 7/5/2014 where the Interested Parties were elected.

(ii) Whether the manner in which the Respondent handled the affairs of Tom Mboya Memorial Hall Development Association amounts to breach of natural justice as deemed by the ex-parte applicants.

(iii) Whether in giving a 21 days Notice and going ahead to direct for the holding of election, the respondent acted ultra vires his powers.

(iv) Whether there is a hand of Hon. Awiti M.P Nyali constituency in the purported registration of the Interested Parties.

(v) Whether this application has been opposed by the Interested Parties.

20. They urged there was no meeting that was convened, thus the registration of the Interested Parties was not properly done. There were no interim officials as by the Registrar of societies Mr. Joseph Onyango. The minutes annexed by Augustine Ogolla for the interested party had an error purportedly which showed the meeting to have been held on 2.5.14 yet the first minute disclosed it took place on 5/5/2014. The minutes annexed by Mr Onyango for the respondent is different from the one annexed by the Interested Parties.

21. In addition, Mr. Kennedy Lumbe, the in-charge Methodist Hall, denied a meeting took place at their hall. One of the members purportedly who had attended the meeting Mr. Kelvin Wasonga had died almost 5 years ago. No meeting was held in accordance with Article 7(5) of the Association.

22. Their right to being heard was denied since the 4 letters in question were sent to Hon. Awiti. Section 18 (1) provides that One (1) month notice be given to the parties but only 21 days was issued as per the letter dated 3/3/2014. Section 18(2) gives the Registrar powers to cancel registration of a society in the event of failure to comply. Section (3) gives the aggrieved party a right to appeal against a cancellation of registration of society. The Registrar had acted ultra vires by directing the interim officials to conduct an extra ordinary general meeting and conduct an election.

23. The court was referred to a commentary on Peter Kaluma, *Judicial Review Law, procedure and practice* when it is stated that “a notice is a condition precedent to fair hearing. Any hearing undertaken without due notice for the affected party violated the requirements of natural justice and it was null and void and rendered itself to being quashed”.

24. Also the same position was referred in the Court of Appeal decision in **Commissioner of lands versus Kunste Hotel, Kenya National Examination Council v. Republic ex-parte Geoffrey Gathenjo Njoroge & 9 others.**

25. It was their submission that Augustine Ogolla was not a party in the matter and he could therefore not swear an affidavit. Finally, they urged the court to allow the application.

#### **Respondent’s submissions**

26. The respondent opposed the application and urged the court to rely in its replying affidavit. They urged that the applicants had not established any prima facie case to warrant the court to grant the said orders. The Deputy Registrar had properly appointed the Interested Parties after the society carried out elections and they were duly elected.

27. This application was meant to frustrate the effort of the Society members who had the interest of the society. This appointment of the Interested Parties was done in good faith and within the statutory mandate as provided in the Societies Act. They relied in **Republic v. Judicial Service Commission & Ex-parte Joyce Manyasi (2012) eKLR** where the court stated as follows:

“Judicial Review is about the decision making process and not the merits of the decision. The purpose of judicial review is to ensure that public bodies and officials perform their functions in good faith, without malice and in accordance with the law. Judicial review remedies are not meant to curtail public bodies from exercising their statutory powers”.

28. Counsel further urged that the application was bad in law and an abuse of the court process since the petitioner is asking for the respondent to be prevented from carrying their mandate. Counsel urged that the application be dismissed with costs.

#### **Interested Parties’ submissions**

29. They framed the following issues for the court to determine:-

(a) Whether elections occurred on the 2/5/2014 and if they did, were they justified in view of the provisions of Article 7(5) of the Society’s Constitution

(b) Whether the ex-parte applicants given an opportunity to be heard in relation to the events leading to the meeting of 2/5/2014 and in relations to the decision of the Registrar of Societies.

(c) Was the Registrar of Societies justified in calling for elections of the society and recognizing them in the manner he did as per the letter dated 7/5/2014.

(d) Did the Registrar of Societies act *ultra vires* his powers in calling for and recognizing the results of the elections held by the Interested Parties.

(e) In view of the above, is the *ex-parte* applicants' claim tenable should it be dismissed with costs.

30. They further urged that article 7.5 of the Association's Constitution provided as follows:-

*"A special general meeting may also be requisitioned for a specific purpose by order in writing to the secretary of not less than 10 members and such meeting shall be held within 21 days of the date of the receipt of the requisition."*

The *ex-parte* applicant was issued with a notice and the elections were conducted pursuant to the said Article. The applicants were given an opportunity to be heard when they received the Registrar's letters dated 3/3/2014 and 4/4/2014.

31. Further the election of members of the executive committee was to be held at an interval of 5 years as per Article 4.2 of its Constitution. This prompted the Registrar to invite the members to convene a meeting and hold elections. Section 18(2) of the Societies Act gives the Registrar power to cancel the registration of a society if within a period of one month the members have not resolved the dispute in the management of the Society.

32. Counsel referred to *Association Provincial Picture Houses Ltd v. Wednesbury corporation Ltd* [1947] 2 ALL ER 680 contended that the Registrar's decision was not unreasonable.

33. The counsel also relied on the Black's Law Dictionary, which defined the word *ultra- vires* to mean "beyond the powers" and urged that the Registrars acted within his powers. Section 18(2) of the Societies Act uses the word 'may' which gives the Registrar the discretion to either cancel or issue the directive that he gave.

#### **Issues for determination**

34. The court has referred to the applications, the responses and the submissions and has framed the following issues for determination:

(a) Whether the Registrar acted *ultra vires* the Societies Act in directing the Association to hold elections in which the Interested Parties were alleged duly elected, and

(b) If so, whether the reliefs sought would be granted.

#### **Determination**

35. The Tom Mboya Memorial Hall Development Association is a society governed by the societies Act, Cap 108 Laws of Kenya. This Association was established as a non-political, non-sectarian, voluntary association of members as per its constitution of 2013 after being granted leave to amend it. The then cabinet secretary in the Ministry of Land, Housing and Urban Development, granted a certificate of incorporation to James Obara Kings, Charles Oricho and James Odira Akiro as the trustees. However as per the letter dated 7.5.2014 the Deputy Registrar of Societies named the Interested Parties as the officials after allegedly being duly elected. The *ex-parte* applicant averred that there was no election that was conducted and thus an order of Certiorari be issued to quash the decision of the Registrar of Societies.

36. It is now well established that the purpose of Judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court as was held in the English case of Chief constable of the *North Wales Police v. Evans* [1982] ALL ER 1155 which decision was followed in *Commissioner of Lands v Kunste Hotel Limited* [1997] eKLR when the court stated as follows:-

*"Judicial Review is concerned not with Private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority which he has been subjected."*

37. Further, as held in *Association Provincial Picture Houses Ltd v. Wednesbury corporation Ltd* [1947] 2 ALL ER 680:

*"The power of the court to interfere in each case is not as an appellate authority to overrule a decision of the local authority, but as a judicial authority which is concerned and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which parliament has confided in them".*

38. The Interested Parties alleged that they held a general meeting and even annexed documents. This is a Judicial Review court, which does not devolve into the merits on how the general elections were conducted. The court will not look at the documents and annexures since it shall be looking at the evidence instead of the decision making process.

39. In the *Municipal Council of Mombasa v. Republic and Umoja Consultants* Civil Appeal No. 185 of 2001 it was held:-

**“Judicial Review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence in support of the decision. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it is a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.**

40. Section 18 of the Societies Act provides as below:-

**18. Disputes as to officers**

**(1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may by order in writing, require the Society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the constitution of proceeding for the settlement of such dispute.**

**(2) If an order subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.**

**(3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.**

41. It is the court’s view that the Societies Act Section 18 is clear that before the Registrar can take a decision under the provision he must hear the parties involved. This is quiet apart from the inquiry outside the scope of judicial review whether the said general election of officials of the Association were duly held as directed by the Registrar.

**Conclusion**

42. The court finds that the Respondent herein being a public body acted *ultra vires* as he did not accord the applicants the right to be heard before taking the decision in its letter of 4/4/2014 directing that elections to be held. The earlier letter of 3/3/2014 calling on the ex parte applicants to show cause why the Registrar should not declare a dispute and require the ex parte applicants to convene an extraordinary meeting for purposes of elections was not shown to have been served on the ex parte applicants.

43. It would appear that in giving a Notice to Show cause by letter of 3/3/2014, the Registrar was labouring under the influence of the area Member of Parliament as to amount to a decision taken with ulterior motives already taken before the notice to show cause is given. The Registrar had already formed an opinion that “*it is not possible to recognize either group, i.e. yourselves and those calling themselves interim office*” and therefore no meaningful opportunity to be heard was given to the ex parte applicant to be heard on the matter before the decision to call for elections was made. The letter of 3/3/2014 calling for show cause is in the following terms:

**“OFFICE OF THE ATTORNEY-GENERAL**

**&**

**DEPARTMENT OF JUSTICE**

**3<sup>rd</sup> March, 2014**

SOC/28824

The Secretary

Tom Mboya Memorial Hall Development Association

P.O Box 95139 – 80104

**MOMBASA**

Dear Sir,

**RE: SOCIETIES ACT (CAP. 108) AND SOC/28824**

**TOM MBOYA MEMORIAL HALL DEVELOPMENT**

**ASSOCIATION**

Further to your returns of 6<sup>th</sup> January, 2014 and other returns dated 5<sup>th</sup> January 2014 and complaints received from corporate and general members and supported by a letter from your area M.P as Patron, (all copies enclosed) it is not possible to recognize either group, i.e yourselves and those calling themselves interim office.

In that regard, this office requires you to respond within the next 21 days and give reason why the Registrar should not declare a dispute and require you to properly convene at an extra ordinary General meeting and conduct an all inclusive elections.

If this office does not receive your response within the stipulated period, we will authorize the interim office to convene such a meeting and conduct fresh elections which then will be recognized by this office.

Yours faithfully

**JOSEPH ONYANGO**

**DEPUTY REGISTRAR OF SOCIETIES**

CC: Interim Secretary General

(James A. Akal

Tom Mboya Memorial Hall Development Association

P.O. Box 95139 – 80104

**MOMBASA**

44. The Area Member of Parliament's said letter is as follows:

**“Hon. A. Awiti. H. Bollo, MP**

Nyali Constituency

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**21<sup>st</sup> February, 2014**

M/S. THE REGISTRAR OF SOCIETIES

P.O BOX 40112 – 00100

**NAIROBI**

Dear

**RE: - REGISTRATION OF NEW OFFICE BEARERS**

Reference to our previous discussions concerning the above matter.

I do introduce the Interim Secretary General for Tom Mboya Memorial Hall Mr. James Okal to you. He is requesting your good office to help them call for election of new office bearers for the society, Tom Mboya Memorial Hall.

As their area Member of Parliament kindly request you to register the newly elected officials. They want to start a Tom Mboya University College, Tom Mboya Medical Centre and Comprehensive Insurance for the members of the Welfare but this cannot be achieved without an election which has not been done since 2007.

Attach is the list of Tom Mboya Memorial Hall Members.

Any assistance will be highly appreciated,

Yours faithfully,

**Hon. Awiti Bollo, MP**

**Nyali Constituency**

45. Clearly, the Registrar was improperly motivated by the Area MP's letter to direct fresh elections at which, as alleged, the preferred persons would be appointed without any semblance of an election. It cannot be said in the words of the Court in **North Wales Police v. Evans**, supra, that the ex parte applicants were given a fair treatment in the matter and it is obvious that the Registrar in giving effect to the calls for assistance by the Area Member of Parliament for fresh elections the Registrar in pretending to call for resolution of the dispute by calling for elections had taken into account irrelevant consideration of the wishes of the Member of Parliament notwithstanding his status as the Association's patron.

46. In addition, without getting into the merits of the decision of the Respondent, it would appear to the court on a balance of probabilities that the elections directed to be held by the Respondent's letter of 4/4/2014 were not held and there could have been no proper appointment of the Interested Parties as officers of the Association within the meaning of section 18 of the Societies Act.

**Orders**

47. Accordingly, for the reasons set out above, the court makes the following orders:

1. The judicial review application for Certiorari dated 23/5/2014 is granted as prayed.
2. There shall be no order as to costs.

*Order accordingly*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**E.K. OGOLA**

**JUDGE**

**APPEARANCES:**

M/S Odongo B.O. & Co. Advocates for the Ex-parte Applicant.

Mr. Ernest Kioko, State Counsel for the Respondent.

M/S Ameli Inyangu & Partners for the Interested Parties.