

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 11 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 27, 32, 36, 165 AND 232 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 11 OF THE SOCIETIES ACT, CHAPTER 108, LAWS OF KENYA (REVISED)

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES, 2013

BETWEEN

Nadya Atieno Ogwonyo.....1st Petitioner

Emmanuel Kevongo Chasia.....2nd Petitioner

Versus

Registrar of Societies.....1st Respondent

The Hon. Attorney General.....2nd Respondent

JUDGEMENT

The petitioners case is that sometimes in May 2016, desiring to register a church, they instructed their advocate to do a name search at the Registrar of Societies, but the advocate was informed that there was a freeze in registration of churches "until further notice," hence they were unable to lodge their documents. It is also averred that the 'further notice' is indefinite and that written requests for details dated 18th May 2016 and 10th August 2016 elicited no response.

Subsequently, the petitioners received a communication dated 22nd August 2016 stating that the second Respondent had issued a moratorium against registration of religious organizations pending gazetting of regulations to govern the sector. The moratorium has been in place since 2014.

As a consequence thereof, the petitioners aver that they have been barred from registering their membership as a church, hence they cannot undertake charitable activities, hold crusades, associate or congregate to worship or carry out religious activities, hence the decision is illegal, unconstitutional, null and void.

The petition is opposed. Ann N. Mwangi, a Deputy Registrar General of the second Respondent avers that in the weeks preceding the issuance of the moratorium, there were numerous religious institutions and societies which were seen to take advantage of their congregation through extortion whilst there were cases of increased radicalization in some places of worship. Hence, it is within the constitutional mandate of the second Respondent to promote, protect and uphold the rule of law and defend public interest. Thus, the decision was informed by the need for more regulatory measures to govern religious institutions since

the provisions in the societies act were deemed inadequate.

She also avers that the office of the second Respondent invited leaders from various Religious institutions for a consultative meeting on 14th November 2014 and in the said meeting the second Respondent explained that it was only interested in safeguarding enjoyment of rights not limitation of freedom of worship; that on 18th December 2014, the first Respondent wrote a letter addressed to representatives of various religious institutions who had attended the above meeting highlighting the rules that the leaders had adhered to and which had to be complied with by the religious bodies within 60 days from the date of the letter and submit their opinions through memoranda.

Pursuant thereto, several religious institutions submitted their memoranda which was analyzed by the first Respondent's organizing committee for further directions during a workshop held at the Kenya School of Government on 31st March 2015. However, different faith based organizations differed on certain provisions of the proposed regulations opining that they would be over regulated by the government and this hampered the exercise of passing and implementing the regulations. The petitioners were notified of this fact when they sought registration, but they proceeded to file this suit.

Advocates submissions

Counsel for the petitioners submitted that the Respondents have created a vacuum by suspending a law and the reasons offered are not sufficient to keep the law in abeyance and argued that even in instances where the law is found to be unconstitutional, there are instances where it has been allowed to operate. [1] I doubt the truth and veracity of this proposition because to me, an unconstitutional law is not a law. A law which violates the constitution is void. Period. I do not see how a law can be found to be unconstitutional and still allowed to operate. Decisions flowing from such a law would obviously be illegal.

Respondents submissions

Counsel submitted that the petition is premature and cited section 15 (2) of the Societies Act[2] reproduced later in this judgement also submitted that the petitioner did not exhaust the suitable statutory laid down mechanism. Counsel also cited the decision in *Roshara Ebrahim vs Ashleys Kenya Ltd & 3 Others*[3] in which the court citing *Gabriel Mutava & 2 Others vs Managing Director Kenya Ports Authority & Another*[4] held that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil and criminal law.

Also cited is the principle of constitutional avoidance enunciated by the U.S . Supreme court in *Alwander vs. Tennessee Valley Authority*[5]and that there was no proper constitutional question before the court and reiterated that the decision complained of is within the constitutional and statutory mandate of the Attorney General[6] and that in interpreting the constitution, the court is enjoined to promote its purposes, values and principles and good governance and to up hold the principles laid down in article 10. Further, freezing the registration has not hindered the rights under article 36 and in any event, section 11 of the act provides for instances when the registrar can refuse registration.

Counsel submitted that under section 5 (2) of the Office of Attorney General Act,[7] the AG is required to provide efficient and professional legal services to the government and the public for the purposes of facilitating, promoting and monitoring the rule of law, and that the moratorium in question was necessitated by the numerous and increased cases of abuse by religious institutions and societies wherein the church leaders are seen to take advantage of their congregation and radicalization in places of worship which cases are incompatible with peace, welfare and good order, hence the Respondents exercised their statutory powers under section 11 and section 5 (1) (f) & (2) of the Office of Attorney General Act.[8]

It is also submitted that in issuing the moratorium and appreciating the importance of the matter and the constitutional obligation on public participation enshrined in article 10, the respondents engaged the stakeholders on discussions to come up with a regulative frame work to govern religious institutions which would have resulted in lifting the moratorium.

Issues for determination

Firstly, ***whether the petitioner ought to have exhausted the statutory laid down mechanism.*** Section of the Societies Act^[9] which is the applicable legislation provides that:-

15. *Appeal from order of refusal, cancellation or suspension*

(1) Any society aggrieved by the Registrar's refusal to register it, or by the cancellation or suspension of its registration under section 12 may—

(b) in the case of any other society, appeal to the Minister within thirty days of such refusal, cancellation or suspension and the Minister shall consider, determine and communicate his decision on the appeal within ninety days of the appeal.

(2) A society aggrieved by the decision of the Minister under subsection (1)(b) may appeal to the High Court within thirty days of the decision.

[1] Act No. 49 of 2012

[1] Ibid

[1] Supra

The above provision is clear. The petitioner did not utilize the above mechanism before approaching this court. This raises a fundamental question, that is whether or not this petition is properly before this court and whether or not the court can in view of the above clear provisions of the law assume jurisdiction and entertain it.

A court's jurisdiction flows from either the Constitution or legislation or judicial pronouncements. The Supreme Court of Kenya,^[10] discussed the issue of jurisdiction in the following manner; " *Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.*" Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[11]

In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-^[12]

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

Special regard needs to be paid the following extract from ***Words and Phrases Legally defined***^[13] at page 1 are pertinent:-

".....By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of

a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. Indeed, in the case of the *Speaker of the National Assembly vs Karume*.[\[14\]](#) the Court stated:-

“...Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”

The court of appeal[\[15\]](#) discussing the same subject reiterated as follows:-

“.....This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.” Speaker of the National Assembly v. Karume (supra)

In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others*[\[16\]](#) it was held that :-

“.....However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

The court of appeal in *Samson Chembe Vuko vs Nelson Kilumo & 2 others*[\[17\]](#) also adopted the above reasoning while this court as late as 12th May 2017 in *Jennifer Shamalla vs The Law Society of Kenya & Others*[\[18\]](#) cited the above authorities with approval and arrived at the same conclusion.

In my view, the petitioner ought to have utilized the mechanism provided under the above provisions and only approach the High court by way of appeal. I find backing in the above cited provisions of the law, the cited cases and also in the decision rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others*[\[19\]](#) where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others*[\[20\]](#) where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned. Consequently, I find that the preliminary objection succeeds.

Accordingly, on this ground alone, I am inclined to, as I hereby do, to strike out this petition for being improperly before the court.

The second issue is ***whether the petitioner is entitled to the reliefs sought.*** The functions of the Attorney General are stipulated in section 5 of the Office of the Attorney General Act[\[21\]](#) which provides that (1) "in addition to the functions of the Attorney-General under Article 156 of the constitution, the Attorney-General shall be responsible for (f) reviewing and overseeing legal matters pertaining to the registration

of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire purchase and coat of arms;"

Subsection (2) enjoins the Attorney General in the execution of the functions conferred by the Constitution and the Act, to provide efficient and professional legal services to the Government and the public for the purpose of facilitating, promoting and monitoring the rule of law, the protection of human rights and democracy.

My understanding of the facts as enumerated above is that the first Respondent has not refused to register the petitioners society. Concerns were raised about the conduct of some religious organizations and a task force was formed to look into matters of this nature including the petitioners issue and asks that the petitioner awaits the outcome of the task force.

The prayers sought include an order of *certiorari and declaration seeking to pronounce the decision in question as nul and void*. These are judicial review remedies and the rules governing grant of judicial review do apply. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' 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.

Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramourcy of the law.

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.

Broadly, in order to succeed, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

In the present case, the first Respondent states clearly it has not refused to act. He has given what in my view is a credible reason. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality.[\[22\]](#)

The reason offered by the first Respondent has not been shown to be unlawful or malicious. The court cannot stop a lawful process. It can only intervene if it is shown to be an abuse of the process, illegal or baseless or if it is prompted by ulterior motives or any such other motives other than furtherance of the mandate of the first Respondent and public interest. The applicant has not alleged or proved malice or illegal process. The alleged breach of Rights has not been proved at all since the circumstances speak for themselves.

Also, it has not been shown that the first Respondent acted illegally. The Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the first Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters.

An administrative decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent.

The grant of the orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the petitioner has not satisfied the threshold for this court to grant orders sought. The effect is that the orders sought are hereby refused and this petition is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated at **Nairobi** this **13th** day of **July**, 2017

John M. Mativo

Judge

[1] Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others {2014}eKLR

[2] Cap 108, Laws of Kenya

[3] {2016} eKLR

[4] {2016} eKLR

[5] 297 U.S. 288, 347 {1936}

[6] See Article 156 (4) & (6) of the constitution and section 5 (1) (f) of the Attorney General Act

[7] Act No. 49 of 2012

[8] Ibid

[9] Supra

[10] In the matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported) at paragraphs 29 and 30

[11] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[12] 19 U.S. 264 (1821)

[13] **volume 3: 1-N**

[14] {2008} 1KLR 425

[15] In the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another {2015} eKLR**

[16] {2008} 3 KLR (ER) 296).

[17] {2016} eKLR

[\[18\]](#) Pet no. 85 of 2016

[\[19\]](#) {2015}eKLR

[\[20\]](#) {2011}eKLR

[\[21\]](#)Supra

[\[22\]](#) Pastoli vs Kabale District Local Government Council and Others {2008} 2EA 300