



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 287 OF 2011 (JR)

IN THE MATTER OF: AN APPLICATION BY BISHOP ABSOLOM NDUNGO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE SOCIETIES ACT, (CHAPTER 108 LAWS OF KENYA) AND THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT (CHAPTER 151 LAWS OF KENYA)

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....1ST RESPONDENT

THE REGISTRAR GENERAL (OFFICE OF THE ATTORNEY GENERAL)..... 2ND RESPONDENT

EX PARTE

ABSOLOM NDUNGO

JUDGEMENT

1. By a Notice of Motion dated 28th November 2011 filed in this Court on the same day, the *ex parte* Applicant herein, **Absolom Ndungo**, seeks the following orders:
 - a. **An order of certiorari removing to this Court the Kenya Gazette Notice No. 13802 OF 4th November 2011 in so far as the same relates to the applicant for purposes of it being quashed.**
 - b. **An order of prohibition directed at the Respondents restraining them by themselves, agents, servants or otherwise howsoever from unlawfully interfering with the applicant’s licence to celebrate marriages.**
 - c. **An order of mandamus directed at the Respondents compelling them to reinstate the**

applicant in their records for licenced ministers.

d. That costs of this application be provided for.

2. The Motion is grounded upon the Statement filed on 14th November 2011 and the verifying affidavit sworn by the *ex parte* applicant on 14th November 2011.
3. According to the applicant, he is the Vice-Chairman of the Kenya Redeemed Church in accordance with records held by the Registrar of Societies and also a Bishop of the Kenya Redeemed Church overseeing the Western Zone and a Senior Pastor of the Kenya Redeemed Church Kayole. According to him, there is currently a dispute over his position as Vice-Chairman of the Kenya Redeemed Church which is before the courts and which dispute the Registrar of Societies was fully aware of. Despite this, the Respondents on the 4th November 2011, caused a notification to be published in the Kenya Gazette to the effect that the applicant's licence to celebrate marriages under the ***African Christian Marriage and Divorce Act*** (hereinafter referred to as the Act) had been cancelled, an act that was driven by bias and made without taking into consideration matters that ought to have been taken into consideration while taking into consideration matters that ought not to have been taken into consideration and thereby arriving at a wrong decision.
4. In his supplementary affidavit sworn on 23rd February 2012, the applicant avers that he has served in Kenya Redeemed Church since 1973 and has never received any warning letter or been reprimanded. According to him contrary to the constitution of the church there was no notice of the Annual General Meeting and hence the same was contrived to defeat justice and circumvent the due process in light of the pending court cases. To him the Registrar in breach of his obligations has taken sides in the disputes and accepted fraudulent returns while well aware of the pending disputes. Since the correct procedure has not been followed in removing him from the church he is still a member thereof and the church has no legal power to cancel licences to celebrate marriages which power is statutorily donated to the relevant registrar who cannot exercise his discretion at the behest of a church leader. It is his contention that the licence to celebrate marriages is given to an individual Minister and not to a church. It is his position that the registrar cancelled his licence without finding any fault or breach on his part but due to malicious pressure from **Allan Njeru** yet the said **Allan Njeru** and the entire membership of the Kenya Redeemed Church are subject to the provisions of the ***Societies Act*** under which the Church is registered.
5. In reply to the application, the 2nd Respondent filed affidavits sworn by **Bishop Allan Njeru**. According to him, he is the founder of Kenya Redeemed Church way back in 1971 before which he was a member of Full Gospel Church of Kenya. On realising that he had a call from God to preach he broke away from Full Gospel Church of Kenya and registered the said Redeemed Church in 1972. The applicant, according to him joined the Church in 1984 and was anointed and ordained as a pastor. He deposed that he personally applied for the applicant's licence with **Pastor Andrew Murage** who is the church's treasurer so as to be celebrating marriages from the office of the Registrar General. According to him the Registrar General does not issue licences to individuals but after recommendation of respective churches and conversely cannot cancel the same without recommendation by the concerned church hence the donor of the licence is the church on whose recommendations the Registrar acts. According to him, on 8th April 2011 the applicant was excommunicated from the church in accordance with the Leadership & Governance of the Rules of the church which decision was communicated to him hence he ceased to be a Bishop, member or even pastor in the church. This action was taken after sensing that the applicant was up to no good and he was asked to return the properties of the church. Instead of doing so, he started filing cases and on realising that the applicant was not ready to go peacefully the Registrar was notified to revoke or cancel the applicant's licence pursuant to which the Registrar issued a Gazette Notice of 4th November 2011. According to the deponent, under both the ***Societies Act*** and the ***African Christian Marriage & Divorce Act*** (hereinafter referred to as the Act) the court does not have the jurisdiction on judicial review hence the entire proceedings are an abuse of the court process, frivolous and vexatious. By granting the orders sought, it is contended that the court will be compelling the church to take back the applicant who is abusing the process by instituting several cases.

6. It is further deposed that the applicant was expelled from the church pursuant to the resolution of the Annual General Meeting on 22nd December 2011 after which the church filed its annual returns indicating the Vice Chairman as **John Njenga Kamau**. Since the applicant 'a name no longer appears in the records of the Registrar as a member he should not force himself on the church.
7. I have considered the submissions filed on behalf of the parties herein.
8. It is clear that in this application what is challenged is the decision of the 2nd Respondent, the Registrar General vide a Gazette Notice No. 13802 of 4th November 2011 by which the applicant's licence to celebrate marriages was cancelled pursuant to section 6(1) of the ***African Christian Marriage and Divorce Act***, Cap 151.
9. That the action of the Registrar was an administrative action cannot be doubted. Article 47 of the Constitution however provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

10. The broad grounds, though not exhaustive, on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“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, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

11. A reading of section 6(1) of the Act does not seem to enumerate the circumstances under which a licence may be cancelled. However, under Article 47 aforesaid the applicant was entitled to reasons for the said cancellation. Although the 1st Respondent has the discretion to cancel licences of ministers that discretion must be exercised bona fide and ought not to be abused. As was held in **Karina vs. Transport Licensing Board Nairobi HCMCA No. 1214 of 2004 [2004] 2 KLR 406**, where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair.
12. Where Parliament clearly vests the exercise of discretion on a person or authority it would be wrong in the Court's view to intervene in the merits of the decision. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the

- power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
13. In **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003 Warsame, J** (as he then was) held that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters and that High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers.
14. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:
- “Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.”**
15. It is therefore my view that even where the law does not expressly enjoin the concerned authority to give reasons for the exercise of discretion, it ought to give reasons so as to satisfy the requirement that it is acting *bona fide* and not abusing the statutory power or discretion conferred upon it.
16. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:
- “The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law.....In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts..... The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority..... An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law.”**
17. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, the Court held:
- “Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law..... It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”**
18. In this case the applicant contends that the 1st Respondent considered extraneous matters in cancelling his licence. The 1st Respondent has not disclosed to the Court what circumstances it considered in taking the said action. Since no such reasons are forthcoming this Court can only conclude that there were no reasons for the exercise of the discretion to cancel the applicant’s

licence.

19. Whereas the 2nd respondent has attempted to provide a nexus between the grant of licence to the membership of the church in question, as I held in a ruling delivered in this matter on 26th April, 2013, a reading of section 7 of the Act does not seem to support that line of argument. That section does not state that the minister licenced thereunder must be attached to that particular church. However, the said provision seems to state that for one to be licenced one must first and foremost be a minister since the section provides for licensing of “any minister”. The word “minister” is however, not defined although “licensed minister” is. ***Black’s Law Dictionary***, 9th Edition at page 1086 defines “minister” at the relevant part as “a person acting under another’s authority; an agent”. In our scenario the use of the word “minister” may mean an agent of the Minister rather than a church official. That the ex parte applicant was such a Minister cannot be doubted otherwise the 1st Respondent would not have licensed him to preside over marriages.
20. The *ex parte* applicant’s position is that his degazettement was undertaken on ulterior and malicious motives engineered by the 2nd respondent rather than at the discretion of the 1st Respondent. Without the 1st Respondent giving reasons as to why it cancelled the applicant’s licence, this court is not in a position to find on what basis the licence was cancelled. From the position taken by the 2nd Respondent, the applicant’s contention seems to be correct.
21. The 2nd respondent on the other hand does not seem to seriously contest the applicant’s application to quash the Applicant’s licence. What the 2nd Respondent seems concerned about is the return of the applicant to the church. That however, is not the matter before me since this application does not challenge the applicant’s excommunication. In any case, this is not the right forum for the determination of such an issue since judicial review reliefs cannot be granted against the 2nd Respondent. As was held in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005:**

“The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, *prohibition* or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

22. In the result, I find merit in the applicant’s application.

ORDER

23. Consequently, the orders that commend themselves to me and which I hereby grant are:

- a. **an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the Kenya Gazette Notice No. 13802 of 4th November 2011 in so far as the same relates to the applicant and the same is hereby quashed.**
- b. **An order of mandamus is hereby issued directed at the 1st Respondent compelling him to reinstate the applicant in the records of licensed ministers.**
- c. **In light of what I have said about the persons or entities against whom judicial review orders do issue the prayers sought against the 2nd Respondent are declined.**
- d. **The costs of this application are awarded to the applicant to be borne by the 1st Respondent.**

Dated at Nairobi this day 12th of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Marete for Mr. Ingutya for the applicant

Mr. Bett for Mr Wambugu Kariuki for 2nd Respondent