



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIRIOBI
JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION
MISCELLANEOUS APPLICATION NO. 318 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR OF SOCIETIESRESPONDENT

AND

BENEDICT HONGO ODHIAMBO.....1ST INTERESTED PARTY

JULIUS GIKONYO KANYUIRA.....2ND INTERESTED PARTY

FRANCIS KIBE WAGACHA.....3RD INTERESTED PARTY

EDWIN GRAHAM ODALO4TH INTERESTED PARTY

JAMES MBURU NUTHU.....5TH INTERESTED PARTY

PETER MWARAGANIA.....6TH INTERESTED PARTY

PETER MUTHEE KIHUYU.....7TH INTERESTED PARTY

COLLINS OCHIENG8TH INTERESTED PARTY

DAVID MAMBO MAIRU.....9TH INTERESTED PARTY

JOSEPH NDUATI NGOBU.....10 INTERESTED PARTY

BEDAN MWANGI MIRINGO11TH INTERESTED PARTY

BENEDICT HONGO ODHIAMBO,

JULIUS GIKONYO KANYUIRA AND

FRANCIS KIBE WAGACHA (SUED AS THE OFFICIALS OF

GITHU ZIMA SOCIETY).....12TH INTERESTED PARTY

EX PARTE APPLICANTS: FRANCIS KIRIMA M'IKINYUA, JOHN WAINAINA NDUNGU AND PETER KIBE MUTIGA (SUING AS THE OFFICIALS OF ZIMMAN SETTLEMENT SCHEME SOCIETY)

JUDGEMENT

1. By a Motion on Notice dated 10th January, 2013, the *ex parte* applicants herein, **Francis Kirima M'ikinyua, John Wainaina Ndungu and Peter Kibe Mutiga**, seek the following orders:
 1. **That this Honorable Court be pleased to issue an order of Certiorari to bring before this court and quash the decision of the Respondent date 2nd September, 2013 purporting to appoint a committee comprising of the 1st to the 11th Respondents to manage the affairs of the Applicant.**
 2. **That this Honorable Court be pleased to issue an order of mandamus compelling the Respondent to confirm that the legal officials of the Applicant are Francis Kirima Mikunyua, John Wainaina Ndungu, Peter Kibe Mutiga, George Oluoch Omondi, Joseph Musyoka Wambua, Kennedy Ochieng Ondoro and Anthony Maina Waihuni pending the expiry of the term of the current officials and or the conducting of an all inclusive general election by Zimman Scheme Settlement Society.**
 3. **That the costs be provided for.**

Ex Parte Applicant's Case

2. The application is supported by a supporting affidavit sworn by **Francis Kirima M'ikunyua**, who deposed that he was the chairman of the applicant Zimman Settlement Scheme Society (hereinafter referred to as the Society).
3. According to the deponent, in or around the year 2008 he was elected as the Chairman of the Applicant herein and was again re elected in the year 2011 and has therefore held the position of the chairman of the Society since then.
4. Following the election in the year 2011 they filed their annual returns on the 30th December, 2011 confirming the Officials of the Applicant as indicated in the said returns together with notification of change of officers dated 30th December, 2011 copies of which were exhibited. According to the deponent, Article 46(b) of the Applicant's Constitution provided that the elected Officials were entitled to serve for three years and were eligible for re election and consequently the term of the current officials is expiring on the 30th December, 2014 which position was acknowledged by the Respondent by way of letter dated 28th February, 2012 in which the Respondent confirmed that they had received the returns filed by the Applicant and further confirmed that as per their records the secretary of the Applicant is **Brian Kibe Mutiga**, the Treasurer is **George O Oluoch** while the deponent was the chairman.
5. However the 1st, 2nd and 3rd Interested Parties filed HCCC No. 133 of 2012 challenging the outcome of the said election wherein the Court ordered that no election of the Society was to be carried out during the pendency of the said suit and Judicial Review Cause No 145 of 2011. This suit was on the 9th July, 2013 withdrawn wholly on the grounds that they were no longer Officials of the Applicant and following the said withdrawal and the express acknowledgment by the Interested Parties that they were not officials of the Applicant there is no dispute on the leadership and the management of the Applicant to warrant the meddling and or intervention of the Respondent.
6. Despite that position the Respondent by way of letter dated 2nd September, 2013 purported to constitute a committee comprising of and headed by the same 1st, 2nd and 3rd Interested Parties to manage the affairs of the Applicant including the mandate to call for elections within sixty days yet the said Interested Parties were not members of the Applicant and have also expressly stated that they were not officials of the Applicant. It was further deposed that the 3rd Interested Party, who has been expelled from the Society due to gross misconduct, has a pending Criminal Case Number 483 of 2011 at the Chief Magistrates Court in Kiambu in which the Applicant herein is

- the complainant and it is simply untenable and inconceivable that the Respondent can now purport to appoint him into a committee to manage the affairs of the Applicant while the said Criminal Case is still pending in court.
7. It is averred that the Applicant herein was formed and registered to take care of the welfare and interest of over 400 squatters living on all that parcel of land known as Land Reference Number 57/26 (Nairobi Block 123/1 – 279) while the 12th Interested Party is a rival society which was also formed and registered to take care of the interest and welfare of another group of squatter living on the same parcel of land hence it is clear that the Applicant and the 12th Interested Party are two independent and rival societies representing the interest of different squatters within the same land.
 8. The deponent's position was that the Applicant and the 12 Interested Party had formed a joint management team in coalition which was agreed on by the Officials of the two Societies to facilitate the smooth management of the Settlement Scheme but the said coalition was dissolved by mutual consent on the 16th January, 2012 to ensure independence and avoid and prospect of one society interfering in the internal affairs of the other and the notice of dissolution served on the Respondent. Pursuant thereto, on 8th January, 2013 the Respondent issued an official confirmation of the name of the officials of the two societies and by another letter dated 22nd March, 2013 the Respondent withdrew its earlier letter and confirmed that the 1st, 2nd and 3rd Interested Parties as the Officials of the 12th Interested party and that decision is the subject of High Court Misc. Application Number 309 of 2013 which is pending before this court and in which the Respondent and the 1st Interested party have all sworn affidavits confirming that the 1st, 2nd and 3rd Interested Parties are the officials of the 12th Interested Party.
 9. By way of letter 22nd August, 2013 the Respondents summoned the Officials of the Applicant herein for a meeting at his office on the 28th August, 2013 at 10.30 am which letter was however received on the 27th August, 2013 and the applicants immediately instructed their Advocates to request the Respondent to reschedule the meeting because the notice was too short and all the officials of the Applicant and their said advocate had pre arranged engagements which the advocate did. However, the Respondent dismissed the request for another date and instead went ahead to appoint a committee comprising of that all the Interested Parties herein and mandated them to run the affairs of the Applicant and organize for an election within 60 days a decision which is contended was made based on emotions, whims and in temper and which decision was unreasonable as it effectively appointed the members and officials of a rival society to manage the affairs of the Applicant.
 10. It is contended that none of the Officials of the Applicant was present at the meeting and therefore a decision having far reaching consequences on the affairs and management of the Applicant was made without its officials being given an opportunity to be heard contrary to all the known rules of natural justice and further that the committee was appointed in utter breach of the Constitution of the applicant and the decision was therefore draconian, dictatorial and autocratic. According to the applicants the said decision made on the 2nd September, 2013 was unconstitutional as it violated the Applicant's legitimate expectation to fair administrative action. To them, the Respondent herein, and particularly **Mr. Joseph Onyango**, is a Public Servant and must exercise the discretion of his office fairly, legally and in accordance with the rules of natural justice and since the Applicant is a registered society with a constitution, all decisions on its management and appointment of officials must comply with he said Constitution and should not be based on the whims and fiat of a bureaucrat. Further, land being an emotive issue, any decision touching on the management of squatters must not just be fair but must be seen to be fair. The applicants aver that the said decision has caused a lot of confusion in the management of the Applicant and could, like previously, degenerate into violence and chaos.
 11. On behalf of the applicants it was submitted that the decision of the Registrar dated 2nd September, 2013 in as far as it purports to appoint a committee to manage the affairs of a society with a constitution and duly elected officials was made without jurisdiction and is therefore ultra vires as there is no provision under the **Societies Act** which allows the Registrar to appoint officials, either on an interim or permanent basis, for society with duly elected officials. It is therefore submitted that the Registrar's decision was illegal and amounted to administrative coup.

- In support of this submission the applicants relied on **Republic vs. Attorney General ex parte Biwott [2002] KLR 685.**
12. It is further submitted that the Respondent knew from the returns filed with it who were the officials of the applicant and for how long they were to be in the office hence there was no dispute to warrant his intervention and reliance is placed on **Transworth Conveyors Limited & Another vs. Kenya Revenue Authority & 3 Others [2008] KLR 718.**
 13. It is submitted that the Respondent's decision does not meet the clear constitutional threshold contained in Article 47(1) of the Constitution and should therefore be reviewed by being quashed.
 14. In declining to grant the adjournment sought on behalf of the applicants it was submitted that the same amounted to unfair hearing. Apart from that objections were raised on the participation of the interested parties' in the said meeting yet they were not members which objections the Respondent failed or refused to consider and proceeded to give his decision. In support of this submission the applicant relied on **Ismail S. Mboya vs. Registrar of Societies [2004] eKLR.**
 15. It was submitted that by appointing the 4th interested party as the secretary to organise for the election of the applicant, yet the 4th interested party had been charged with a criminal case with several counts of misusing the applicant's documents and in which the applicant is complainant the said decision was unreasonable.

Respondent's Case

16. In response to the application the Respondent filed a replying affidavit sworn by **Joseph L. Onyango**, a Deputy Registrar General and a senior principal State Counsel in charge of Societies on 12th March, 2014.
17. According to him, the Applicant's subject society was first registered by the Registrar of societies on 2nd December 2003 as Zimman Resettlement Scheme, which Society changed its name to Zimman Settlement Scheme on 15th December 2008. The applicants herein were selected in office on 17th October 2008 for a period of three years as stipulated in the society's constitution and ceased to be officials of the society after their term of office expired on or about 15th December 2011.
18. According to the deponent, since the expiry of the applicants' tenure of office attempts have been made to hold elections thereafter but this has yielded presentation of different conflicting returns being filed which situation brought about confusion and leadership wrangles resulting in the registrar receiving incessant allegations and counter allegations amongst the society's members about the office bearing and management of the society.
19. In his view, even though the Registrar of Societies does not interfere in the management of the societies, he however intervenes upon receiving notification from concerned members and the said dispute must be a contravention of the society's constitution. As a result of the said confusion, it was deposed the Registrar vide a letter dated 22nd August, 2013 invited all affected stakeholders to a joint consultative meeting to be held in his office located at Sheria House on the 28th August, 2013 at 10.00 am. However in an attempt to frustrate the efforts of the Respondent, the Applicants herein, who are mere busy bodies, neglected and/or deliberately refused to attend the said meeting thus waiving their right to be heard as required under the rules of natural justice.
20. Subsequently after wide consultation between the Registrar and the society's members who attended the said meeting at the Registrar's chambers on the 28th August, 2013 a joint committee was constituted with a mandate to make arrangements for an Extra Ordinary General Meeting within 60 days at which an all exclusive elections would then be conducted and on the 2nd September, 2013 the Registrar copied a letter to all the concerned parties informing them of the appointment of the joint-committee.
21. According to the deponent, an order of certiorari cannot issue as prayed for because the office of Registrar acted in good faith while discharging his statutory mandate to bring order and for the benefit of the society in question. In the same vein an order of the Mandamus cannot issue and should not issue since the applicants are in office illegally and as such the court cannot enforce an illegality.
22. It was therefore the Respondent's case that this application is abused of the Court process, without merit and a waste of the courts time, and he **Determination**

23. I have considered the foregoing.

24. The broad grounds 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.... 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.”

25. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law. See **R vs. Barnet London Borough Council Ex Parte Nilish Shah [1983] 1 ALL ER 226 at 240**.

26. In this case, it is the Respondent's contention that there is confusion and leadership wrangles within the society and that it was this state of affairs which led to the impugned decision. If that was the position one would have expected the Respondent to act pursuant to the provisions of section 18 of the ***Societies Act***, Cap 108 Laws of Kenya (hereinafter referred to as the Act).

27. Section 18 of the ***Societies Act***, Cap 108 Laws of Kenya provides as follows:

(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 institution of proceedings for the settlement of such dispute.

(2) If an order under 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.

28. It is clear that there is no express power conferred on the Respondent under the said provision that empowers him to appoint a committee to manage the affairs of a society and the Respondent has

- not pinpointed any other provision which empowers him to do so. Without any such powers, it is clear that the Respondent purported to exercise a power not expressly bestowed upon him by the law and hence exceeded his mandate under the said Act. In other words the Respondent acted *ultra vires* his powers and that rendered his action an illegality.
29. Apart from that it is alleged that the Respondent appointed members of a rival society to manage affairs of the applicant society. By a letter dated 8th January, 2013 the respondent confirmed that **Francis Kirima M'ikunyua, Peter Kibe Mutiga and George Oluoch Omondi** were the Chairman, Secretary and Treasurer respectively of the Society. It is contended which contention is not seriously controverted that the 1st, 2nd and 3rd interested parties were in fact officials of a rival society and that the 4th interested party was facing criminal charges in respect of the offences allegedly committed against the Society. In **Republic vs. Attorney General & Another Ex parte Waswa & 2 Others [2005] 1 KLR 280**, the Court held that bias and unreasonableness have been recognised as grounds which stand alone in assisting the Courts to deal with the challenged decisions. In that case it was held that the de-registration of the applicants and the registration of main rivals within two days was indicative of both bias and unreasonableness on the part of the decision maker and that the failure to give reasons for what was patently lack of even-handedness on the part of the decision maker did constitute procedural impropriety. In addition where there is certainly evidence of bad faith on the part of the decision maker the Court would not in cases where bad faith is proven to exist in influencing a decision, hesitate to take up this as a valid ground of argument.
30. In my view to appoint persons whose interests are adverse to those of a Society to manage the Society is early irrational and smacks of bad faith on the part of the Registrar of Societies hence warrants the Court in interfering with such action. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. 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**.
31. Having considered the instant application, I have no doubt that the impugned decision was not only illegal but was also irrational.
32. It follows that the Notice of Motion dated 10th January, 2013 is merited and succeeds.

Order

33. Consequently, the orders which commend themselves to me and which I hereby grant are as follows:
1. **An order of Certiorari to bring before this court the decision of the Respondent dated 2nd September, 2013 purporting to appoint a committee comprising of the 1st to the 11th interested parties to manage the affairs of the Applicant for the purposes of being quashed which decision is hereby quashed.**
 2. **An order of mandamus compelling the Respondent to confirm that the legal officials of the Applicant are Francis Kirima Mikunyua, John Wainaina Ndungu, Peter Kibe Mutiga, George Oluoch Omondi, Joseph Musyoka Wambua, Kennedy Ochieng Ondoro and Anthony Maina Waihuni pending the expiry of the term of the current officials and or the conducting of an all-inclusive general election by Zimman Scheme Settlement Society.**
 3. **That the Respondent will bear the applicant's costs of these proceedings**

Dated at Nairobi this day 12th of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kioko for the Respondent

Cc Patricia