



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 138 of 2010**

**IN THE MATTER OF: AN APPLICATION BY REVERENDS; DAVID MULEI MBUVI, SAMSON BETT, ZACHARIA CHIRCHIR, PETER KIPKETER MARU, STEPHEN MWENDWA KINGANGI, SOLOMON KIPTANUI CHESIBOI, JACKSON KIMENYE NGOVE, JACKSON TIMONA MUOKA, STANLEY CHUMBA, BENSON MUANGE MWANGANGI, JONATHAN ROTICH, ABRAHAM TARUS, DAVID TUM AND ZACHARIA CHERUIYOT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE REGISTRAR GENERAL AND SENIOR DEPUTY REGISTRAR GENERAL**

**AND**

**IN THE MATTER OF: THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT (CAP.151)**

**AND**

**IN THE MATTER OF: THE REGISTRAR OF TITLES**

**AND**

**IN THE MATTER OF: THE KENYA GAZETTE NOTICE NO.2877 OF 2010**

**BETWEEN**

**REV.DAVID MULEI MBUVI,  
REV.SAMSON BETT,  
REV.ZACHARIA CHIRCHIR,  
REV.PETER KIPKETER MARU,  
REV.STEPHEN MWENDWA KINGANGI,  
REV.SOLOMON KIPTANUI CHESIBOI,  
REV.JACKSON KIMENYE NGOVE,  
REV.JACKSON TIMONA MUOKA,  
REV.STANLEY CHUMBA,  
REV.BENSON MUANGE MWANGANGI,  
REV.JONATHAN ROTICH  
REV.ABRAHAM TARUS,  
REV.DAVID TUM  
REV.ZACHARIA CHERUIYOT.....APPLICANTS**

**VERSUS**

THE REGISTRAR GENERAL.....1<sup>ST</sup> RESPONDENT

SENIOR DEPUTY REGISTRAR

GENERAL.....2<sup>ND</sup> RESPONDENT

REGISTRAR OF SOCIETIES.....3<sup>RD</sup> RESPONDENT

REV. SILAS YEGO.....INTERESTED PARTY

## J U D G M E N T

The fourteen Exparte Applicants herein (*hereinafter referred to as the Applicants*) moved this court by way of a Notice of Motion dated 15<sup>th</sup> April 2010 seeking an order of **Certiorari** to remove to this court for purposes of being quashed a decision of the Senior Deputy Registrar General published under *Kenya Gazette Notice 2877* of 19<sup>th</sup> March, 2010 purporting to cancel the licences granted to the Applicants namely Rev. David Mulei Mbuvi', Rev. Samson Bett', Rev. Zacharia Chirchir', Rev. Peter Kipketer Maru', Rev. Stephen Mwendwa Kingangi', Rev. Solomon Kiptanui Chesiboi', Rev. Jackson Kimenye Ngove', Rev. Jackson Timona Muoka', Rev. Stanley Chumba', Rev. Benson Muange Mwangangi', Rev. Jonathan Rotich', Rev. Abraham Tarus, Rev. David Tum's and Rev. Zacharia Cheruiyot to celebrate marriages as Ministers under the African Christian Marriage and Divorce Act, Chapter 151 of the Laws of Kenya.

The motion is supported by the statutory statement dated 8<sup>th</sup> April 2010 and the verifying affidavit sworn on even date by Bishop David Mulei Mbuvi on his own behalf and on behalf of the other Applicants.

The application is opposed by both the three Respondents and the Interested Party. The Registrar General, the Senior Deputy Registrar General and the Registrar of Societies are named as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively while Rev. Silas Yego is named as the Interested Party.

The Respondents opposed the Notice of Motion through a replying affidavit sworn on 7<sup>th</sup> June 2010 by Lucy Njoki Waitthaka, a Senior Deputy Registrar General/Deputy Chief State Counsel in the Department of the Registrar General. The Interested Party on his part opposed the motion through a replying affidavit sworn on 28<sup>th</sup> November 2011.

Briefly, the facts of this case are that the Applicants and the Interested Party are church ministers of the African Inland Church, Kenya (the Church).

The pleadings filed herein show that in November 2006, the church held elections to elect leaders to occupy various leadership positions in the church.

According to the Applicants, the elections were mismanaged by the Interested Party with the result that two factions of leadership emerged within the church. One faction comprising the Applicants herein was led by the 1<sup>st</sup> Applicant while the other was led by the Interested Party.

Though both factions submitted notices of change of officials of the church to the Registrar of Societies each claiming to have been validly elected as such in the November elections and seeking registration in the 3<sup>rd</sup> Respondent's records as the newly elected officials of the church, the Registrar of Societies (3<sup>rd</sup> Respondent) on 23<sup>rd</sup> February 2007 decided to register the faction led by the Interested Party. This decision was contested by the Applicants through several correspondences addressed to the 3<sup>rd</sup> Respondent.

Thereafter, a long and protracted battle for leadership and control of the church between the two factions followed leading to the filing of several suits in the High Court as can be seen from Para 14 of the Applicant's verifying affidavit.

The affidavits filed by the parties show that some of the suits are still pending hearing while others have been dismissed for want of prosecution.

On or about 19<sup>th</sup> March 2010, the Senior Deputy Registrar General published in the Kenya Gazette Notice No.2877 her decision cancelling the Applicants licenses to celebrate marriages. This is what provoked the Applicants to commence the current judicial review proceedings.

The Applicants complain that the 2<sup>nd</sup> Respondent's decision was made in violation of the rules of natural justice since they were not granted a hearing by the 2<sup>nd</sup> Respondent before the impugned decision was made yet it adversely affected their status and livelihood.

The Applicants also contend that the decision was malicious and made in bad faith with the aim of imposing on the church the leadership of the Interested Party without the sanction of the church membership.

It is the Applicants' case that the decision was unlawful as no reasons were given to justify the decision to cancel the Applicants' licenses to celebrate marriages.

Finally, the Applicants claimed that the decision of the 2<sup>nd</sup> Respondent was ultra vires Section 6(1) of the African Christian Marriage and Divorce Act Cap.151 of the Laws of Kenya (the Act)) since the power or authority to licence or cancel licences to church ministers to celebrate marriages was conferred on the Registrar General and not on the 2<sup>nd</sup> Respondent or registered church officials.

The Interested Party in his replying affidavit sworn on 28<sup>th</sup> November 2011 supported the Respondent's case that the impugned decision was made following a communication from the Executive Committee of the Central Church Council's decision to withdraw the Applicants' ordination certificates which meant that they had been prohibited from conducting pastoral duties like officiating marriages and preaching in church.

In Paragraph 7 of the replying affidavit sworn on behalf of the Respondents, the deponent averred that several letters from various advocates had been received by the Registrar of Marriages advising her to cancel the licences of the Applicants and that through the said letters the original licences granted to the Applicants to celebrate marriages had been surrendered.

It is the Respondent's case that the decision to either licence or cancel licences of church ministers is made by their respective churches not by the 2<sup>nd</sup> Respondent and that the role of the Registrar was to cause publication of the churches decision in the Kenya Gazette as part of her statutory functions under the Act. The Interested Party contends that the decision published in the Kenya Gazette was the decision of the Executive Committee of the Central Church Council which was made on 29<sup>th</sup> March 2006.

The 2<sup>nd</sup> Respondent stated that in publishing the decision to cancel the licenses issued to the Applicants to celebrate marriages, she acted diligently, in good faith and within her statutory mandate.

Both the Respondents and the Interested Party claimed that the Applicants were guilty of non-disclosure of material facts and that their application besides being an abuse of the court process was also incompetent and defective and ought to be dismissed with costs.

Having considered the pleadings in this case and the written and oral submissions made by advocates on record for the respective parties, I find that four key issues emerge for determination by this court namely;

(1) Whether the Applicants' Notice of Motion is incompetent and fatally defective and whether it is an abuse of the court process.

(2) Whether the 2<sup>nd</sup> Respondent's decision conveyed in the Kenya Gazette Notice No.2877 of 19<sup>th</sup> March 2010 was ultra vires the provisions of the African Christian Marriage and Divorce Act.

(3) Whether in making that decision the 2<sup>nd</sup> Respondent violated the rules of natural justice.

(4) Whether the Applicants are entitled to the reliefs sought in this case.

Starting with the first issue, Mr. Karanja learned Counsel for the Interested Party submitted that the Notice of Motion was statute barred as it was filed outside the 6 months statutory period allowed by the law for parties aggrieved by administrative decisions to challenge them by seeking orders of certiorari. Mr. Karanja argued that the decision published in Gazette Notice No.2877 was not a decision of the 2<sup>nd</sup> Respondent but a decision of the Church's Executive Committee of the Central Church Council (Churches Executive Committee) which had been made on 29<sup>th</sup> March 2006. And as the instant proceedings were instituted on 8<sup>th</sup> April 2010, they were statute barred. Mr. Karanja further submitted that as the impugned decision had been made by the Churches Executive Committee and the Respondent's role was only to formally gazette the same which fact was within the knowledge of the 1<sup>st</sup> Applicant, the application was incompetent for misjoinder of parties as the Churches' Executive Committee should have been enjoined as the Respondent or an interested party. The interested party claimed that failure to enjoin a necessary party and to institute judicial review proceedings within the stipulated time made the application incompetent and fatally defective.

Mr. Kaluma learned counsel for the Applicants in his submissions did not directly respond to the claim by the Interested Party that the application was time barred but instead submitted that the decision being challenged in this case was the decision by the Senior Deputy Registrar General (2<sup>nd</sup> Respondent) conveyed in Gazette Notice No.2877 of 19<sup>th</sup> March 2010 and not the decision of the Churches' Executive Committee.

I have looked at the pleadings filed herein. It is clear from the prayers in both the chamber summons seeking leave and in the Notice of Motion that the decision under challenge in these proceedings is the decision of the 2<sup>nd</sup> Respondent published in Kenya Gazette Notice No. 2877 dated 19<sup>th</sup> March 2010 and not the decision of the Churches' Executive Committee allegedly made on 29<sup>th</sup> March 2006. There is therefore no basis for Mr. Karanja's submission that the impugned decision had been made by the Churches' Executive Committee. The gazette notice speaks for itself. It does not show that the decision to cancel the Applicants' licences to celebrate marriages was made by the Churches' Executive Committee. The notice is signed by the 2<sup>nd</sup> Respondent and not by a representative of the Churches' Executive Committee. In any event it is only the Registrar General who is empowered under the law to issue and cancel licences to celebrate marriages. I therefore concur with Mr. Kaluma's submissions that the decision being challenged in this case was the decision made by the 2<sup>nd</sup> Respondent conveyed in Gazette Notice No.2877 of 19<sup>th</sup> March 2010.

Given that finding, is the Applicant's suit time barred?

The court record shows that the chamber summons seeking leave to commence these proceedings was filed on 8<sup>th</sup> April 2010 hardly a month after publication of the gazette notice. It is therefore very clear to me that the Applicants instituted the proceedings timeously within the time prescribed under the provisions of Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

The claim by the Interested Party that the Applicants' application was time barred cannot therefore be sustained.

Similarly, the submission that the application is incompetent for non-joinder of the Churches'

Executive Committee falls on its face considering my finding that the decision under challenge in these proceedings is the decision of the 2<sup>nd</sup> Respondent and not that of the Churches' Executive Committee.

It is therefore my finding that the Notice of Motion filed herein is competent and is properly before the Court.

Turning now to the claim that the Applicants' application amounted to an abuse of the court process, the interested party argued that the 1<sup>st</sup> Applicant had previously filed another case being Misc. App. No.200 of 2006 against the Churches' Executive Committee in which he had prayed for orders similar to those sought in this case.

The Interested Party also contended that the Applicants were guilty of non-disclosure of material facts as they had deliberately failed to disclose the existence of this case (JR.200/2006) to the court.

All those allegations were denied by the Exparte Applicant. Mr. Kaluma submitted that the prayers sought in Misc. App. 200 of 2006 were different from those sought in the present case. He also asserted that the Applicants had not only disclosed in their pleadings the existence JR.200 of 2006 but had also attached to the verifying affidavit the rulings made therein.

I have read through the Applicants' verifying affidavit and I concur with Mr. Kaluma that the Applicants had infact disclosed at Paragraph 14 thereof the existence of several suits filed in the High Court involving the same parties which included Misc. App. No.200 of 2006. I have also noted that JR.200 of 2006 only involved the 1<sup>st</sup> Applicant herein and the Churches' Executive Council. The other 15 Applicants and the Respondents were not parties to that suit.

It is also clear from the pleadings in that case that the orders being sought in that case are entirely different from the orders being sought in this case.

In JR. Misc.App.200/2006, the Applicants had sought inter alia an Order of Certiorari to quash the decision of the Churches' Executive Committee made on 29<sup>th</sup> March 2006 purporting to withdraw the ordination of Rev. David Mulei Mbuvi. In this case, the prayer for an order of certiorari seeks to quash the decision of the 2<sup>nd</sup> Respondent cancelling licenses issued to the Applicants to celebrate marriages.

In view of the foregoing, Mr. Karanja's submission that the Applicants' Notice of Motion amounts to an abuse of the court process is factually incorrect and cannot be sustained.

Having resolved the preliminary issues raised regarding the competence of the notice of motion, I now wish to delve into a consideration of the merits or otherwise of the Applicant's motion.

It is part of the Applicants' case that the 2<sup>nd</sup> Respondent's decision was ultra vires Section 6(1) of the African Christian Marriage and Divorce Act. Mr. Kaluma while supporting this contention submitted that the power to grant and to cancel licenses was by virtue of Section 6 (1) of the Act granted to the Minister of State who had subsequently delegated the same to the Registrar General. Counsel further submitted that since delegated power cannot be sub-delegated, the 2<sup>nd</sup> Respondent acted ultra vires Section 6(1) of the Act when she made the impugned decision.

To counter these submissions by the Applicants, Mr. Karanja on his part invited the court to find that the Registrar General has officers working under her office as she cannot be expected to perform all administrative work that falls within the docket of the office of the Registrar General.

Section 6(1) of the Act provides that:

"The Minister may license any minister to celebrate marriages under this Act, and may at any time cancel such license; and notice of the granting or cancellation of such licenses shall be published in the Gazette".

It is not disputed that the minister's power to license church ministers or to cancel such licensees was delegated to the Registrar General vide Legal Notice No.569 of 1956.

However, it is my view that this delegation was done to the Office of the Registrar General and not to the person occupying the office of the Registrar General personally. Any other interpretation of the Gazette Notice No.569 of 1956 would lead to an absurdity as it is common knowledge that the Registrar General occupies a public office which oversees the operations of several departments serving different needs of Kenya citizens from all over the country. In the performance of her administrative duties, the Registrar General is assisted by officers working in the office of the Registrar General for example the Registrar of Companies, the Registrar of Births and Deaths, the Registrar of Marriages, Registrar of Societies among others. It would therefore be illogical to expect the Registrar General to personally attend to all administrative tasks appertaining to her office. Some of the decisions and statutory functions of the Registrar General would of necessity be executed by authorized officers in that office not because of any delegated powers but because those officers are part and parcel of the office of the Registrar General.

The impugned gazette notice shows that the decision to revoke the Applicants' licenses was made by the Senior Deputy Registrar General in the exercise of her statutory mandate donated by Section 6(1) of the Act. Considering that it is not disputed that the 2<sup>nd</sup> Respondent as an officer working in the Office of the Registrar General, I find that the 2<sup>nd</sup> Respondent's decision was not ultra vires the provisions of Section 6(1) of the Act. It was a decision made within the statutory mandate of the 1<sup>st</sup> Respondent's office in which the 2<sup>nd</sup> Respondent was working at the time she made the impugned decision.

Though the Registrar General or her officers had the mandate and power to licence or to cancel licenses issued to church ministers to celebrate marriages, this power had to be exercised objectively, reasonably, and in good faith. It was not supposed to be abused. The Respondent's being public officers discharging public functions had a legal obligation to act fairly in the performance of their duties.

The Applicant's major grievance in this case is that the 2<sup>nd</sup> Respondent unilaterally and arbitrarily revoked the Applicants' licenses to celebrate marriages and proceeded to publish the said decision in the Kenya gazette before giving the Applicants an opportunity to be heard yet they were people who were adversely affected by that decision. This claim by the Applicants is not controverted by either the Respondents or the Interested Party. The Applicants' complain that in making her decision, the 2<sup>nd</sup> Respondent violated the rules of Natural Justice.

Generally, two cardinal principles constitute the rules of natural justice which are that no man shall be condemned unheard (*audi alteram partem*) and that no man shall be a judge in his own cause (*nemo iudex in causa sua*)

It is trite law that these twin rules of natural justice must be observed by not only courts and tribunals but also by persons or public bodies who have a duty to act fairly. The rules of natural justice are inherent in all proceedings or decision making processes be they judicial, quasi-judicial or administrative as long as they affect the rights and interest of citizens. The decision made by the 2<sup>nd</sup> Respondent was administrative in nature and no doubt, it adversely affected the rights and interests of the Applicants. The rules of natural justice are all about fairness and as stated earlier, the 2<sup>nd</sup> Respondent was duty bound to act fairly when making decisions that would directly affect the right of citizens. In the execution of her statutory mandate, the law expected the 1<sup>st</sup> Respondent and any officer working under her to strictly adhere to the rules of natural justice.

The first component of the rules of natural justice required the 2<sup>nd</sup> Respondent to give the Applicants an opportunity to respond or to contest the allegations levelled against them by the authors of the various letters addressed to the Registrar of marriages before conceding to pressure to cancel their licenses.

I find that the requirement for the observance of the rules of natural justice was even more pertinent in this case considering that the Respondents must have been aware of the leadership rivalry and the bad

blood existing between the two factions in the church in view of the disputed elections and the fact that the pressure to have the subject licenses revoked was emanating from persons in the faction led by the Interested Party or their advocates - see letters annexed to the Respondent's replying affidavit marked LWI.

Having failed to give the Applicants an opportunity to defend themselves against the allegations levelled against them in letters marked LWI even with the knowledge of the leadership wrangles in the church, the 2<sup>nd</sup> Respondent's decision cannot be said to have been made objectively, fairly and in good faith.

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

I have no doubt in my mind that the 2<sup>nd</sup> Respondent in making the impugned decision without hearing the Applicants' side of the story subjected them to unfair treatment and violated their legitimate expectation that due process would be followed in the event that the Respondents found it necessary to make decisions that would adversely affect their status in the Church and consequently their livelihood. Besides not giving the Applicants a hearing, the 2<sup>nd</sup> Respondent did not also furnish them with reasons for her decision.

Though it may not have been possible or practical to publish her reasons in the gazette notice, the dictates of fairness required the 2<sup>nd</sup> Respondent to directly communicate to the Applicants the reasons for her decision. This was important for the purpose of promoting transparency and accountability, values which are not only recognized under the Constitution of Kenya 2010 but are important pillars in good public administration. The duty to give reasons has also been elevated to a constitutional requirement under Article 47 of the Constitution of Kenya.

In view of the foregoing, it is evident and I so find that the 2<sup>nd</sup> Respondent in making the impugned decision not only failed to comply with the rules of natural justice but also violated the Applicants right to fair administrative action guaranteed under Article 47 of the Constitution.

Having established that the 2<sup>nd</sup> Respondent's decision contained in Gazette Notice No.2287 of 19<sup>th</sup> March, 2010 was arrived at in breach of the rules of natural justice and in contravention of Article 47 of the Constitution, I find that the said decision was null and void *ab initio* and of no legal effect. It amounted to an illegality which automatically attracts the intervention of this court by way of judicial review.

It is trite law that the judicial review remedy of certiorari will issue to quash decisions which are made by statutory bodies or public officers either in excess of or outside their jurisdiction, for errors of law on the face of the record or in breach of the rules of natural justice- see Halisbury's Laws of England, 4<sup>th</sup> Edition Paragraph 111 at Page 204.

In the case of **Kenya National Examination Council –Vs- Republic, Exparte Geoffrey Gathenji & 9 Others, C/A Case No.266 of 1996** the Court of Appeal while discussing the remedy of Certiorari expressed itself in the following terms:

“Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”.

In this case the Applicants have ably demonstrated that the 2<sup>nd</sup> Respondent though acting within her jurisdiction under Section 6(1) of the Act failed to follow due process in making the impugned decision. Besides having violated the rules of natural justice, the 2<sup>nd</sup> Respondent subjected the Applicants to unfair treatment and thereby violated their right to fair administrative action.

Having been made in contravention of the law, the 2<sup>nd</sup> Respondent's decision cannot be allowed to stand and must be quashed by an order of Certiorari.

In the circumstances, I find merit in the Applicants' Notice of Motion dated 14<sup>th</sup> April 2010 and it is hereby allowed with no orders as to costs.

DATED, DELIVERED and SIGNED this 5<sup>th</sup> day of November 2012.

**C.W. GITHUA**  
**JUDGE**

***In the Presence of:***

Florence – Court Clerk

Mr. Miare for Applicants

N/A for 1<sup>st</sup> Respondent

N/A for 2<sup>nd</sup> Respondent

N/A for 3<sup>rd</sup> Respondent

N/Afor Interested Party