



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
MISC APPLI 330 OF 2008

REPUBLIC..... APPLICANT

VERSUS

**THE MINISTER OF STATE FOR NATIONAL
HERITAGE & CULTURE..... RESPONDENT**

1. SIMEON KANANI..... 1ST INTERESTED PARTY

2. OBURE PHILIPPE..... 2ND INTERESTED PARTY

EX PARTE

1 NATIONAL COUNCIL OF NON GOVERNMENTAL ORGANIZATIONS

**2 THE EXECUTIVE COMMITTEE, NATIONAL COUNCIL OF
NON-GOVERNMENTAL ORGANIZATIONS**

JUDGMENT

The notice of motion dated 5/4/08 is filed by the National council of non-Governmental Organisations (NGO) and the Executive Committee National Council of Non- Governmental organizations, National Council of Non-Governmental Organizations, Anthony Kinyili, Phoebe Odera Oruka, Charles Waithaka, George Gitau Wainaina, David Wanyonyi Osotsi, and George Argwings Kodhek against the Minister of state for National Heritage and culture, the Respondent Simon Kanani and Obure Phillippe are named as Interested Parties. The ex parte Applicants seek the following prayers;. An order of certiorari to remove into this court and quash the decision of the minister of state for National Heritage and culture contained in Gazette notice No.12111 of 7th December 2007 purporting to appoint and notify the public that one Simeon Kanani is the chairperson of the National Council of NGOs. The applicant also seeks costs of the Notice of Motion. The motion is premised on a statement and verifying affidavit sworn by Dr. George Wainaina a member of the Executive Council of the 2nd Applicant. The application was opposed and Wilson Marotse Mulei, a legal officer with the Ministry of Heritage and Culture swore an affidavit dated 18/5/09 and filed in court on 16/6/09 and the 1st Interested Party Simeon Sagana Kanani also filed a replying affidavit dated 7/5/09.

The Applicant was represented by Mr. Kaluma advocate, the Respondents by Mr. Bosire and the Interested Parties by Dr. Khaminwa.

A brief background of the Applicants' case is that the 1st Applicant is a self regulatory body for all NGOs under S 23 of the NGO Co-ordination Act, 1990. The council consists of over 5,000 members and it functions through decisions and actions of its Executive Committee which is the Supreme governing organ. The Executive Committee is elected by the Council membership at a General or Special General Assembly convened under the Act, Rules and Regulations (G W 1). That the current Executive Committee was elected in May 2006, for a term of 3 years and the term was to end in May 2009. The Council Chairperson is also elected by the membership from the serving Executive Committee. The chairperson, one Rogo Manduli whose term was to end on 29/7/07 at an election where another would be elected did not take place because of a court order issued in **HCC 662/07 HILDAH OGOLLA V NGO (GW- 3)**. A fresh notice was issued calling for election of the chairperson on 12/7/09 (GW. 5). Meanwhile, on 5/12/07 the Respondent made a decision which he published in the Gazette Notice 12I11 of 7th December 2007 appointing the 1st Interested party as chairperson of the Council, after allegedly being elected at a Special General meeting held on 21/11/07 (GW. 6). It is the Applicants' contention that the minister has no power under the Act to elect a chairman of the Council and the decision contained in the gazette notice is therefore ultra vires, contrary to law and illegal. That the decision is intermeddling with the affairs of the NGO movement. That the publication of the notice has caused chaos in the body. That the Executive Committee was involved in the alleged meeting of 21/11/07 and that it is officials at the Ministry who facilitated it. It was deponed that the 1st interested party is not a member of the Executive Committee and does not qualify to be a chairperson. That due to the said decision, the second Interested Party is posing as a Secretary/Chief Executive Officer of the Council. Mr. Kaluma submitted that in his decision, the Minister invoked S 4 (1) (b) of the NGO Co-ordination Act but that under S 4 (1), the Minister can only appoint people to the Board on the recommendation of the Council. The Board is a body for registering the NGOs. That in the process, he also degazetted persons who were recommended by the Council to represent the body. That under Article 10 (18) (i) the persons to represent the Council on the Board must come from the Executive Committee. Counsel urged the court to quash the said decision contained in the gazette notice.

In opposing the motion, the Respondent contended that the NGO Council had not held elections for the office of Chairperson and the Executive Committee since 2005 and the Government was concerned about the leadership crisis in the Council of NGOs and the conflicts within the sector causing strained donor relations and loss of public goodwill. The Minister decided to appoint a caretaker committee on 8/8/05 whose functions were inter alia, to call for fair elections within 90 days (WMM 1). There was discontent in the leadership due to failure to call for elections by the Council and in accordance with Articles 11 11.4 (9) and 11.7 of the Rules and Regulations, some members called for a Special General Assembly (WMM 2). Those who called for the meeting were 50 fully paid up members as per list (WMM 3). That it is Dr. Kanani (1st interested party) who was elected and that the elections were challenged in HCC 801/07 (WMM 4) and the court declined to grant an injunction. Mr. Mulei deponed that the gazette notice was not an appointment but was notification to the general public of the changes in the leadership made on 21/11/07. He agreed that the Minister does not appoint the chairman of NGOs Council and merely exercised his powers under S 2 of Cap 446, — the State Corporations Act, to minimize apathy in the NGO Council. That he invoked his powers under S 4 (1) of the NGO Co-ordination Act to appoint Council members. That the minister's actions are legal and he exercised executive authority delegated to him in good faith and the application should be dismissed.

Dr. Kanani deponed that he was elected on 21/11/07 and was appointed chairman vide gazette notice 12111 (1) on 7/12/07 (SSKI and 2). That he has been performing his duties in that capacity since (Para. 4). That there has been discontent in the NGO council due to the leadership of one Rogo Manduli and members petitioned the Council for elections but they were ignored. That due to pressure, Manduli called for a Special General Assembly on 22/9/07 but one Hellen Orimba filed HCC 662/07 and the elections were never held. That the members invoked Reg. 11 (SS K 5) to call for and held a Special General Meeting which they did on 21/11/07. Thereafter Several cases were filed challenging the election, i.e. HCC 781/07 in which Manduli Rogo tried to stop the elections of 21/11/07 but an order of injunction was not granted and elections proceeded. That after elections, Manduli filed another case HCC 801/07 to

injunction the interested parties from holding a meeting as officials but the court declined to grant the orders. That she then called for elections on 26/4/08 but the interested parties rushed to court and the said elections were stopped. In HCC 35/09 the interested parties filed a suit against George Wainaina and his group to stop their illegal acts as he claims to be the chairman and officials of the National Council of NGOs (SS M 8) and the same is still pending before the court. That the Applicants are distorting the facts of this matter and that these proceedings lack merit and should be dismissed. Dr. Khaminwa also submitted that due to the chaos that existed in the NGO sector, the decision taken by the Minister was fair reasonable and any aggrieved party should file a petition not Judicial Review. That they should wait till both civil cases are heard as directed by J. Khamoni. That Judicial Review is not the proper forum for resolving the issues before the court.

The issues for determination seem to be as follows:-

1. *Whether the Minister appointed Simeon Kanani as the Chairperson of the Council of NGOs;*
2. *What is the procedure for electing a Chairperson of the of NGO Council;*
3. *whether the Minister of State for National Heritage and Culture has power to appoint or gazette the Chairperson of the National Council of non-Governmental organizations.*
4. *Whether the Gazette Notice No.17/11 of 7/12/07 purporting to appoint and notify the public that one Simeon Kanani is the Chairperson of the Council of NGOs is lawful or ultra vires the provisions of the NGO Co-ordination Act 1990 and Rules and Regulations made thereunder;*
5. *Whether the order of certiorari can issue;*
6. *Who bears the costs of the application.*

It is apparent from Para. 10 of the 1st interested parties affidavit that there have been leadership wrangles in the NGO movement for some time now. A testimony of this is the various cases filed since 2006.

(2) **HCC 781/07 FILED BY NATIONAL COUNCIL FOR NGO V KITUO CHA SHERIA** Trying to stop elections scheduled for 21/11/07. (SSK 6)

(3) **HCC 801/07 NATIONAL COUNCIL OF NON-GOVERNMENTAL ORGANISATIONS V SIMEON KANANI AND 7/08 NATIONAL COUNCIL OF NGO V ORIE ROGO MANDULI** in which J. Khamoni dismissed the application (SS K 7) to stop the interested parties from taking office.

(4) **HCC 35/09 NATIONAL COUNCIL OF NGOS V GEORGE GITAU WAINAINA (SS K 8)** which is said to be still pending before the court.

(5) **SPEARS OF HOPE OTHERS V THE NATIONAL COUNCIL OF NGO'S HCC 530/06** in which Kanani (1st interested party), the proprietor of the 1st Plaintiff sought to challenge the proposed elections that were scheduled to take place on 27/5/06. As admitted by the Applicant the chairman's term should have expired by 29/7/07. It is not clear when she left office.

What this court finds interesting is that the Applicants did not disclose exactly what had been going on in the NGO sector before the purported decision of the Minister. There had been a lot of litigation with several suits pending before the civil court. It is interesting that the Applicants only referred to HCC 530/06 which had been filed much earlier by the Interested Parties and was dismissed on 26/5/06 by J. Mugo. J. Khamoni's ruling in HCC 7/07 and 801/07 is that the applications for injunctions were dismissed and the effect of the rulings seems to have been that the challenge to the Interested Parties election has not been interfered with or halted. The interested parties are still in office.

The applicants have a duty of candour to disclose to the court all material facts even if they are adverse

to their case. Such disclosure should be made at the time for leave so that the court can on those facts, exercise its discretion to grant or refuse leave. Failure to make material disclosure may lead to the court setting aside its orders or declining to exercise its discretion in favour of the Applicant to grant Judicial Review orders even if the orders were deserved. It is expected that a party coming for Judicial Review must come with utmost good faith. Michael Fordham in his Book Judicial Review Hand Book 5th Edition at para. 10.3.

“10.3 Judicial Review claimants have always been under an important duty to make full and provide disclosure to the court of material facts, and known impediments to Judicial Review (e.g. alternative remedy, delay, adverse authority, statutory ouster)”

CLAIMANTS DUTY OF CONDOUR

Dr George Gitau Wainaina who swore an affidavit in support of the notice of motion never disclosed that he had actually been party to the elections of 21/11/07 along with the 1st interested party and that lost the elections. He was aware of these elections even as he filed these proceeding challenging the Gazette notice, that the Minsiter had made the appointment when he knew very well there had been elections. It is obvious he failed to disclose material facts that were important to assist this court exercise of its discretion. The Applicants can not be entitled to the orders of Judicial Review even on that basis alone.

Whereas the Applicants contend that it is the Minister who appointed the 1st Interested Party to the post of Chairman of the Council of NGO's, the Respondent and Interested Parties have vehemently denied that fact and contend that the 1st Interested Party was elected at a Special General Assembly on 21/11/07. Mr Mullei for the Respondent deponed that it is members of the NGO who decided to call for a meeting in accordance with Articles 11, 11.4(a) and 11.7 of the NGO Rules and Regulations. Both sides have acknowledged that the Minister has no power to appoint a Chairman of the NGO Council.

Whether the Gazette amounts to an appointment by the Minister; Gazette Notice No.1211/11 dated 7/02/07 reads as follows:-

“It is notified for general information of the public that the members of the National Council for NGOs at a Special General Meeting held on 21/11/07 elected Simeon Kinani (DR) to be Chairman of the Council with effect from 21st November, 2007.

Dated this 5th December, 2007.

S.K. SHAKOMBO

Minister of State for National Heritage.”

A reading of the above notice clearly indicates that what the Minister did is to notify the public of the changes in leadership in the NGO sector. The notification came after elections at an alleged Special General meeting held on 21/11/07. There is no mention of the Minister having appointed the 1st Interested Party. It is not a notice which requires interpretation. It is plain on the face of it. I find that the Minister did not make any decision on 5/12/07 appointing the 1st Interested Party as Chairman of the Council of NGOs.

The above being the case the next question is whether there were any elections at a Special General Meeting.

The Rules and Regulations of the National Council of NGOs Kenya was exhibited as GW 1. Article II deals with the issue of membership, their rights and responsibilities.

Amongst the member's rights is the right to take part in all NGO activities, contest any vacancies of the NGO Concil which is vacant, elect office bearers to the Executive and Regulatory Committees in terms of

the Rules. Article II provides for the Special General Assembly and when the same can be called. That Article reads as follows:-

“11.1. A special Assembly shall be convened by the Chairperson or the Vice Chairperson upon the directions of the Executive Committee or;

11.2.1 Upon a written request of not less than fifty (50) fully paid members of the NGO Council having sufficient cause.

11.2.2 The members (minimum fifty) requisitioning the Special General Assembly must pay a total of Kshs.50,000/- (fifty thousand shillings only) towards the cost for holding such a meeting.

11.4 The Special Assembly has all the powers of the General Assembly and is governed by the same Rules and Regulations on its composition as those that govern the General Assembly.

11.5 The Special Assembly shall be convened by the Chairperson, giving not less than fourteen (14) days notice in writing to all members. The notice shall be sent out to all members together with an agenda prepared by the body requisitioning the Special Assembly.

11.6 If for any reason the Chairperson, upon a requisition of members of the Executive Assembly, the body requisitioning such an assembly has the right to nominate a person to convene such an assembly.

11.7 If for any reason both the Chairperson and the Vice-chairperson are unable to perform the above stated duties, any 50 fully paid up members may convene a special assembly to address this issue.”

A Special General Assembly may be called by the Chairperson or the vice Chairperson on the direction of the Executive Committee. At Art 11.2 a Special General Meeting can be convened upon a request of not less than fifty (50) fully paid up members of the NGO Council having sufficient cause and it will have the powers of the General Assembly which is created under Art 10.0. The General Assembly is the Supreme authority of the NGO Council. Its composition (para. 10.3) is all members of the NGO Council and at any meeting the quorum is 50 delegates. The powers and functions of the General Assembly are found at para. 10.18. At Art 10.18 (h) one of its functions is to elect the chairperson, Treasurer and Vice Treasurer from the members of the Executive Committee and at (1) to elect 7 persons from the Executive Committees for recommendation to the Minister for their appointment as representative of the NGO Council within the Board.

In the instant case, there was I believe sufficient cause for the members to invoke the provisions of Art 11 and call for a Special General Assembly. I have earlier considered what has been taking place in the NGO's sector. There had been leadership wrangles which had never been resolved resulting in there being no elections for several years. There was need for elections.

The Interested Parties exhibited a list of the persons who allegedly took part in the Special General Assembly and a total of 92 persons attended the elections and the minutes of the meeting are exhibited as (WMM 2). Whether or not the interested parties followed the proper procedure for calling of the Special General Meeting, I believe is not a matter for this forum. That issue can be canvassed at another forum. What is not in contention is that there were some elections of the officials of the NGO Council, held on 21/11/07 and that is the decision that the Minister conveyed in the impugned gazette notice.

Ordinarily how is a chairman appointed?. Elections for the organs of the NGO Council are provided for under part IV of the Regulations. Under Art 22.1, for one qualify to stand for elections, one has to be proposed and seconded by members of the NGO Council. Vacancies are announced by the NGO Council 56 days before the General Assembly (22.2). The rest of the detailed procedure is set out in Art 22.1 – 22.33. The nominated candidates are presented to the General Assembly for elections. Under Art 10 (g) it is the Council which elects the members of the Executive Committee and Regulatory Committee, the

Chairperson, Treasurer and vice Treasurer from the members of the Executive Committee and at 10 (h) elects 7 persons from the Executive Committee for recommendation to the Minister for their appointment as representatives of the NGO Council within the Board. The Board is set up under S 3 of the NGO Co-ordination Act No. 19 of 1990. The Functions of the Board are provided under S 7 which are inter alia, to facilitate and co-ordinate the work of the NGOs in Kenya, advice the Government on activities of NGOs and their role in development in Kenya, to develop a code of conduct to regulate activities of NGOs in addition activities in Kenya, conduct a regular review of the Register for comparison with reports submitted by the NGOs and the Council.

It is apparent that the Minister has no role to play in the election of the members of the NGO Council or Executive Committee or other Regulatory Committees as the procedure is specifically spelt out in the Regulations made within the NGO Co-ordination Act.

Does the Ministry have any role to play in the running of NGOs? Under S 4(1), (b) the Minister is authorized to appoint 3 members of the Board who have knowledge or experience in development and management and at para (i) he may appoint five members of the Board on recommendation of the Council to represent the diversified areas of NGOs interests on the Board. Section 7 provides for the functions of the Board. Under S7 because of the functions of the Board the Minister may be involved in formulation of policies governing the NGOs by virtue of being in charge of the Ministry under whose docket the NGOs fall. Otherwise the Minister has no direct authority over the NGOs. His role can be deduced from the Ministerial Statement exhibited by Mulei as (WMM1) where the Minister noted the leadership crisis in the sector and set up a caretaker committee to oversee and streamline the NGO Council and help pave way for elections. The Minister can only help oversee or streamline the running of the NGOs council but can not choose their leaders. I find that the Minister did not make any decision appointing a Chairman for the NGO Council but only made known to the public the changes in the sector having been concerned about the wrangles on the NGO movement.

I have read the ruling of J. Khamoni in HC 35/09 (exhibited) when he noted with concern that the parties involved have filed suits in court all revolving around leadership but they never go ahead to prosecute them but file one application after the other and keep shifting their positions to call themselves the NGO Council or Respondents and that there are several pending suits between the parties which are yet to be resolved all touching on leadership. His view was that the various cases filed may lead to conflicting decisions by the courts and should be prosecuted to their conclusion. These observations were made in June 2009. That same dispute is the one that has found its way to Judicial Review. The parties should ideally proceed with Civil cases instead of adorning the dispute with a public law face.

What is evident from what transpired on 21/11/07 is that some parties do not agree with the elections and this application is really a challenge to those elections. This court has no jurisdiction to deal with the merits of those elections. As disclosed by the Interested Party, and the Ruling of J. Khamoni there is a matter pending before the Civil court HCC 35/09 in which the issue can be canvassed. George Gitau who swore the verifying affidavit contested the chairmanship at these elections. That is the forum where evidence can be adduced as to exactly what happened and whether the elections were fair or not. Judicial Review is not the proper procedure to challenge the elections because oral evidence can not be adduced and be put to test by way of cross examination. The dispute is really between the parties who lost and won but not with any public body or officer like the Respondent. It is a dispute in private law and should be adjudicated there.

I find and hold that the impugned Gazette notice does not disclose any decision made by the Minister to appoint the Chairman of the NGO Council. An order of certiorari lies to quash a decision made in excess or without jurisdiction or where the decision is made in breach of rules of natural justice. The Minister had no duty to appoint a Chairman and did not appoint any. An order of certiorari can not issue.

This application lacks merits and is therefore dismissed with costs to the Respondents and interested parties.

Dated and delivered at Nairobi this 2nd day of October 2009.

R.P.V. WENDOH

JUDGE

Delivered in the presence of:-

Mr P. Kaluma for Ms Samba for the Plaintiff/Applicant

Mr Onyuso for the Defendant/Respondent

Shimanga holding brief for Dr. Khaminwa for Interested Party

Muturi – court clerk