



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM; VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 129 OF 2018

BETWEEN

MOHAMED A. MALIM.....APPELLANT

AND

THE REGISTERED TRUSTEES OF THE

AGRICULTURAL SOCIETY OF KENYA.....1ST RESPONDENT

THE ELECTORAL COMMITTEE

AGRICULTURAL SOCIETY OF KENYA.....2ND RESPONDENT

THE CHIEF EXECUTIVE OFFICER OF

THE AGRICULTURAL SOCIETY OF KENYA.....3RD RESPONDENT

ANISA ABDALLA.....4TH RESPONDENT

AGNES MWAGWAMBI.....5TH RESPONDENT

HENRY NYAGAH.....6TH RESPONDENT

SAMUEL MWEU.....7TH RESPONDENT

KAULI MWEMBE.....8TH RESPONDENT

HASHIM KALUME NYALE.....9TH RESPONDENT

CHARO KATANA NGALA.....10TH RESPONDENT

GEORGE NYASI MAJALA.....11TH RESPONDENT

KENYA KITSAO.....12TH RESPONDENT

JENIFER AKINYI AGUTU.....13TH RESPONDENT

MARIAM SHELA NZARO.....14TH RESPONDENT

NYAMVULA MAKALA MWACHUPA.....15TH RESPONDENT

PASCAL MWAMBILE KARISA.....16TH RESPONDENT

SAUMU HASHIM KALUME.....	17 TH RESPONDENT
STEPHEN RANDU KITHI.....	18 TH RESPONDENT
ELIZABETH JIJAA KIPHUSTUS.....	19 TH RESPONDENT
LUCKY WAMBUA NGUNA	20 TH RESPONDENT
JOHN MUNYAO MWALIMU.....	21 ST RESPONDENT
TATU MUNYAO MWALIMU.....	22 ND RESPONDENT
RIZIKI ALI SHEE.....	23 RD RESPONDENT
AMINA SOODY MWINYI.....	24 TH RESPONDENT
JAMILA SOODY MWINYI.....	25 TH RESPONDENT
JAMILA SOOSDY MWINYI.....	26 TH RESPONDENT
NAIMA MWIKALI ABDALLAH.....	27 TH RESPONDENT
SWALEH BAKARI SALIM.....	28 TH RESPONDENT
USAMA SAIB MBARAK.....	29 TH RESPONDENT
MBWANA SAIDI MBARAK.....	30 TH RESPONDENT
MOHAMED AHMED MOHAMED.....	31 ST RESPONDENT
LEILA ABDUL AHMED.....	32 ST RESPONDENT
MOHAMED OMARI.....	33 RD RESPONDENT
MBARAK HAMID MBARAK.....	34 TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (Ogola, J.)

dated 11th July, 2018 in Misc. Applic. No. 33 of 2017)

JUDGMENT OF THE COURT

1. This appeal challenges a ruling dated 11th July, 2018 wherein the learned Judge (**Ogola, J.**) dismissed the judicial review proceedings initiated by the appellant vide Misc. Applic. No. 33 of 2017. It is common ground that judicial review remedies are discretionary in nature and the principles governing the exercise of such judicial discretion are settled. As such, what the appellant is calling upon us is to interfere with the exercise of the learned Judge's discretion.
2. The parameters which determine whether or not we will accede to the appellant's request were well put by the predecessor of this Court in the case of ***Mbogo & Another vs. Shah* [1968] EA 93**. Basically, before interfering with such discretion we must be satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision; or that it is manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and as a result, there has been injustice.
3. At the heart of the dispute between parties were elections conducted at the 1st respondent's Mombasa branch on 17th March, 2017 for various posts. Apparently, the appellant is a longstanding member of the said branch and was affected by those elections. In particular, the 3rd respondent issued a notice on 1st March, 2017 notifying the 1st respondent's members of a Special Annual General Meeting (AGM) to be held on 17th March, 2017 and elections which were scheduled to take place on the said date. We set out the pertinent portion of the said notice:

“RE: 2017 SPECIAL ANNUAL GENERAL MEETING

NOTICE is hereby given that there will be a special annual general meeting for members of the Agricultural Society of Kenya residing within the Coast Branch on 17th March, 2017 at 12:00 noon at ...

AGENDA

1. ...

2. **ELECTIONS**

...

3. **ANY OTHER BUSINESS**

MEMBERSHIP CLEARANCE REQUIREMENT

Members will be required to bring with them the following documents for the purpose of clearance into the A.G.M hall;

...

According to the Society membership rules, only those members of the Society who have been members for three consecutive years before the Branch Annual General Meeting are eligible to participate ...”

4. Additionally, vide the said notice the 1st respondent also notified members of its nomination of the 3rd and 4th respondents for election to the posts of Branch Committee and Council.

5. The appellant was interested in vying not just for one elective post but three hence he submitted his application for the post of Branch Chairman, Committee Member, Council Member. On the date of the elections, he was informed by the 3rd respondent that he had been disqualified from vying for the Branch Chairman post because firstly, he had never served as a Council Member. Secondly, that he was not in good standing with the 1st respondent due to a disciplinary case he had.

6. Apparently, the appellant in conjunction with other members had written a letter dated 10th February, 2015 threatening to disrupt an AGM which was then scheduled for 20th January, 2015. Taking the threats seriously, the 1st respondent issued a notice to show cause dated 16th February, 2015, under the 3rd respondent's hand, asking the appellant to give a written explanation of the letter in question. In response, the appellant gave an explanation by a letter dated 17th February, 2015. Based on the response, the appellant was subjected to a disciplinary hearing before the 1st respondent's Special Staff and Finance Committee on 25th March, 2015. Upon the conclusion of the hearing, the Committee delivered its verdict vide a letter dated 30th March, 2015 which read in part:

“The Committee found you at fault in respect to your participation in the preparation of the inflammatory document dated 10th February, 2015 arriving at a verdict of guilty.

...

The decision further follows your letter of explanation and your personal appearance before Special Committee of Staff and Finance.

Following the verdict, the Staff and Finance deliberated and decided to reprimand you as punishment to this breach.”

From the record, it is apparent that the appellant accepted the verdict and apologized for his actions as is evident from his letter dated 1st April, 2015.

7. As would be expected, the appellant was upset with his disqualification and he appealed against the same to the 1st respondent by a letter dated 20th March, 2017. The appeal was dismissed by the 1st respondent on 18th April, 2017.

8. Unrelenting the appellant, approached the High Court by instituting the judicial review proceedings subject of this appeal. He sought a number of judicial review remedies namely:-

a) An Order of Certiorari to remove to this Honourable Court to be quashed the decision of the 2nd and 3rd Respondents herein, disqualifying the Applicant from contesting for the post of branch committee, council member and branch chairman which was communicated on 17th March, 2017 and confirmed through the decision of the 2nd Respondent issued on 18th April 2017 after the Applicant appealed.

b) An Order of Certiorari to remove to this Honourable court to be quashed the directive of the 3rd Respondent herein, through the notice dated 1st March, 2017, issued appointing the 1st and 2nd Interested Parties (3rd and 4th respondents herein) to serve in the branch committee till December 2019 and 2020 respectively.

c) An Order of Certiorari to remove to this Honourable court to be quashed the directive of the 3rd Respondent herein, through the notice dated 1st March 2017 appointing 1st and 2nd Interested Parties to serve in the council of the society till December 2020 and 2019 respectively.

d) An order of certiorari to remove to this Honourable court to be quashed the election conducted during the special annual general meeting of the Coast Branch held on 17th March, 2017.

e) An Order of mandamus to compel the Respondents to call for a fresh election of the Coast Branch to elect twelve (12) members of the Branch Committee and seven (7) members amongst the Branch Committee to serve in the Society council and amongst the council members so elected, one to serve as Coast Branch Chairman.

f) An Order of Mandamus to compel the Respondents to clear the Applicant to contest for the post of branch committee member, council member and branch chairman of the coast branch at the fresh elections to be held as per the Prayer No.(e) above.

g) An Order of mandamus to compel the Respondents to allow all paid up members during the year 2016 to take part in the fresh election and to vote their preferred candidates.

9. His application was premised on the grounds that the 1st, 2nd and 3rd respondents' decision to disqualify him was unreasonable and motivated by malice. In his view, there was no basis for the said respondents to hold that he was not in good standing on account of a disciplinary case, he denied at first. Nonetheless, he said the reprimand meted out to him on 30th March, 2015 did not affect his standing because barely a month later he was appointed as a member of the 1st respondent's Caretaker Committee on 15th April, 2015.

10. He also believed that his disqualification was aimed at ensuring the 1st respondent's preferred candidates, that is, the 3rd and 4th respondents, were elected to the posts they were nominated for. The appellant also claimed that his disqualification on the basis of the reprimand exhibited the 1st, 2nd and 3rd respondents' bias as against him. This is because some of the persons who were also reprimanded on account of the inflammatory letter, namely, the 7th and 8th respondents, were cleared to contest for various posts.

11. Further, the appellant called into question the notice dated 1st March, 2017 to the extent that he believed that the 1st respondent had locked out fully paid up members from voting in the said elections contrary to the Society's constitution. In his view, the imposition of the 3year membership period as a prerequisite for eligibility to vote was contrary to the 9th to 34th respondents' legitimate expectation to take part in the elections as members of the Society.

12. In response, the 1st, 2nd and 3rd respondents opposed the application terming it as frivolous and an abuse of the court process. As far as they were concerned, the appellant was disqualified for valid reasons and his appeal was heard as required by the law. Refuting that the disqualification was unreasonable, the said respondents averred that the Society's rules were clear that one has to have good standing in order to hold office. In as much as the rules did not define what good standing entailed, the fact that the appellant was reprimanded was a clear indication that he was not in good standing.

13. It was also the 1st, 2nd and 3rd respondents' case that 7th and 8th respondents were cleared to contest because unlike the appellant, they had filed appeals against their decision to reprimand them and the same was still pending determination. Moreover, the 1st, 2nd and 3rd respondents contended that the appellant's suit was *res-judicata* on account of previous judicial review proceedings being **Misc. Applic. No. 13 of 2017**. That suit was filed by some of the respondents herein challenging the notice dated 1st March, 2017.

14. The learned Judge applied his mind to the rival arguments put forth on behalf of the parties as well as the law and dismissed the appellant's application. In doing so, he expressed himself in the impugned ruling as follows:

“I have carefully read through a copy of the Green Book attached to the replying affidavit of BATROMA M. MUTHOKA filed on 20th July 2017. At page 12, Rule E provides that a member seeking to be elected as a Branch Chairperson must meet several conditions among them that he or she must not have been convicted of a criminal offence, should be below 70 years of age, have a University Degree or alternatively have atleast form four level qualification with the necessary skills and experience to run a large organization; served in the Branch Committee for at least 5 years; served in the Council for at least 5 years prior to the election; and be of good standing with the Society. It is important to note that the conditions are in respect to the position of Branch Chairman which the Applicant vied for.

The Society's Green Book does not offer a definition of the term “good standing”. Be that as it may, was the definition assigned to the term while vetting the Applicant's candidature unreasonable? The Respondents claim that the Applicant was reprimanded by the Society and he never appealed against the reprimand. The Applicant does not dispute that he was reprimanded but argues that he was never suspended nor expelled as punishment. The Respondents in turn submits that the reprimand amounted to a gross misconduct. To my mind, the reason given by the Respondents for finding the Applicant not to have been of good standing is not unreasonable. The 2nd Respondent and 3rd Respondent did not act unreasonable. They did not consider extraneous or irrelevant issues in arriving at that decision.

...

As to the legitimate expectation of the 6th to 31st Interested Parties that they would be allowed to vote in the elections as they had fully paid up memberships, this issue was determined in Mombasa Miscellaneous Application No. 13 of 2017 where I found that

the amendments to the 1st Respondent's Article 11 of the Constitution were made procedurally. Therefore their right to vote was rightly take away by the Constitution. The decision in the said case can only be reviewed by way of an appeal."

15. The foregoing decision is what provoked the appeal before us wherein the learned Judge is faulted for:

a) Holding that the 1st respondent had not acted unreasonably in disqualifying the appellant from contesting for elective posts in the elections in issue.

b) Failing to find bias on the part of the 1st respondent for disqualifying the appellant on the basis of a past reprimand.

c) Failing to consider whether the 1st respondent's decision was driven by ulterior motive of imposing its preferred candidates in the elective seats.

d) Failing to find the eligibility of the 6th, 7th and 8th respondents to vie for the respective elective posts they did.

e) Holding that the 1st respondent's members did not protest the direct appointment of the 4th and 5th respondents.

f) Finding that the 9th to 34th respondents' legitimate expectation to participate in the elections in question had been determined in Misc. Applic. No. 13 of 2017.

16. Reiterating that the disqualification of the appellant was unreasonable, Mr. Oluga, learned counsel for the appellant, argued that if his standing with the 1st respondent was in issue following his reprimand on 30th March, 2015, then he certainly would not have been appointed as a member of the Caretaker Committee of the 1st respondent's Mombasa branch. What is more, neither the 1st respondent's constitution nor its rules define what good standing entails. Therefore, the determination of what amounts to good standing should have been reasonably considered by the 1st respondent based on the circumstances of the case. In counsel's opinion, the 1st respondent's decision to equate the appellant's reprimand to lack of good standing was not reasonable taking into account the relevant circumstances.

17. Counsel felt that both the 1st respondent and the learned Judge misapprehended that the requirement for a candidate to be in good standing related only to the post of the Branch Chairman and not the other two posts he had expressed his interest in.

18. Asserting that the scope of the court in judicial review proceedings had evolved and extended to merit consideration of decisions in issue, counsel made reference to this Court's decisions in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR*** and ***Super Nova Properties Limited & Another vs. The District Land Registrar Mombasa & 5 others - Civil Appeal No. 98 of 2016 (ur)***.

19. According to counsel, had the learned Judge considered the merits of the 1st respondent's decision, he would have arrived at a different outcome. By way of illustration, counsel urged that under Clause E (vi) of the 1st respondent's Mombasa branch election rules, for one to qualify to vie for the post of the Branch Chairman, he/she must have served in the Branch Committee for at least 5 years. Nonetheless, the 8th respondent had not served in such a capacity in the Mombasa branch.

20. Last but not least, counsel took issue with the learned Judge's finding to the effect that the question of the 9th to 34th respondents' legitimate expectation to vote in the elections in question was determined in **Misc. Applic. No 13 of 2017**. In his opinion, the said respondents never filed the substantive motion in the said proceedings and the learned Judge only went as far as considering whether to grant stay of the elections.

21. On his part, Mr. Aziz, learned counsel for the 9th to 34th respondents, supported the appeal on more or less similar grounds as the appellants.

22. Mr. Millimo, learned counsel for the 1st to 8th respondents, explained that the appellant served in the 1st respondent's Caretaker Committee because after the Mombasa Branch Committee was disbanded, a Caretaker Committee was set up to hold fort pending elections of the Branch Committee. It is at that juncture that the appellant was appointed. At the time of his reprimand he was acting in that capacity and as such, was allowed to continue to do so pending the next elections. Further, he was appointed by the 1st respondent rather than elected to the said position. Counsel posited that the requirement for a candidate to be in good standing did not only apply for the Branch Chairman post but to all elective posts.

23. Mr. Millimo contended that the 1st respondent's decision to disqualify the appellant was informed by its constitution and rules. Therefore, the decision could not be termed as unreasonable. In that regard, the often quoted case of ***Associated Provincial Picture Houses Ltd, vs. Wednesbury Corporation [1948] 1 K.B. 223*** was cited.

24. He maintained that the learned Judge had properly appraised himself on the allegation of bias and ulterior motive, on the part of the 1st respondent, and arrived at the correct decision. Counsel was steadfast that in as much as judicial review had evolved it did not extend to merit review of a decision in issue. Mr. Millimo also referred to the ruling rendered by the learned Judge in **Misc. Applic. No. 13 of 2017** to emphasise that the issue of the 9th to 34th respondents' legitimate expectation to vote had been determined therein. In conclusion, counsel argued that there was no reason for this Court to interfere with the learned Judge's discretion thus the appeal herein should be dismissed.

25. We have considered the record, submissions by counsel and the law. To begin with, we are not in doubt that the scope of judicial review

has developed and widened over time. Nonetheless, we do not accept, as the appellant postulates, that it has extended to merit review of decisions being challenged. We succinctly appreciated the magnitude of the development in the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR as follows:

Initially, the scope of judicial review and the remedies which could issue thereunder were set out in the Law Reform Act and Order 53 of the Civil Procedure Rules. The ground(s) upon which such review could be exercised by the High Court was where the administrative decision/action in question was deemed as being ultra vires and/or against the rules of natural justice. Similarly, the judicial review remedies which the High Court could issue were restricted to orders of certiorari, mandamus and prohibition. As Diplock J. had predicted in Council for Civil Service Union vs. Minister for Civil Service [1995] AC 374 there have been developments in judicial review. In his own words, he expressed:-

'Judicial review has ... developed to a stage where ... one can classify under three heads the grounds upon which administrative action is a subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further developments on a case by case basis may not in the course of time add further grounds. I have in mind particular the possible adoption in the future of the principle of proportionality.'

Echoing those developments in the Kenyan legal system,

Peter Kaluma in Judicial Review, Law and Practice, 2nd

Edition at page 69 states that:-

'Thus judicial review is no longer a strict administrative law remedy as was the case in the past. Judicial review is currently an administrative law remedy and a constitutional fundamental. The right to fair administrative action, the right to written reasons for adverse administrative action and the right to judicial review of administrative action are now enshrined in the Constitution as fundamental rights and freedoms to be enjoyed by every person subjected to administrative action.'

...

Likewise, the remedies which could issue have since expanded from the traditional remedies to declarations, damages and injunctions as set out under Section 11 of the Fair Administrative Action Act.'

Regardless of the foregoing development, we went on to clarify that:

"As we have set out above, judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made."

26. Similarly, this Court confirmed as much in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others (supra):

"The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

27. Based on the foregoing, we find that the learned Judge appreciated the limits of his mandate while considering the judicial review application. He was only required to determine whether the process adopted by the 1st, 2nd and 3rd respondents was in line with the observations made by this Court in Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 others [2016] eKLR that-

"It is therefore important to remember in every case that the purpose of judicial review remedies are to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question."

28. In our view, the 1st, 2nd and 3rd respondents' decision to disqualify the appellant from contesting in the elections in question was not unreasonable. We say so because like the learned Judge observed, the 1st respondent's rules required a candidate vying to be the Branch Chairman has to be in good standing. It does not matter that no specific definition is given in the rules as to what good standing amounts to. We are clear in our minds that a person who has been convicted of a serious infraction, like the appellant, can reasonably be held not to be in good standing. We also find that it is not unreasonable to assume that the 1st respondent required candidates vying for whichever elective post should be in good standing.

29. We are convinced that the fact that the appellant was serving as a member of the Caretaker Committee after the reprimand did not render his disqualification unreasonable. We find that it was not in dispute that he was appointed to that position and was not elected as he had sought in the elections in question.

30. On the issue of bias and ulterior motive, we concur with the following findings by the learned Judge:

“In this case, the Applicant purports that there was prejudice against him by the Respondents. However, the Applicant must not just claim bias; he must prove that there was actual bias. In my view, the circumstances surrounding the candidature of the Applicant are not similar to those of Salim Mazrui and Jaffar Kiti. The Applicant has not proved that he appealed against his reprimand nor has he disputed the assertion by the Respondents that Salim Mazrui and Jaffar Kiti appealed against their reprimands. The Applicant’s only ground is that they were all reprimanded hence they should receive the same treatment. This cannot be the case if some of the individuals did appeal against the reprimand and the appeals are still pending. Therefore, the Applicant has no reason to claim that the Respondents were biased against him.

...

In this case, the Applicant contends that the 1st and 2nd Interested Parties were directly appointed which is not in line with the laws of the Society. The Applicant has however failed to cite the specific Rule or Constitutional provision of the Constitution of the Society that the Respondents offended. That notwithstanding, this court cannot delve into the correctness of the decision but can only question whether there was indeed ulterior motive in reaching the decision. During the Special Annual General Meeting held on 17th March, 2017, the aforementioned Interested Parties were directly elected to various positions. The members present did not protest the direct appointment of the 1st and 2nd Interested Parties. I would think that if the two were being imposed on the members, members present would protest their election. The only ground for the issue of ulterior motive is the imposition of officials by the Respondents but there is no evidence to substantiate this claim.”

31. Equally, on the issue of the 9th to 34th respondents’ legitimate expectation to vote in the elections, we see no reason to interfere with the learned Judge’s findings. In any event, the amendment of the 1st respondent’s constitution imposing a 3year term of membership as a qualification for voting is evident in minutes of the 1st respondent’s 90th AGM held on 5th April, 2013 which are on record.

32. For the reasons outlined herein above, we see no reason to upset the learned Judge’s discretion. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the 1st to the 8th respondents.

Dated and delivered at Mombasa this 14th day of March, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR