



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 43 OF 2016

BETWEEN

ALI ABDALLA DUHMY (CHAIRMAN).....1ST APPELLANT

SHEE ATHMAN OMAR (VICE CHAIRMAN).....2ND APPELLANT

NASSIR SALIM KHAMISI (SECRETARY).....3RD APPELLANT

MOHAMED HEMED ATHMAN (TREASURER).....4TH APPELLANT

AND

MOHAMED ABDISHEIKH.....1ST RESPONDENT

SWALEH ABOUD ABDALLA.....2ND RESPONDENT

ALI OMAR SAID.....3RD RESPONDENT

ABDALLA SWALEH OMAR.....4TH RESPONDENT

ABDALLA ABDISHEIKH.....5TH RESPONDENT

IDRIS MAAMUN ALI.....6TH RESPONDENT

(Being an appeal from the decision/order of the High Court of Kenya at Malindi (Chitembwe, J.) dated 30th June, 2015

in

HCCC. Cause No. 144 of 2012.)

JUDGMENT OF THE COURT

1. Service to the public in whatever capacity is more often than not a gratifying yet thankless duty. The people served demand and expect exemplary service, but they rarely reciprocate by saying even a simple ‘thank you’, and even start demanding such service as of right. When such service is not accompanied by remuneration or other advantage of whatever nature, even a true “servant of the people” would naturally feel uneasy if his/her selfless service is not appreciated and may need to reconsider the viability of such service.

2. A true servant of the people should not hesitate to step aside or vacate a position when his term of office comes to an end to give an opportunity to others to serve. If the community one serves express their will to the effect that you should give somebody else an opportunity to serve them, then one has no business forcing themselves to remain in such service.

3. Further, leadership, or a public duty can only be determined by the members of the community receiving the said service. An overzealous “servant” should not force himself/herself on the people and once the people have spoken through their vote, then their will must be

respected. It is from that perspective that we approach this appeal.

4. A short history of the matter is necessary to place this matter in proper perspective. **Nur Muslim School Society**, (the society) is a non-political society registered under the Societies Act on 25th January, 1961. Among its objectives is teaching Islamic Religion and Arabic. Like any society, its affairs are conducted through office bearers who under its Constitution are elected at an Annual General Meeting as provided by its Constitution. The society appears to have existed and conducted its affairs with no major hitch until December 2005 when it appears that a faction of the society held a meeting, (which another faction disputed and failed to recognize) and conducted elections in which Ali Abdalla Duhmy, Shee Athman Omar, Nassir Salim, Said Salim Omar, Mohamed Hemed and Ahmed Athman were said to have been elected Chairman, Vice Chairman, Secretary, Vice Secretary, Treasurer and Vice Treasurer of the society respectively. The appellants fell in this group of officials. They consequently filed a notification of change of officials with the registrar of societies. They then started running the affairs of the society including operating the society's Bank account No. 030121107007 held at Barclays Bank of Kenya at Malindi Branch.

5. The officials who were voted out were unhappy with the state of events and moved to the **High Court vide Nairobi HCC. No. 468 of 2006**, which was however transferred for hearing in Malindi on 9th March, 2007. The High Court (**Meoli, J.**) on 4th April, 2013 directed that the said suit be consolidated with Civil **Suit No. 144 of 2012**. Consolidation does not appear to have been done and the former suit which had since acquired a new number after being transferred to Malindi i.e. **HCCC 40 of 2009** was dismissed for want of prosecution. This information is contained at page 212 of the record of appeal.

6. It is not clear from the record what transpired between 2006 when the suit was filed and sometime in 2012 when Civil Suit No. 144 of 2012 was filed. It would appear however that the officials elected in the contested elections of 2006 continued running the affairs of the society until December, 2011 when at another contested Annual General Meeting, the same officials were said to have been unanimously re-elected. That meeting was subsequently challenged as invalid for having lacked the requisite quorum.

7. The other faction called another Annual General Meeting on 13th July, 2012 in which they elected other officials. These latter officials are the respondents in this appeal while the former are the appellants. Following the latter "elections" the firm of Mutisya Bosire & Co. Advocates for the respondents wrote to the appellants asking them to hand over the offices and general administration of the society to the respondents on 29th August, 2012 at 11.00 a.m.

8. This is what prompted the appellants to move the **High Court vide Civil Suit No. 144 of 2012** seeking a declaratory order that they were the lawful office bearers of **Nur Muslim School Society** and an order of injunction restraining the latter officials (respondents herein), from taking over office or running the affairs of the society or interfering with its running in any way.

9. Contemporaneously, they filed a Chamber Summons application seeking interim orders of injunction pending the hearing and determination of the said suit. The application fell for hearing before **Meoli, J.** who having found that the appellants were the ones running the School gave orders maintaining the *status quo* pending hearing and determination of the suit. The learned Judge also advised the parties to consider pursuing Alternative Dispute Resolution under the office of the Chief Kadhi or the Registrar of Societies. That recommendation does not appear to have been pursued.

10. The main suit was heard by **Chitembwe, J.** who dismissed it with an order that each party bears its own costs. The learned Judge however, in a bid to stop "future unnecessary disputes" gave the following orders:-

"i) The Society's Secretary, Ali Omar Said, to prepare a proper register of members.

ii) Since time is too short for another Annual General Meeting, I do direct that the next general meeting to be held on or before 31st December, 2016.

iii) During the Annual General Meeting, the relevant Government Officers should be invited to attend and oversee the elections if need be."

The respondents were declared the lawful office bearers of **Nur Muslim School Society**.

11. That is the judgment that is challenged through this appeal, in which the appellants have proffered nine grounds of appeal in their memorandum of appeal dated 21st June, 2016. The learned Judge is faulted for, *inter alia* holding that the appellants are clinging to office by virtue of a meeting which lacked quorum; failing to consider the appellants' submissions and basing his determination on an issue that had not been pleaded, that is the issue of quorum in respect of the meeting held on 18th December, 2011.

13. The appellants entreat this Court to allow the appeal and set aside the impugned judgment and replace the same with one allowing their suit. In essence, they are asking this Court to order that they are the *bona fide* office bearers of the **Nur Society** and they should continue holding the offices they held before the said judgment.

14. Submissions were filed for and against the appeal with very brief highlighting by Mr Mutisya, learned counsel for the respondents who contended that the appeal was incompetent. The written submissions by the appellants filed on 16th November, 2016 expound their grounds of appeal, essentially asking the Court to reinstate them as the officials of the said Society.

15. The respondents on the other hand maintain that the meeting in which the appellants claim to have been elected lacked the requisite quorum and their election was therefore null and void. One of the pertinent issues raised in the respondents' submissions is that subsequent to the elections of 18th December, 2011 on which the suit giving rise to this appeal was premised, there have been several other elections which

have not been challenged. According to the respondent, this appeal has therefore been overtaken by events. Indeed, this Court was on 10th October, 2017 informed by counsel for the parties that there were elections that were due in December, 2017, and we were requested to defer the hearing of the appeal to a subsequent date thereafter to allow the parties to conduct the said elections.

16. The elections were conducted as scheduled but apparently, for reasons we could not fathom, the appellants still wanted to proceed with this appeal.

17. We have considered all the material placed before us by way of the record of appeal, the supplementary record of appeal and the submissions by counsel. Our view of this matter first and foremost is that as recommended by **Meoli, J.** the matter ought to have been resolved through ADR. This is so because the dispute herein involves a religious society which we presume pursues purely altruistic objectives as opposed to a commercial or other profit making entity. Attempts by this Court to encourage the parties to resolve the matter amicably was also rebuffed and sadly, the Court had to be engaged in an academic exercise which in our view was unnecessary. We say so because, as rightly submitted by learned counsel for the respondents, the elections in dispute were specific and any orders granted even if they were to be in favour of the appellants, would not invalidate any elections held after the suit was filed. The Court cannot invalidate the elections that were conducted subsequently whether they met the required standards or not as that is not what is before us. We were informed that indeed elections were conducted in 2016 pursuant to Judge Chitembwe's order. Other elections were conducted in December, 2017, as this appeal was still pending. Whether those elections were conducted fairly or not is not an issue that is before us, or one that we can interfere with.

18. As we indicated earlier, this appeal has been overtaken by events and rendered moot. We remind the parties herein and their respectful counsel that it is their responsibility under **Section 3A (3)** of the Appellate Jurisdiction Act to assist the Court to further the overriding objective, which involves determining appeals in a "just, expeditious, proportionate and affordable manner." Where it is clear as is in this case, that the determination of an appeal will serve no purpose, it behooves counsel to advise their clients as much so that the Court's time and other resources can be applied in a more meaningful and productive manner. It is in our view not necessary to expend more time on this matter.

19. In conclusion, as we stated in our opening remarks in this judgment, when the people you serve or lead tell you through elections that they need change, then their will must be respected. Elective leadership in a public body or institution can only be determined by the members through elections. The appellants have served their society for many years. As stated earlier, public service may sometimes not be appreciated, but as good leaders/servants, the appellants ought to respect the will of the people they have been leading and redirect their leadership qualities and experience to other areas, where the same may be needed and appreciated. We think we have said enough to demonstrate that this appeal is totally devoid of merit. The same is dismissed with no order as to costs.

Dated and delivered at Mombasa this 17th day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR