IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 10 OF 2016

BETWEEN

TARAK KHAWAJA & 5 OTHERS.....APPELLANT

AND

THE REGISTRAR OF SOCIETIES & 9 OTHERS.....RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya

at Mombasa, (Emukule, J.) dated 3rd December 2015

in

MISC. C. APP. No. 37 of 2015)

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JUDGMENT OF THE COURT

This appeal was provoked by the judgment of the High Court at Mombasa ***(Emukule, J.)*** dated 3rd December 2015 by which he issued an order of *certiorari* and quashed a decision of the ***Registrar of Societies (the Registrar)*** dated 30th June, 2015 recognizing the appellants as the interim office bearers of the ***Muslim Association Mombasa (the Society)***, a society duly registered under the ***Societies Act (the Act).*** The learned judge also issued an order of *mandamus* directing the Registrar to confirm 8 of the respondents in this appeal as the duly elected office bearers of the Society. The appellants contend, among others, that the learned judge misapprehended the case and the evidence before him and misinterpreted and misapplied the provisions of the Act, while the respondents maintain that the orders by the learned judge were fully justified in the circumstances of this appeal because the Registrar had among others acted in violation of the rules of natural justice.

The Society has been in existence in Kenya since the colonial times. The record shows that it was incorporated on 5th October 1946 under the ***Land (Perpetual Succession) Ordinance, 1923*** with the object of protecting, safeguarding and furthering the religious, educational, literary, scientific, social and charitable interests of Muslims of all denominations without regard to race or nationality. The Society is also responsible for the maintenance of the ***Sakina Mosque*** in Mombasa. On 29th September 1953 the Society was registered as a society under the Act.

This appeal was precipitated by the events that took place at Sakina Mosque for a period of about one year between December 2013 and December 2014. According to the respondents, before those events, which we shall examine shortly, the Society held its general meeting on 1st July 2012 during which elections were conducted and new office bearers elected, among them some of the respondents in this appeal. At that meeting, the Society also resolved to adopt a new constitution.

On or about 6th July 2012 the Society filed returns under the Act and notified the Registrar of the change of office bearers and also applied for approval for adoption of the new constitution. By a letter dated 3rd August 2012 the Registrar confirmed the following as the Society's office bearers:

i)	***Shaahid Sheikh***	***Chairman***
ii)	***Haroon S. Butt***	***Vice Chairman***
iii)	***Rehan R. Malik***	***Secretary***
iv)	***Yusuf I. Halla***	***Treasurer***

By a further letter dated 12th September 2012, the Registrar approved the Society's new constitution.

All appear to have been well at the Society until December 2013 when a group of persons described as "radicals" descended on the Sakina Mosque, ejected the Imam and beat up the chairman of the Society before forcefully taking over control and running of the mosque. Because of the ensuing violence, insecurity and tension, the Government shut down the mosque indefinitely and it was not re-opened until December 2014. During the hiatus, some of the office bearers of the Society resigned in the wake of the violence and interim office bearers were appointed after the reopening of the mosque. On 16th June 2015 the Society resolved to hold elections on 12th July 2015 and published in the ***Standard Newspaper*** of 27th June 2015 a notice to members to that effect.

It would appear that while the respondents were proceeding as outlined above, a different group of the Society comprising the appellants was undertaking a parallel initiative as regards the office bearers of the Society. As it later transpired, the Registrar contended that on 5th March and 15th May 2015, he had, at the prompting of the appellants, written to the interim secretary of the Society but received no response. The letter of 5th March 2015 referred to complaints raised by the appellants regarding the constitution of the Society and the manner in which the Society was being run and gave the respondents 30 days within which to convene an all inclusive meeting of the Society to address the complaints and to amend the constitution, failing which the Registrar would allow the appellants to convene a meeting and pass the necessary resolutions. As regards the letter of 15th May 2015, the Registrar noted the lack of response by the respondents to the first letter and asked them to call a meeting of the Society within 14 days or he would authorize the appellants to call the meeting.

Subsequently the appellants held the meeting on 28th June 2015 and appointed interim office bearers who the Registrar confirmed as:

i)	***Tarak Khawaja***	***Chairman***
ii)	***Nayyer Butt***	***Vice Chairman***
iii)	***Shaukat Ghulam***	***Secretary***
iv)	***Farook Uppal***	***Treasurer***
v)	***Atif Bux***	***Member***

vi) Salim Chaudry ***Member***

vii) Mohammed Islam Uppal ***Member***

The information regarding this new set of office bearers was contained in a letter from the Registrar dated 30th June 2015 addressed to ***Shaukat Ghulam*** as the interim secretary, which the respondents claim was presented to them on 8th July 2015 by ***Tarak Khawaja***, one of the respondents. The letter also stated that the new interim office bearers had the mandate to run the day-to-day affairs of the Society, to constitute a committee to review and come up with a new constitution of the Society, to conduct elections under a new constitution, and to report back to the Registrar within one year.

Upon getting the above letter the respondents protested to the Registrar and sought its revocation contending among others that they had never received the letters of 5th March and 15th May 2015 and that the appellants could not be *bona fide* office holders of the Society because they were not members. On 12th July 2015 the respondents went ahead with the general meeting of the Society as notified in the Standard Newspapers and elected new office bearers of the Society as follows:

i) Dr. Mohamed Ajmal Fazil ***Chairman***

ii) Nazir Khan ***Vice Chairman***

iii) Dr. Mohamed Zahir Alavi ***Secretary***

iv) Shakeel Ahmed Khan ***Treasurer***

v) Jamal Deen ***Member***

vi) Shahbaz Khan ***Member***

vii) Nisar A Malik ***Member***

viii) Shaahid Sheikh ***Member***

ix) Amjid Gulam Hussein ***Member***

x) Mohamed Arif ***Members***

On their part, the appellants contended that elections of the Society were last held in 1988 and that the duly elected office bearers who were recognized by the Registrar were:

i) Syed Ikramul Hassan ***Chairman***

ii) Abdulrehman O. Cheka ***Vice Chairman***

iii) Mohamed A Chaudhry ***Secretary***

iv) Iftikhar A Malik ***Treasurer***

v) Ramzan Allan ***Supervisor***

Upon the death of the chairman and the secretary, no elections were held to fill their offices and as a result the Society was run for over 20 years illegally and contrary to its constitution and in violation of the Act. While admitting that elections of office bearers of the Society were held on 6th July 2012, the appellants claimed that only four persons were elected. Regarding the amendment of the Constitution, they contended that it was illegally done, to among others, limit the number of members to 300 only and

to discriminate against ***Sunni*** Muslims. As regards the elections of 12th July 2015, the appellants maintained that they were irregularly and unlawfully conducted and that some of those purportedly elected were members of the ***Punjabi Muslim Association*** who did not qualify membership of the Society.

To address the mismanagement of the Society, the appellants averred that they engaged the Registrar, culminating in his letters of 5th March and 15th May 2015 addressed to the respondents, and that it was upon the respondents' failure to act in accordance with the directions of the Registrar that the appellants held a meeting of the Society on 28th June 2015 and elected interim official of the Society as aforesaid.

The Registrar, in an affidavit sworn on 2nd October 2015 by ***Joseph L. Onyango*** took a position similar to that of the appellants and blamed the respondents' mismanagement of the Society for the hostile takeover of the mosque by the radicals.

Back to the respondents, after failing to get a favourable response from the Registrar regarding their protest, they moved to the High Court and filed ***Miscellaneous Civil Application No. 37 of 2015*** for judicial review. After obtaining leave, which was ordered to operate as a stay of the decision of the Registrar, they filed a notice of motion on 8th September 2015. On their part the appellants filed an application to vacate the order of stay. Upon hearing both parties on the two applications, ***Emukule J***. found that the Registrar had failed to prove postage of letters of 5th March and 15th May 2015 to the respondents; that the respondents had been denied their right to be heard before the appellants were confirmed as interim office bearers of the Society; that the appellants were not members of the Society and therefore under its constitution could not hold office; and that the Registrar had acted *ultra vires* his powers under ***section 18*** of the Act. Accordingly he granted the orders of *certiorari* and *mandamus* as aforesaid but directed each party to bear their own costs.

That is the judgment that is impugned in this appeal. On 24th May 2016 the Registrar filed a notice of cross-appeal, which he subsequently withdrew, vide a notice dated 13th February 2017. With the consent of the parties, we directed that the appeal be determined through written submissions and limited oral summation.

For the appellants, ***Mr. Odera***, learned counsel submitted that the learned judge had misapprehended the dispute when he reduced it to an issue of recognition of the officials of the Society falling under section 18 of the Act. In counsel's view, the heart of the dispute was the amendment of the constitution, restriction of the membership to 300 people only, and failure by the respondents to run the society in accordance with its constitution and the Act. It was contended that from 1989 to 2012 no elections or general meeting of the Society were held. The amendment of the constitution to limit the number of members to 300 was also challenged, as was the elections of 2012. The appellants further contended that having misapprehended the dispute as one under section 18 of the Act, the learned judge also erred by invoking sections 49 and 50 of the Act, which similarly were not applicable in the case.

Next, the appellants contended that the learned judge erred by holding that the respondents had been denied an opportunity to be heard. It was submitted that the letters of 5th March and 15th May 2015 were ordinary correspondence that did not require service in the manner contemplated by ***sections 49*** and ***50*** of the Act and that the appellants must be deemed to have received the letters because they were sent through the Societies postal address. The respondents having failed to take up the opportunity to be heard, it was contended that the appellants proceeded lawfully and held the meeting of 28th June 2015 and elected interim office bearers. The appellants relied on the judgment of this Court in ***Paul Auma Orwa & Another v Registrar of Societies & 4 Others, CA No 93 of 2015***. It was also contended that the learned judge had failed or omitted to consider the replying affidavit sworn on behalf of the appellants in rebuttal of the respondents' case.

Lastly it was submitted that the trial court should not have made orders which put the Society in the hands of the respondents because they profess the Punjabi Muslim faith and are office bearers of the Punjabi Muslim Association contrary to the dictates of the Society's constitution. It was also urged that the

function of determining the office bearers of a society belong to the Registrar rather than the court; that the Act provides a right of appeal to the High Court and that judicial review focuses on the decision making process of the inferior tribunal rather than the merits of the decision. For those propositions the appellants relied on ***Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njuguna & 9 Others, CA. No. 266 of 1996*** and ***Republic v. Chairman Amagoro Land Disputes Tribunal & Another Ex parte Paul Mafwabi Wanyama, CA No 41 of 2013***.

The Registrar's written submissions were totally off the mark as they purported to address his cross-appeal, which, as we have stated, was withdrawn on 13th February 2017. The relevant arguments as far as this appeal is concerned were that the Registrar had acted within the provisions of the Societies Act and that there was no basis for the orders issued by the High Court.

Opposing the appeal, ***Ms. Mwangi,*** learned counsel for the respondents submitted that the appellants, in their grounds of appeal and submissions, had erroneously addressed the merits of the case rather than the decision making process by the Registrar. They contended that the judicial review application before the learned judge was concerned only with the decision making process and in support of that proposition relied on ***Municipal Council of Mombasa v. Republic & Another, CA No. 185 of 2001*** and ***Republic v. Chairman Amagoro Land Disputes Tribunal & Another Ex parte Paul Mafwabi Wanyama, (supra).*** In their view, the High Court had properly identified the real issue in dispute, which was, who were the *bona fide* officers of the Society. That issue, it was submitted, must be addressed in the manner provided in section 18 of the Act and that, sections 49 and 50 of the Act, prescribes the procedure for serving an order made by the Registrar pursuant to section 18 of the Act.

Pressing the point, the respondents submitted that the Registrar had failed to satisfy the High Court that he had indeed sent the letters of 5th March and 15th May 2015 to the respondents, and the result was that the respondents were denied the right to be heard before a decision, adverse to them, was taken. On the authority of ***Republic v Registrar General & 8 Others ex parte Peter Mambembe & 2 Others, HC. Misc. C.A. No. 102 of 2006*** the respondents urged that the registrar's decision made in violation of the right to be heard was null and void. They also contended that under section 18, the option open to the Registrar was to cancel the registration of the Society and that his powers being statutory, he could only do what the Act permitted him to do and no more. If the Registrar acted *ultra vires* his powers, it was submitted on the authority of ***Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others (supra),*** that his decision would be amenable to the supervisory jurisdiction of the High Court through judicial review.

Next, the respondents submitted that the High Court had properly quashed the purported election of the appellants as interim office bearers of the Society after satisfying itself that they were not members of the Society, and by reason thereof, they were not eligible for election in the Society. On whether the Registrar had properly exercised his powers under section 19 of the Act to require the respondents to amend the constitution of the Society, the respondents submitted that in invoking his powers under section 19, the registrar was obliged to follow due process.

Lastly the respondents submitted that there was no basis for the contention by the appellants that the respondents could not hold office in the Society because they professed the Punjabi Muslim faith. The respondents contended that Punjab is only a geographical region in which the majority of the population is made up of Muslims of the Sunni faith. On the basis of the foregoing submissions the respondents urged us to find that the judgment of the High Court was well founded and to dismiss the appeal with costs.

We have anxiously considered the record of appeal, the judgment of the High Court, the submissions by learned counsel and the authorities that the respective parties relied upon. While the parties have raised and articulated positions on a host of issues, in our estimation this appeal turns primarily on whether or not the respondents were afforded an opportunity to be heard before the Registrar allowed the appellants to convene a meeting that purported to elect interim office bears of the Society in place of the respondents. Irrespective of the provision of the Act under which the Registrar acted in the circumstances of this appeal, it cannot be gainsaid that before allowing the appellants to take action to depose the

persons holding office in the Society immediately before 28th June 2015, he was obliged to hear those office bearers.

Firstly, by dint of ***Article 47*** of the ***Constitution***, and the ***Fair Administrative Action Act, 2015***, the latter of which came into force on 17th June 2015 some two weeks before the impugned decision of the registrar, such office bearers are guaranteed the right to fair administrative action, which among others is lawful, reasonable and procedurally fair. (See ***Suchan Investments Ltd v Ministry of Natural Heritage & Culture & 3 Others, CA No. 46 of 2012*** and ***Moses Kiarie Kairuri & 4 Others v Attorney General & 3 Others, HC. Pet. No. 280 of 2013).***

Section 4(3) of the 2015 Act further requires that where any administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is obliged to give that person prior and adequate notice of the nature and reason for the proposed action and an opportunity to be heard and to make representations. Where any proposed administrative action is likely to materially and adversely affect the legal rights of a ***group of persons*** or the general public, the administrator is obliged by ***section 5*** to issue a ***public notice*** of the proposed administrative action inviting public views and to consider all views submitted in relation to the matter before taking the administrative action.

Secondly, in reading and applying the provisions of the current Societies Act, which came into effect on 16th February 1968, ***section 7*** of the ***Sixth Schedule*** to the Constitution must be borne in mind. That provision saved all laws that were in force before the promulgation of the Constitution on 27th August 2010, but at the same times requires those laws to be construed with the alterations, adaptations, qualifications and exceptions necessary to make them compliant with the Constitution. (See ***Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others, SC. Pet. No. 14 of 2014***). Accordingly provisions of the Societies Act must not only be read to give full effect to the freedom of association guaranteed by the Constitution, but also to require the Registrar, in discharging his administrative or statutory duties, to respect and uphold the right to fair administrative action that is guaranteed to members of the Society.

In this appeal, there is no doubt that as of 28th June 2015 when the appellants were allegedly elected as interim officials of the Society, there were in office officials who were duly recognised by the Registrar vide his letter dated 3rd August 2012, and a Constitution that was approved and recognized by the Registrar on 12th September 2012. Before sanctioning the removal of those office bearers from office for whatever reason that the respondents had put forward, such as failure to hold elections and general meetings since 1988 or unlawful amendment of the Constitution, they were entitled to prior notice and the right to be heard.

Having carefully considered the complaints that the appellants submitted to the Registrar, which led to his decision on 30th June 2015 to recognise new office bearers of the Society, thus triggering the application for judicial review, we would agree with the learned judge that the dispute before the Registrar was substantially on the legitimate or *bona fide* office bearers of the Society. The appellants' complaints regarding the amendment of the constitution or failure to call general meetings of the Society were irretrievably tied to the allegedly illegal tenure of office of the office bearers recognised by the Registrar on 3rd August 2012 and could not be remedied without addressing the question whether those office bearers were legitimate office bearers. Indeed, the two letters from the Registrar dated 5th March and 15th May 2015, much as they raised the issue of amendment of the constitution and the alleged exclusion of members of the society in the running of its affairs, the Registrar specifically demanded elections of office bearers, begging the question why that would be necessary if there was indeed no dispute on whether the society had legitimate office bearers.

The Act provides a specific procedure for addressing disputes regarding the office bearers of a society. Section 18 provides as follows:

> ***"18. (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."

Under the above provisions, once the Registrar is satisfied that there is a dispute between members or officers of a Society so that he cannot tell the identity of the legitimate office bearers, he is required to serve a written order upon the Society requiring it to produce, within a month either evidence of settlement of the dispute, or of the properly appointed officers or evidence that proceedings have been initiated to resolve the dispute. Where the society fails to comply with the notice, the registrar has power to order cancellation of the society's registration.

The Registrar contends that the respondents were afforded an opportunity to be heard since by his letters of 5th March and 15th May 2015 he notified them of the complaints by the appellants and required them to take remedial measures within specified time, which the appellants failed or neglected to do. ***Section 16 (1)*** of the Act obliges every society to have an office and a postal address, the particulars of which are to be given to the Registrar. ***Section 16(2)*** requires the Registrar to send all communications and notices under the Act by post addressed to the postal address of the Society. ***Section 50*** of the Act has additional provisions regarding service on the Society or individuals. It provides thus:

"50. (1) Every order, notice, summons or other document issued under this Act or under any rule made thereunder shall be validly served—

(a) on a society, if it is sent by registered post addressed to it at its registered postal address; or

(b) on an individual, if it is served or is sent by registered post addressed to him at the registered postal address of the society with which he is concerned.

(2) Any document served by being sent by registered post shall be deemed to have reached the person or society to whom or to which it is addressed at the end of ninety-six hours after the time of posting.

Like the High Court, we are satisfied that the letters by the Registrar were issued pursuant to section 18 of the Act and therefore required to be served in the manner required by section 50 of the Act. Before the Registrar can claim to have afforded the respondents an opportunity to be heard, which they failed to take up, he must first show that he had served them in the manner prescribed by the Act. It is not in dispute that the respondents were not personally served with the letters of 5th March and 15th May 2015, nor were those letters sent to them or the Society by registered post. In those circumstances, the respondents cannot be faulted when they say that they did not receive the letters and only came to know of the complaints that had been levelled against them after the appellants had purported, with the authorization of the Registrar, to depose them and to elect interim office bearers of the Society.

There are additional reasons why we agree with the High Court that the respondents were not afforded an opportunity to be heard before the appellants purported to depose and replace them with interim officials. First, the letters of 5th March and 15th May 2015, speak for themselves that while they were merely addressed to the respondents through a postal address, the copies thereof to the appellants were specifically hand-delivered to Tarak Khawaja, one of the appellants, who by letters dated 12th March and 20th May 2015 acknowledged receipt of the copies. Although those letters were addressed to Tarak

Khawaja through a postal address, the Registrar nevertheless had them hand-delivered to him. We wonder why the Registrar did not use the same mode of delivery to the respondents. Secondly, in view of the large number of members of the Society, it would have been expected that the Registrar would issue a public notice on the action he had allowed the appellants to take as required by section 5 of the Fair Administrative Action Act. Thirdly, although the Registrar in his letters had emphasized the need to have an all-inclusive meeting of all members of the Society, there is no evidence whatsoever that the appellants ever invited the respondents and their faction to the meeting of 28th June 205 which allegedly elected the interim officials. This contrasts with the approach that the respondents had taken when they advertised in the Standard Newspapers their intention to hold elections of the Society on 12th July 2015.

Violation of the right to be heard renders the decision that is ultimately arrived at null and void. In ***Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others, [1997] 1 KLR (E&L)*** this Court stated thus:

> ***"An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision..."***

And in ***Mbaki & Others v. Macharia & Another [2005] 2 EA 206*** this Court reiterated the importance of the right to be heard in the following terms:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

(See also ***Onyango Oloo v. Attorney General [1986-1989] EA 456).***

Satisfied as we are, that the respondent's right to be heard before an adverse decision was taken against them was violated, we do not deem it necessary to delve into the other issues raised by the appellants in this appeal such as whether the respondents were legitimately in office, the alleged violation of the Society's constitution and the Act, or the religious affiliations of the contending groups. It may well be that if the respondents were afforded a hearing the Registrar would have come to the same decision that the Society should hold elections immediately. But having violated their right to be heard, it matters not that he could ultimately have come to the same decision if he had heard them. As was stated in ***General Medical Council v. Spackman [1943] 2 All E.R. 337:***

> ***"If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."***

We accordingly find that this appeal has no merit and is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR