



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 93 OF 2015

BETWEEN

PAUL AUMA ORWA.....1ST APPELLANT

WILSON PETERSON MBANDO.....2ND APPELLANT

AND

REGISTRAR OF SOCIETIES.....1ST RESPONDENT

SAFINA LUNGAZO ALUSE.....2ND RESPONDENT

MATHIAS ABWODHO.....3RD RESPONDENT

JOEL ONONO.....4TH RESPONDENT

AFRICAN ISRAEL NINEVEH CHURCH (suing though Trustees).....5TH RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (Chemitei, J.) dated 30th July, 2015

in

HC JR NO. 26 OF 2013)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the High Court (Chemitei, J.) delivered on 30th July 2015 dismissing the appellants’ motion for judicial review.

Background

2. Having been granted leave by the High Court to commence judicial review proceedings, the appellants

applied, by a motion dated 9th January 2014, for an order of certiorari to quash the decision of the 1st respondent, the Registrar of Societies, (hereafter referred to as “*the Registrar*”) approving a new constitution with respect to the 5th respondent, African Israel Nineveh Church, (hereafter referred to as “*the Church*”); an order of prohibition prohibiting the respondents from interfering with the affairs of the Church; and an order of mandamus compelling the Registrar to convene a meeting of all stakeholders and to call for a referendum on the constitution of the Church.

3. In affidavits in support of the motion, the 1st appellant and Archbishop John Mweresa Kivuli II deposed that they are leaders of the Church since 1983; that the Church “*has been undergoing constitutional amendment process under two independent commissions*”; that the Church sought and briefed one Edward Ogolla, who held himself out as a lawyer, to handle the exercise; that the said Edward Ogolla kept the Church in the dark regarding his deliberations with the Registrar; that the appellants were dismayed to learn that the Registrar had gone ahead to approve a constitution of the Church; that despite returns in respect of the Church having been filed, the Registrar failed to update the records with regard to the current officials of the Church; and that the Registrar in cahoots with a dissident group of the Church calling itself NCC frustrated efforts to deliver an acceptable Constitution. They went on to say that the actions of the 2nd to 4th respondents were the cause of the split in the Church and that as a result there are two headquarters of the Church.

4. In his replying affidavit, Mathias Obwotho, the 3rd respondent, deposed that the appellants had failed to disclose the existence of other proceedings; that the Registrar intervened in the affairs of the Church in order to stem internal wrangles; and that the proceedings initiated by the appellants were aimed at undermining other members of the Church and the authority of the Registrar.

5. Joseph L. Onyango, an advocate of the High Court of Kenya and a Deputy Registrar General, swore a replying affidavit on behalf of the Registrar in opposition to the motion. He deposed that the Church was registered as a society under the Societies Act in 1956; that the grandson of the founder of the Church Rt. Rev. John Mweresa Kivuli II upon his election to office of High Priest ran the Church as a personal venture, misappropriated funds and mismanaged the Church; that the Registrar received complaints from the officials and members of the Church and attempted to reconcile them; that members of the Church appreciated that the constitution of the Church was the root cause of the wrangles; that a suit was instituted by one of the factions of the Church being Civil Case No. 107 of 1998; that the court gave directions in that case for the constitution of the Church to be amended.

6. Mr. Onyango deposed further that following consultations between the Registrar and the warring factions of the Church it was agreed that a joint constitutional review committee be established to amend the Constitution; that the established joint constitutional review committee completed its work in consultation with the members of the Church and presented an amended constitution of the Church to the Registrar for approval and the Registrar duly approved the same despite which, “*some unscrupulous members and purported officials... attempted to present [to the Registrar] a purported amended constitution for approval*”.

7. According to the Registrar, however, all proper channels were followed in accordance with the law in bringing forth a new constitution for the Church and “*all parties were fully aware.*”

8. According to Mr. Onyango, members of the Church had the opportunity under the new Constitution to conduct elections and to remove Rt. Rev. John Mweresa Kivuli II from the office of High Priest; and that the new office bearers who are running the day-to-day activities of the Church were duly elected under the new constitution and confirmed by the Registrar. He maintained that the new constitution was made with the “*full participation and knowledge of the whole church...and is working effectively for the church.*”

9. After considering the appellants’ motion, the affidavits and the written submissions, the learned Judge of the High Court, as already indicated, dismissed the motion in his judgment delivered on 30th July 2015. Aggrieved, the appellants filed the present appeal.

The appeal and submissions

10. In their memorandum of appeal before this Court, the appellants complain that the learned Judge of the High Court should have allowed their application because the process of amending the constitution of the Church was not consultative and was tainted with procedural impropriety; that the Judge failed to consider pertinent provisions of the constitution of the Church; and that the Judge disregarded the appellants' evidence choosing instead to believe the respondents' case.

11. The appellants appeared in person. They referred to the memorandum of appeal and submitted that the process of amending the constitution of the Church violated the principles of natural justice; that the Registrar was biased against the appellants and the Church; that the constitution of the Church that sought to be amended "*had something to offer in the whole process of amending the same constitution*" and should not have been "*demonized as authoritarian*"; and that the Judge wrongly disregarded the evidence tendered and arguments presented by the appellants in support of their motion.

12. The appellants acknowledge that there are factions within the Church; that the initial constitution of the Church did not entirely accord with the requirements of the Societies Act, Chapter 108 of the Laws of Kenya, and required amendments or replacement; and that the Registrar was justified in intervening in the affairs of the Church.

13. The appellants however contend that the Registrar did not comply with the provisions of Sections 19 and 20 of the Societies Act in particular in that there is no evidence that the consent of the Registrar was obtained prior to commencing the process of amending the constitution; that the Registrar did not issue an order requiring the Church to amend its constitution; that the Church did not convene a meeting of members; that the joint constitutional review committee appointed by the Registrar to end the divisions and factions within the Church was not representative or inclusive; that one Mr. Edward Ogolla who purported to represent the Church on the alleged joint committee for review of the constitution was not chosen by the Church to do so; and that the Registrar arrogated to himself powers to appoint a committee to manage the affairs of the Church ultimately imposing new leadership to run the affairs of the Church through illegal and unfair means. For those reasons, the appellants urged us to set aside the decision of the High Court dismissing their application.

14. Ms. S. Lutta, learned counsel for the Registrar, urged the Court to uphold the decision of the High Court. In her view, the process of amending the constitution of the Church was consultative and accorded with the Societies Act; the different factions of the Church were represented in the joint review committee; the Church was represented by one Edward Ogolla who masqueraded as an advocate; the consultative process resulted in the constitution that was presented to the Registrar for registration; and that the Registrar rejected another constitution that the appellants purported to present that had not followed the due process.

15. Ms. Lutta argued that the Magistrate's Court at Vihiga identified the need to amend the constitution of the Church in Civil Case No. 107 of 1998 on account of contentious provisions in the constitution; that based on the orders of the court in that case, the Registrar issued directions for the amendment of the constitution of the Church; that the process of amendment of the constitution was agreed upon; that the amended constitution was approved at a meeting of the Church held on 1st December 2013; and that Sections 19 and 20 of the Societies Act were complied.

16. Mr. Nelko Misati, learned counsel for the 2nd to 5th respondents, submitted that the Registrar properly exercised his mandate in intervening in the affairs of the Church whose constitution violated the Constitution of Kenya; that following a complaint by the Church the Registrar directed that a special general meeting be convened to set up a committee to make a new constitution; that the Registrar directed that there be representation from both groups; that the constitution presented to the Registrar was indeed ratified and new office bearers democratically elected under that constitution; that the new constitution and new officials elected thereunder are already in place; that 2nd to 4th respondents are no longer officials of the church as they held office on interim basis and the prayers against them have been overtaken by events.

17. In reply, the appellants maintained that they were not represented in the constitution review process; that Edward Ogolla with whom the Registrar dealt was not a lawyer and did not represent them; that even if he were taken to have represented them, could their faction be represented by only one person? They posed. That the Registrar did not set up a committee to review the constitution; that the Archbishop was not involved in the constitution review process; that the Registrar was biased and sided with one faction of the church and sidelined the other faction. The appellants concluded that all factions should sit together and rectify the constitution together.

Analysis and determination

18. We have considered the appeal and the arguments by the parties. The only issue for determination in this appeal is whether the process of amending the constitution of the Church accorded with the law and whether the learned Judge of the High Court erred in holding that there was no procedural impropriety in that process and in dismissing the appellants' application for judicial review. In other words, was there due process leading up to the approval by the Registrar of the new constitution of the Church? If the answer to that question is in the negative, then, an order for certiorari would no doubt be available to the appellants. [See **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge and 9 others [1997] eKLR**]

19. Appreciating that procedural impropriety, or failure to act fairly on the part of a decision making authority is a basis for the court to intervene by judicial review, the learned Judge of the High Court framed the questions in terms whether the appellants were denied a chance to participate in the Church's constitution making process and whether they established a case for judicial review to warrant the grant of the orders that they sought. Citing numerous authorities, the Judge correctly set out the legal principles applicable, observing that the remedy of judicial review is concerned with "*the decision making process*" and not the "*merits of the decision*" in respect of which judicial review is sought.

20. The Judge concluded that the appellants' grievance was not with the process but rather with the outcome of the decision taken by the Registrar. In his judgment, the Judge expressed himself as follows:

"The facts reveal that a meeting of all the factions was called and a committee was elected. They did their work and finally presented the constitution to the 1st respondent who approved it. In the affidavit sworn by JOSEPH L. ONYANGO on behalf of the 1st respondent, it was deposed that the constitution presented by the ex-parte applicants was rejected because it did not conform and that members were not involved its preparation. It appears that the ex-parte applicants are more aggrieved by the fact that the 1st respondent rejected their version of the constitution and chose the one created by the select committee. It is for this reason that they feel that there should have been a referendum so that then they would have had a chance to vote against and probably oust the constitution that was created by the select committee. They are more aggrieved by the outcome rather than the process that was followed."

21. Later in the judgment the Judge expressed the view that a complaint was made to the Registrar by some members of the Church regarding the wrangles within the Church and that:

"Subsequently, a meeting was held at the 1st respondent's office where all the warring factions were represented. In that meeting a constitutional Review Committee with membership from all the warring factions was formed and charged with the duty of coming up with a constitution that was conforming with the Societies Act."

22. The material placed before the High Court on the basis of which the Judge formed those views consisted of letters that emanated from the Registrar. The first of those letters is dated 17th April 2013 addressed to Archbishop John Mweresa Kivuli II by the Registrar. In that letter, the Registrar alluded to an impromptu meeting between the Archbishop John Mweresa Kivuli II and his priests and assured the Archbishop that the office of the Registrar would "*attempt to provide and avail all possible opportunities to reconcile the church*". In the same letter the Registrar made reference to a 'direction' he had made

earlier that the constitution of the Church be drafted afresh in line with the law following the direction given by Vihiga Senior Resident Magistrates Court in Civil Case No. 107 of 1998. The Registrar went on to inform Archbishop John Mweresa Kivuli II in the same letter, that, *“as you are aware this office approved that process of constitution making and now we have been notified that an election scheduled under the new constitution which was approved after that process is set for 20th April 2013”* and that *“as at the date of writing this letter, it is too late to vary or change that process.”*

23. The next letter by the Registrar is to the Secretary of the Church and is dated 23rd August 2013. It refers to a meeting with the church advocate and the advocate appointed by the other group calling itself *“the National Coordinating Committee”* at which, according to the Registrar, a consensus seemed to have been built to the effect that the constitution of the Church should be amended on a priority basis. By the same letter, the Registrar invited the parties for a joint consultative meeting on 30th August 2013 and requested the advocates to attend that meeting *“with at most ten (10) members from their side to deliberate on the modalities of effecting and adopting the process of making the constitution and the way forward.”*

24. That letter was followed by another letter dated 26th September 2013. It is also from the Registrar. It was addressed to Edward Ogolla Advocate and to Biwott Korir & Company Advocates and refers to *“our joint consultative meeting of 30th August 2013 concerning the [church]”* at which, *“both parties agreed that a joint Constitutional Review Committee to amend the constitution be formed to undertake that duty urgently”* and that such committee membership was to be forwarded by 9th September 2013. In that letter, the Registrar lamented that the Archbishop, though represented at the meeting held on 30th August 2013 by Mr. Ogolla Advocate had not *“up to date presented their membership”*. The Registrar concluded that letter with a direction that:

“This is now to direct that the constitutional Review Committee which is now on record may continue to hold the consultative meeting as soon as possible, prepare the constitution and call for a meeting to ratify the same. If the other group appoints members they may be allowed to join in the process. The result of that initiative will form the recognized record of this society.”

25. It is not clear whether the constitutional Review Committee to which the Registrar was referring in that direction is the same committee that the lawyers had deliberated upon at the meeting held on 30th August 2013 or whether he was referring to the constitutional Review Committee he had alluded to in his earlier letter dated 17th April 2013. Whatever the case, what is clear is that the Archbishop and his priests had not at that stage had input in the constitution of the review committee.

26. There is then a letter dated 6th December 2013 addressed to Biwott Korir & Company Advocates and copied to Edward Ogolla Advocate communicating the Registrar’s impugned decision approving the Church’s new constitution. In that letter, the Registrar referred to the letter dated 26th September 2013, to which we have referred above, and to a letter *“by the chairman of the Constitution Drafting Committee Rev. Patrick Wamalwa dated 7th October 2013”* and went on to state:

“We are glad to note that the said Joint Constitutional Review Committee has now completed their work as was agreed by our joint resolution of 30th August 2013, and has now presented the “New Constitution” which we have now approved. They have also presented the minutes and the notification of the change of office bearers following their meeting of 1st December, 2013 which we have also approved...”

27. No minutes of the meetings to which the Registrar referred in his correspondence were availed to the court below. There was therefore no material before the court on the basis of which it would be established who the members of the alleged committee were; where they were drawn from or indeed how they were appointed to the committees; or how the said Rev. Patrick Wamalwa was appointed or elected as chairman of that committee and by whom.

28. The constitution of the Church, which both warring factions agreed was in need of amendments, had provision for amendment in these terms:

“THE AMENDMENT OF THE CONSTITUTION:

The constitution shall be revised after every seven years by the constitution review committee of ten people appointed at an annual general meeting proceeding the year of revision. The HIGH PRIEST, the secretary general and the treasurer general shall automatically be members of the committee.

The High Priest shall be the chairman, the secretary general shall be the secretary and the treasurer general shall be the treasurer of the constitution review committee. The seven other committee members shall be appointed by the annual general meeting prior to the year of revision. Revision shall take only one year.

Notices to be reviewed shall be sent to the secretary general before the annual general meeting approving the constitution. The members shall be notified in writing by a notice of twenty one (21) days.

In the absence of any church member with knowledge on legal matters in relation to the constitution, the church shall seek assistance from competent persons with approval from the HIGH PRIEST.”

29. There is no contest that the Registrar has the power to intervene in the affairs of the Church in accordance with the Societies Act. Section 19 of that Act in particular is relevant in that it empowers the Registrar to require any society to amend their constitution or rules if the same are not in line with the Act.

30. In exercising that power, it was incumbent upon the Registrar to follow due process. In our view, the beginning point for the Registrar should have been to have regard to the procedure for amendment as set out in the constitution of the Church that was to be amended. As we have already indicated, there is no evidence that the composition of the ‘committee’ that produced the constitution that the Registrar approved was itself constituted constitutionally. In our view, the Registrar did not act with procedural fairness towards ensuring that the process of amending the constitution of the Church was fair and inclusive.

31. In his letter dated 26th September 2013, the Registrar noted that although the Archbishop was represented by Mr. Ogolla at a meeting held on 30th August 2013 where it was agreed that a joint constitutional review committee be formed, the Archbishop “*have up to date not presented their membership.*” Although the appellants say that the Church briefed one Edward Ogola, “to handle the exercise”, the Registrar should have been concerned that the Archbishop and those he represents were not represented in the committee.

32. The conclusion reached by the learned Judge that all “*the warring factions were represented*” in the process is not supported by the evidence. We are therefore satisfied that the Judge erred in holding that the process of amending the constitution of the Church was consultative and all-inclusive. We accordingly allow the appeal and set aside the Judgment of the High Court and substitute therewith an order allowing prayers 1 and 3 of the appellants’ notice of motion dated 9th January 2014.

33. Each party shall bear its own costs of the proceedings in the High Court and of the appeal.

Orders accordingly.

Dated and Delivered at Kisumu this 2nd day of June, 2016.

D. K. MARAGA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

.....

DEPUTY REGISTRAR