



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: OMOLO, GITHINJI & AGANYANYA, J.J.A.)  
CIVIL APPEAL NO. 232 OF 2004

BETWEEN

1. ISMAEL S. MBOYA
2. HARUN R. GULAH
3. MOHAMMED ASLAM KHAN (ACTING AS THE OFFICIALS OF  
KISUMU MUSLIM ASSOCIATION) .....APPELLANTS

AND

1. MOHAMMED HAJI ISSA
2. REGISTRAR OF SOCIETIES .....RESPONDENTS

*(Appeal from a ruling and order of the High Court of Kenya at Kisumu (Warsame, J.) dated the 12<sup>th</sup>  
day of February, 2004*

in

H.C.Misc. Civil Appl. No. 280 of 2003)

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JUDGMENT OF THE COURT

By a notice of motion application dated 9<sup>th</sup> December, 2003 and lodged in the superior court under **Order LIII R. 3(1)** of the Civil Procedure Rules the applicant, **Mohamed Haji Issa**, sought the following orders, namely:

*“(a) The decision of the Registration (sic) of Societies made in July 2003 by which officials purportedly elected on 25<sup>th</sup> May, 2003 were registered as officials of the Kisumu Muslim Association be removed into this Court and be quashed.*

*(b) The Registrar of Societies be prohibited from recognizing and or registering the persons purportedly elected in the elections of 25<sup>th</sup> May, 2003 as bonafide officials of Kisumu Muslim Association.*

*(c) The persons purportedly elected on 25<sup>th</sup> May 2003 as officials of the Kisumu Muslim Association be prohibited from holding themselves out to any persons as officials of the said Association.*

*(d) the Respondents to pay the costs of this application.*

The application was based on the grounds set out on the face thereof; namely that:

*“(a) the registration of the persons elected on 25<sup>th</sup> May 2003 as the officials of Kisumu Muslim Association was against the relevant provisions of the Societies Act.*

**(b) the purported elections in which the said persons were elected was not sanctioned by the provisions of the constitution of the Kisumu Muslim Association.**

**(c) The Court has issued an order of injunction dated 23<sup>rd</sup> May 2003 by which the said persons had been restrained from holding the elections of 25<sup>th</sup> May 2003 and that the said order was duly served.**

**(d) as at the time of registration of the said persons, as officials as aforesaid, the applicants had filed objections with the Registrar of Societies which objections are pending to-date.**

**(e) The respondents are relying on an illegality to claim authority to manage and run the business of the Kisumu Muslim Association.**

**(f) the registration of the officials as aforesaid was against the rules of natural Justice.**

**(g) the business of Kisumu Muslim Association is suffering and shall continue suffering unless the registration of the said officials is quashed.**

The application was supported by the affidavit deponed to by the said Mohammed Haji Issa, now the 1<sup>st</sup> respondent, who described himself as the chairman of Kisumu Muslim Association. In it the applicant/respondent deponed that the elections of 25<sup>th</sup> May, 2003 were held against the court order of 23<sup>rd</sup> May, 2003 and that some of the persons who took part in the purported elections were not bonafide members of the Association, and that by the time the elections were being conducted, there were objections filed with the Registrar of Societies still pending. He deponed further that the elections held on 25<sup>th</sup> May, 2003 had not been sanctioned by any organ of Kisumu Muslim Association. There was also a verifying affidavit to the application sworn by the same person.

In a “joint replying affidavit” **Mr. Ismail Mboya, Harun R. Gulah and Mohamed Aslam Khan** Chairman, Secretary and Treasurer of the Association respectively, now the appellants, deponed that they were the duly registered office bearers of Kisumu Muslim Association and they denied being parties to Kisumu Chief Magistrate’s **Civil Case No. 845 of 2002**, in which an injunction was issued and that they were never served with any order of injunction.

According to their replying affidavit Chief Magistrate’s **Civil Case No. 504 of 2003** in which an application was made for an injunction against them was dismissed by the court on 8<sup>th</sup> September, 2003.

In his long ruling dated and delivered on 12<sup>th</sup> February, 2004 the learned Judge (*Mohammed Warsame, Ag. J. - as he then was*) stated, *inter alia*:

**“I now come to the inescapable conclusion that the election which took place on 25<sup>th</sup> May 2003 was a nullity and nothing useful can be derived from an act which was void *ab initio*. The sum total of all the above of the decision of the Registrar dated 9<sup>th</sup> July 2003 which recognized and registered the officials and trustees elected on 25<sup>th</sup> May 2003 as (*sic*) hereby removed into this court and quashed. Prayer one of the Notice of Motion is allowed with costs.”**

Then the Judge went on to give further directions to give effect to his order but these had not been sought in the notice of motion application in the first place, and for the purpose of this appeal, the Court will not delve into those directions.

The appellants were dissatisfied with the ruling and they lodged an appeal to this Court’s sub-registry in Kisumu in a memorandum of appeal dated 16<sup>th</sup> September, 2004, which set out the following grounds:

**“1. THAT the learned trial Judge did not consider the appellants submissions in his ruling.**

2. ***THAT the learned trial Judge erred in finding that a letter confirming the decision taken by the Registrar of Societies amounted to the decision itself and therefore treating the matter as if the decision sought to be quashed was annexed.***

3. ***THAT the learned trial Judge erred in not finding that the verifying affidavit did not contain the facts and the exhibits relied on and that all the facts (sic) were contained in a strange document entitled "Affidavit".***

4. ***THAT the learned Trial Judge erred in not considering all the issues raised before him. In particular whether the proceedings were properly originated by way of notice to the Registrar and not by way of Chamber Summons.***

5. ***THAT the learned Judge erred in bringing into his decision extraneous matters which were not covered either by the pleadings before him or the submissions by the parties.***

6. ***THAT the learned trial Judge erred in granting order (sic) which were not sought by any of the parties to the suit.***

7. ***THAT the learned Trial Judge erred in invoking inherent Jurisdiction of the Court when the said jurisdiction was not invoked and was in any case inapplicable to the matters before him.***

8. ***THAT the learned Trial Judge erred in making findings which were nor (sic) supported by evidence by treating the interested parties as having been parties to Kisumu CMCC No. 845 of 2007 when that was not the case.***

9. ***THAT the learned Trial Judge erred in making order staying suits which were pending in the High Court as entrenched in the Constitution when he had no jurisdiction to do so.***

10. ***THAT the findings, holdings and decisions of the trial Judge are a clear manifestation of deliberate bias against the appellants.***

11. ***THAT the learned Trial Judge erred in entering of a Civil Case by going out of his way to look for evidence some from extra-judicial sources in order to justify his findings.***

12. ***THAT the learned Trial Judge dwelt in speculation and conjecture in arriving at his decision.***

13. ***THAT the learned Trial Judge's decision has occasioned a miscarriage of justice.***

14. ***THAT the learned Trial Judge failed to consider the crystallized decisions guiding the applications relating to Judicial Review and/or misapplied them.***

The appeal was heard before this Court on 16<sup>th</sup> March, 2011 when **Mr. Odunga**, learned counsel for the appellants submitted on it that there was no decision before the superior court for quashing. In his view a letter from the Registrar of Societies in response to another informing the parties of the decision taken was not the decision itself. He submitted further that the superior court granted orders which were not sought and referred to an order that the election of the Association officials be supervised by Supkem as one such decision. He stated further that the Court should not have invoked inherent jurisdiction in the Judicial Review application.

**Mr. Onsongo**, learned counsel for the respondent opposed the appeal and stated that the letter complained of communicated the decision of the Registrar; and that this is what was sought to be quashed. That after the Registrar's decision was quashed the orders the learned Judge made thereafter were only additional and this cannot be the basis of upsetting his decision. That those other directions were given by the Judge to give effect to his main order of certiorari.

According to counsel since the date of the order the Association has gone through two more elections and

that the 1<sup>st</sup> respondent was no longer interested in the management of the Association.

**Ms. Langat** for the Registrar of Societies also opposed the appeal and submitted that it had been overtaken by events, in that since the decision was made there have been other elections held though no new officials had been registered at the Registrar's offices.

As earlier stated, the orders sought in the application before the superior court were under **Order LIII Rule (3(1))** of the Civil Procedure Rules. The orders were those of Certiorari and Prohibition. The remedies of Certiorari and Prohibition as well as that of Mandamus are of a prerogative nature and are only available against public bodies including the Registrar of Societies which are inferior to the High Court. They are made not only for excess of jurisdiction or absence of it but also for a departure from rules of natural justice or in contravention of the laws of the land – **Kenya National Examination Council v. Republic – Ex parte Geoffrey Gathenji Njoroge & 9 Others – Civil Appeal No. 266 of 1996**. They do not lie to correct the course, practice or procedure of inferior tribunals or a wrong decision on the merits of the proceedings – see **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. I at page 37 paragraph 128.**

But one of the orders sought in the superior court was as follows:-

**“C. The persons purportedly elected on 25<sup>th</sup> May, 2003 as officials of Kisumu Muslim Association be prohibited from holding themselves out to any persons as officials of the Association.”**

Under **Order LIII Rule 3(1)** of the Civil Procedure Rules, those persons elected on 25<sup>th</sup> May, 2003 as officials aforesaid are not in the category of public bodies and they could not be prohibited under the Judicial Review Process. No wonder then that no order was made by the learned Judge in respect to this prayer.

But as regards the first order sought by the respondent, the learned Judge had the requisite jurisdiction to consider and determine it on the available evidence which supported the prayer. The learned Judge found that there was a decision the Registrar of Societies had made which was sought to be quashed. Contrary to the submissions of learned counsel for the appellants that there was none, it is our view that the letter written by the Registrar dated 9<sup>th</sup> July, 2003 conveyed the decision taken by her and it was capable of being quashed. The learned Judge took into account that the Registrar had not considered the objections filed there by the appellants in respect of the election conducted on 25<sup>th</sup> May, 2003 and had therefore failed to act in accordance with **section 18** of the Societies Act and/or that she had also ignored an order of injunction obtained in the Chief Magistrate's **Civil Case No. 845 of 2002**, restraining the holding of elections which gave rise to the election of the officials of the Association on 25<sup>th</sup> May, 2005. These were sufficient grounds for the Registrar's decision to be quashed. The learned Judge ordered that this be done. We agree.

In respect to the second prayer:

**“That the Registrar of Societies be prohibited from recognizing and/or registering the persons purportedly elected in the elections of 25<sup>th</sup> May, 2003 as bonafide officials of Kisumu Muslim Association,”**

we are minded that an order of prohibition is one issued by the High Court to forbid an inferior tribunal or body from carrying out a quasi-judicial function which that inferior body has no jurisdiction to do or that it cannot do it in excess of its jurisdiction – see **Kenya National Examination Council v R (Supra)**. Prohibition orders look to the future and prohibit what is intended to happen before it is done, but it cannot be issued to affect what has already been done. In the case the subject of this appeal the Judge fell into an error when he purported to make an order to bar the registration of the appellants by the Registrar of Societies when the officers had already been registered. In view of the foregoing and as the main prayer in the application was not challenged sufficiently, we are of the view that this appeal has no merit and we dismiss it.

We were informed during the submissions that since the filing and/or the decision of the case subject to this appeal, 2 more elections of the Association had been held and they had not elicited any further disputes and that some of the parties, including the 1<sup>st</sup> respondent in this appeal, are no longer interested in the matter. We encourage that reconciliatory spirit. To encourage further that spirit, we make no orders as to costs.

*Dated and delivered at Kisumu this 13<sup>th</sup> day of April, 2011*

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**