



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 310 OF 2009

- 1. PETER KIGUTA MWAURA**
- 2. GEORGE MBUGUA NG'ANG'A**
- 3. SAMUEL KARAU**
- 4. JANE GATHONI MBURU**
- 5. STEPHEN GIKONYO.....APPLICANTS**

AND

- 1. THE REGISTRAR OF SOCIETIES**
- 2. DANIEL MBIRI MUGI**
- 3. FRANCIS N. WAHURIA**
- 4. KENNEDY MURIMI KARANJA.....RESPONDENTS**

(An application for stay and an injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J.) dated 5th October, 2009

in

H.C.C. Appl. No. 97 of 2009)

RULING OF THE COURT

This application dated 16th October, 2009 and filed in this Court on 21st October, 2009 seeks the following orders, namely:

(a) ...

(b) That an injunction do issue restraining the 2nd - 4th respondents from further fraudulently and unlawfully masquerading themselves as members of Githunguri Social Club and/or in any manner whatsoever involving themselves in the activities of the said Githunguri Social club

pending the hearing of the intended appeal,

(c) That an injunction do issue restraining the 2nd - 4th respondents from further fraudulently and unlawfully masquerading themselves as the duly elected properly constituted and/or bonafide officers of the Githunguri Social Club and/or in any manner whatsoever intermeddling with the legitimate and ordinary activities management and or running of the said Githunguri Social club pending the hearing and determination of the intended appeal.

(d) That pending the hearing and determination of the intended appeal an injunction do issue restraining the 2nd - 4th respondents and in particular the 2nd respondent, namely Daniel Mbiru Mugiri from criminally threatening the applicants and in particular the 1st applicant namely Peter Kiguta Mwaura with the consequences and/or unspecified damnation unless the said applicants confer the said respondents with the said club's membership and/or surrender the said Githunguri Social club and its assets to the said respondents.

(e) That the Honourable court be pleased to grant an order of stay of execution of the costs awarded to the respondents pending the hearing and determination of the intended appeal.

(f) That the costs of this application be borne by the respondents.

The application was supported by the grounds set out on the face thereof as follows:-

(i) The applicants being dissatisfied with the judgment and decree of the superior court dismissing with costs the notice of motion dated 16th February, 2009 have procedurally lodged and served the notice of appeal and concomitant request for typed proceedings and judgment dated 5th October, 2009.

(ii) The applicants intend to lodge and diligently prosecute the said intended appeal as soon as the copies of the proceedings and judgment are furnished by the High Court.

(iii) the applicants' intended appeal is manifestly arguable and/or meritorious as borne out by the draft memorandum of appeal but the same will undoubtedly be rendered wholly and/or substantially nugatory unless this Honourable court intervenes forthwith and grants the orders prayed for since the 2nd-4th respondents are hell-bent on completing their fraudulent bid to take over the Githunguri Social Club and thievishly (sic) plunder its assets by reason whereof the applicants and the true membership of the said club will suffer irreparable loss and damage notwithstanding the successful hearing and determination of the intended appeal.

(iv) Further to the foregoing the applicants will be severely prejudiced in the likely event that the respondents particularly the 2nd - 4th respondents execute for the decreed costs since the said 2nd - 4th respondents who are demonstrably persons of dubious character and whose means are unknown to the applicants may not reimburse the said costs in the likely event that the intended appeal is successful. What is more this Honourable Court should guarantee an orderly dispensation of justice (Hon. Mr. Justice Moiwo Ole Keiwua v The Hon. the Chief Justice of Kenya & 5 Others, Civil Appeal No. 296 of 2006 at Nairobi).

(v) It is in the interest of justice that the prayers sought are granted.

The application was supported by an affidavit deposed to by **Peter Kiguta Mwaura**, the 1st applicant who swore that he had the authority of the other four applicants to swear it. He swore that as at 31st October, 2008 the applicants were the properly constituted officers of the club. He stated that the learned Judge wrongly and in total disregard of the evidence on record held:

“That the court has not been told what the membership of the club is.”

That while apparently attempting to controvert the applicants' aforesaid assertion the 2nd – 4th respondents merely contended that the applicants had authored a fictitious list but declined to disclose the purported members they were allegedly representing. That the said 2nd – 4th respondents did not also rebut the applicants' assertions contained in the said applicants' objection to the Registrar's letter dated 8th December, 2008 regarding the said respondents' forged attendance list dated 30th October, 2008. According to the deponent, it was obvious from the learned Judge's judgment dated 5th October, 2009 that she strenuously avoided dealing with the applicants' uncontroverted assertion that the 2nd – 4th respondents concocted the minutes in question appearing at pages 37 - 41 of the record and that no such meeting was held. He appended a list of people whom he said were either dead and/or not members who could therefore not have been expected to attend meeting of 30th October, 2008 which purported to elect new officers of the club.

The deponent stated further that the applicants were particularly aggrieved by the failure by the learned Judge to find that the respondents' contention that the alleged elections were held was a plain falsehood and that it was the applicants' honest belief that the learned Judge's failure and/or refusal to consider and/or give such an issue its natural interpretation demonstrates bias against the applicants and indeed exposes courts to ridicule.

The deponent then referred to the forceful takeover of the club by the respondents with the assistance of the Officer Commanding Station Githunguri Police Station and the threats of consequences he receives from the respondents if he refuses to relinquish the leadership of the club. He complained about the learned Judge's sanction of impunity, criminal impunity, dereliction of duty, abuse of duty, general anarchy, an affront to public policy and that the dispute was not fairly arbitrated upon. He stated that unless orders of injunction and/or stay are granted, the intended appeal would be rendered nugatory and/or the respondents will plunder the immovable and movable assets of the club and also take over the club which will cause the applicants and the true members of the club irreparable loss and damage.

Two (2) replying affidavits were filed in opposition to the applicants' application. The first one was deponed to by **Daniel Mbiri Mugi**, the 2nd respondent, who stated that he had the authority of the 3rd and 4th respondents to swear it. In his said affidavit the 2nd respondent stated that on advice he had received from his counsel, the notice of motion dated the 21st day of October, 2009 and all the documents in support thereof were fatally defective as the motion does not comply with the legal requirements as regards applications for prerogative orders. According to the deponent the orders sought in the application if granted would essentially determine the intended appeal without according this Court the benefit of full arguments as regards the judgment of the superior court. That the issue of membership of the respondents and the positions they hold as elected officials of the club were extensively canvassed before the Deputy Registrar of Societies before the notification was duly accepted; also the same issues were extensively canvassed before the learned Judge of the superior court, on the respondents' application to set aside and remove the applicants from the positions of leadership they had illegally obtained. That the applicants did not appeal against the ruling of the superior court made on the 26th day of March, 2009 which confirmed the respondents as both members and officials of Githunguri Social Club, which positions the respondents had held since then. In his affidavit the 2nd respondent stated that, to the contrary, it is the applicants who are intent to and have actually defrauded the membership for the club of their assets by transferring them to Githunguri Paradise Limited. That it is them who did not comply with the club constitution and did not hold elections or file returns and the list of members which leaves no room for doubt as to who the members of the club are. That the 1st applicant who had been chairman of the club since 1965 edges out any member who expresses a different opinion from his, such that the applicants have mastered the art of concocting lists of membership suitable to them in advancing their course and that those alleged lists were never submitted to the Registrar of Societies as required by law; hence they had no basis of disputing the list of members submitted by the respondents to the Registrar of Societies. The 1st respondent in his affidavit complained about unpalatable and dishonourable language used by the applicants and/or their counsel in their notice of motion and the scandalous averments which would warrant those passages to be expunged from the record, in particular paragraphs 13, 14, 15, 22, 25 and 31. He stated that the respondents were elected officials of the club pursuant to the Annual General Meeting held on the 5th day

of October, 2008 their election was endorsed by the Registrar of Societies which prompted the Judicial Review application to the superior court. On 11th day of October 2009, and in compliance with the constitution of the club, an Annual General Meeting was held in which the respondents were duly re-elected; that the respondent's election for the period between October 2008 and October 2009 were sanctioned by both the Registrar of Societies and the superior court after both parties were heard and it was established that it was in fact the applicants who were out to defraud the members of the club by converting the assets of the club to their private property. According to the affidavit, the assets of the club and its affairs have been running very smoothly and that it was for that reason that the learned Judge of the superior court confirmed the respondents' mandate.

The Registrar of Societies, through Joseph Onyango then engaged as a Deputy Registrar-General and Senior Principal State counsel in charge of societies swore a replying affidavit and supported the respondents' replying affidavit stating that since the election of the respondents as office bearers of the club in a Special General Meeting on 2nd November, 2009 there had been relative calm and peace in Githunguri Social Club. That the 1st respondent, the Registrar of Societies, had been erroneously enjoined as a party as there were no orders being sought from her and that the learned Judge properly directed herself in fact and in law and properly considered all the evidence placed before her in arriving at the judgment now being contested.

In this matter, it would appear the applicants particularly the 1st applicant had been officials of the club since 1965; but on 5th October, 2008 an annual general meeting was held in which the applicants were voted out and a new team led by the 1st respondent as Chairman was voted in. This team comprised of the respondents. But when a notification of change of office bearers was sent to the Registrar of Societies indicating the names of the 2nd to 4th respondents as new office bearers of the club, the applicants, disputed this and the Deputy Registrar of Societies, one **Tom A.O. Ogwen**, called a meeting of the two groups in an attempt to resolve the dispute on 4th December, 2008. The applicants did not show up. The 2nd – 4th respondents then wrote a letter dated 4th December, 2008 to the said Registrar of Societies to endorse the respondents as officers of the club. He did so as shown by his letter dated 23rd January, 2009 addressed to counsel for the applicants. This is how the Registrar of Societies came to be enjoined in this application. On 13th February, 2009 counsel for the applicants made an application to the superior court, by an *ex parte* chamber summons for leave to apply for orders of certiorari prohibition and mandamus against the respondents and that such leave do operate as a stay of the Registrar's decision of 16th January, 2009. The application was supported by an affidavit deposed to by the 1st applicant. The learned Judge (*Wendoh, J.*) who heard the application on 16th February, 2009 granted the orders sought therein and directed that the grant of leave do operate as a stay. She gave the applicants' four (4) days to file the intended motion failing which the stay would automatically lapse. The applicants filed the main application in time and it was heard by the same Judge, who dismissed it on 5th October, 2009. The applicants intend to appeal against the superior court judgment and in that regard they have filed a Notice of Appeal.

The application by notice of motion was for orders of certiorari, prohibition and mandamus. In the Judicial Review application the order of certiorari sought was to call into the High Court and quash the decision of the Registrar of Societies made on 16th January, 2009 while the order for prohibition was to prohibit the said Registrar from acting further in the matter or implementing and/or effecting his said decision under the Societies Act and to prohibit the applicants from intermeddling in the management of the club. On the other hand the order of mandamus sought was intended to direct the Registrar of Societies to respect the constitution and rules of the club. But the orders of injunction sought in the application before this Court are intended to restrain the 2nd – 4th respondents from masquerading as either members or officers of the club. As can clearly be seen, there is no connection whatsoever between the orders sought in the Notice of Motion and those being sought in this application. And as regards the order of stay of execution for costs awarded to the respondents by the superior court, no basis has been laid to warrant this Court to make such an order. It is not shown that the respondents have set in motion the process to recover such costs.

In any case the application before the superior court was by way of Judicial Review under **Order 53, Rule 1** of the Civil Procedure Rules. But **section 8(1)** of the Law Reform Act which is the substantive law on Judicial Review provides as follows:

“The High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative writs of Mandamus Prohibition or certiorari.”

Various decisions of this Court have confirmed that the judicial Review Process is of a special kind of jurisdiction over which the Civil Procedure Code and Rules do not apply; see ***Hotel Kunste v. Commissioner of Lands, Civil Appeal No. 234 of 1995*** and ***R v. Communication Commission of Kenya; Exparte East African Television Network – Civil Appeal No. 175 of 2000*** (unreported). Given these provisions of the law and decisions of this Court on the matter, on the record before us we are not satisfied that the applicants have an arguable appeal to warrant the grant of the orders being sought in this application, and in view of this finding it is not necessary for us to go into the nugatory aspect of the intended appeal.

Consequently we dismiss this application with costs.

Dated and delivered at Nairobi this 23rd day of April, 2010

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR