



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC CIV APPLI 388 OF 2006

REPUBLIC.....APPLICANT

Versus

REGISTRAR GENERAL.....RESPONDENT

EX PARTE STEPHEN KIGURU KAMAU

JACKSON KIPKEMBOI KOSGEI

GEORGE ODOYO OWITI

ELIUD KARANJA WANYOIKE

SAMUEL WACHIRA MAINA

JOSEPHAT KAMAU NG'ANG'A

STEPHEN MAINA MWANGI

STANLEY WAWERU KAMAU

JOSEPH KIMANI

JONATHAN KIRAGU NJUGUNA

JOHN AMDANY

STEPHEN NYAKOI MAKORI

PETER GAITHO WANDERI

JUDGMENT

This is a Judicial Review Application filed by the 13 Applicants who seek an order of certiorari to remove to this court and quash the decision of the Deputy Registrar General made on behalf of the Respondent, dated 20th June 2006 and appearing in the Kenya Gazette on 7th July 2006 purporting to cancel the Applicant's licences to celebrate marriages; an order of mandamus directed against the

Respondent compelling the Respondent to issue the marriage certificate books to the Applicants; costs of the application and any other order the court deems it fit to grant.

The Respondent in this matter is the Registrar General. The Notice of Motion is supported by a Statutory Statement of the Applicants and a Verifying Affidavit sworn by Rev. Stephen Kiguru Kamau in which he depones that he is competent to swear and has authority of the other Applicants to swear it. It is dated 31st July 2005. The Applicant's Counsel also filed skeleton arguments on 1st September 2006.

A Replying Affidavit in opposition was filed by one Longet Terer, a State Counsel engaged as an Assistant Registrar General in the Department of Registrar General, who deponed to have knowledge of the facts of this case. The Affidavit is dated 15th December 2006. The Respondents Counsel one Mr. Adera filed skeleton arguments on 15th December 2006.

On the 30th January 2007 when the matter was heard Mr. Adera Counsel for the Respondent came in after Mr. Ongoya had started submitting. The matter was adjourned to enable Mr. Adera present his submissions to the court but he never showed up on 19th February 2007. The court will therefore consider the Replying Affidavit and skeleton arguments in opposition to the Application.

The factual background of this case from the Applicants perspective is as follows:-

The Applicants claim to be members of the Full Gospel Churches of Kenya and there have been leadership wrangles since November 2003. The dispute pits the Applicants against a group led by Rev. Samuel Muriithi Njogu, Rev. Samuel Mbithi Kathita and Rev. Wilfred Muriuki Gatheru. Elections were held in November 2003, over which the parties disagreed. A repeat was ordered by the Church Dispute Resolution Body but the group led by Rev. Samuel Muriithi Njogu defied it.

Following that dispute, the 2nd Applicant informed the Respondent not to Register the self declared group with its office bears by a letter dated 17th November 2003 (EKW 2). The Respondent attempted to arbitrate on the matter (EKW 3) but withdrew when he realized that there were court orders prohibiting him from recognizing the new office bearers. Despite the court orders, the Respondent went ahead to act on instructions of the opposing group and denied the Applicants Marriage Certificate Books which act amounted to an illegality and contempt of court orders. By Gazette Notice No. 5181 of 20th June 2006, the Respondent purported to cancel the Applicants licences to celebrate marriages (EKW 5). It is the Applicants contention that the list of names cancelled from holding licences consisted of deceased persons or names of persons who have never been licenced to celebrate marriages. As a result, the Applicants allege that the rules of natural justice were breached because they were never heard before their licenses were cancelled, that the Respondent's decision was arbitrary, highhanded and without reasonable cause, the decision was oppressive, made mala fides, biased and unjustified and should be quashed.

In opposing the Application Mr. Longet deponed that the Application is an abuse of the Court process because the leadership wrangles between the parties are pending in court in Misc. Civil Application 9/05 and 1236/04 and that there are no interim orders restraining the officials from performing their official functions.

Mr. Longet also submitted that the Applicants have failed to disclose that they were excommunicated from the church and are no longer ministers, or pastors or members of the Full Gospel Church and cannot therefore be awarded the said orders. This was done in the meeting of 7th – 10th June 2004 at Koru Bible College – minutes were exhibited 'LT 1'.

Mr. Longet also said that it is the Respondent to licences ministers of churches to celebrate marriages and it is the Registrar who has the residual power to cancel them. That the Registrar only licences ministers to celebrate marriages upon written Application by the Registered officials of any church and there was no Application to register the said officials.

That the Applicants should have challenged the church's decision to strip them of their positions through arbitration or before the High Court and that the Respondent would have acted ultra vires were they to grant the Applicants a hearing. That in any event, the grant of a licence to celebrate marriages is a privilege and is not a right and cannot be granted to undeserving persons. That the Applicants are trying to overturn the decision to excommunicate them which they have failed to do in HCC 1236/04. That the cancellation of the licences was justified, not done in bad faith or arbitrarily.

Though Mr. Adera did not attend court to make his submissions on behalf of the Respondent, the court is obliged to consider the Replying Affidavit filed and the skeleton arguments on record.

It would have been of great assistance to this court, had the pleadings in the various cases that have been filed, been exhibited or had the court been told of the present state of the cases. There was indeed a missing link in the Applicants case as to what orders may be in existence as regards these cases that are pending which may have an effect on the decision of the Registrar that is impugned.

The first challenge to the Applicants' case is whether the Applicants have the jurisdiction to bring this Application. It is not disputed that the Respondent attempted to resolve the dispute between the warring factions in the Full Gospel Church but failed. After the disputed elections in November 2003, it seems the Applicants went to court. It is not clear what happened to the case they filed then. But from annexure LTI to the Respondents affidavit it seems the National Pastoral Council of the Full Gospel Church met at Koru between 7th and 10th June 2004. The minutes of that meeting have not been challenged by the Applicants. By then, all that the Applicants seemed to have done to secure their position was to inform the Registrar not to register new office bearers by the letter of 17th November 2004

In the meeting of 7th – 10th June 2004, the unanimous decision of the council was that those who had taken the Church to court be excommunicated. That decision of the council was taken before the court's Order of 12th November 2004 in HCC 1236 of 2004 in which the status quo in the Full Gospel Churches of Kenya prevailing as of October 2004 was to be maintained, was made. And what was the status at the time? The Status was that a decision had been taken on 8th June 2004 to excommunicate the Applicants from the Church. Whether the decision was proper or not, it was in force then and the Applicants' could not be had to take part in the affairs of the church before that decision was quashed or set aside. It is noteworthy that as of 7th to 10th June 2004 there was no court order barring the opposing faction from assuming office.

There is no evidence that by time of the order on 12th November 2004 the said decision of the council had been set aside or quashed. This is what the General Secretary conveyed in the letter Exhibited as EKW 5 to the Registrar General and following which the Registrar issued the Gazette Notice 5181 of 20th June 2006 canceling the licences to officiate marriages by the Applicants.

I am in agreement and do hold that as of 20th June 2006 the Applicants had been excommunicated from the church membership of the Full Gospel Church of Kenya and would not be entitled to officiate any marriages. Further to that, there was no valid court order barring the Registrar from canceling the marriage licences because the order of the court of 12th November 2004 was made after the Applicants were expelled from the church membership and their posts of pastors.

Did the Registrar have an obligation to hear the Applicants before canceling their licences? Firstly it seems that the Registrar was not aware of the fact that the Applicants had been excommunicated from the church when the letter of 3rd March 2005 was written by the Registrar ordering the status quo to be maintained in terms of the court order of 12th November 2004. Once the Registrar learnt of the excommunication having taken effect before the court order, she had no obligation to hear the Applicants otherwise she would be acting ultra vires the Registrars powers to sit on appeal on a decision taken by the church. I believe the church has its own machinery for dealing with such a situation or the Applicants could move the court for the relevant orders. Quashing the decision of the Registrar would in effect be

choosing for the Full Gospel Churches who are its ministers and who are to celebrate marriages which is not the duty of this court.

Under Section 6 of the African Christian Marriage and Divorce Act, under which the ministers of the Full Gospel Church were licenced to celebrate marriages, the Registrar General may licence any minister to celebrate marriages and may at any time cancel such licence; and notice of the granting or cancellation of such licences shall be published in the gazette. S 6 (2) prohibits any minister from celebrating a marriage without such a licence.

When the Applicants applied to be registered as ministers and even served the Registrar with the court order of 12th November 2004 they were aware that they had been excommunicated. It is only when the Secretary General of the church wrote to the Registrar about the excommunication that the Registrar then acted by canceling their licences. The Applicants had not disclosed to the Registrar these very material facts and in my considered view even though ordinarily, the Registrar should have notified the Applicants of the cancellation of the licence, the Registrar did not need to give them a hearing or reasons for cancellation under the circumstances. A licence is a mere permission to do an act which would otherwise have been illegal. In this regard, I am satisfied that the Registrar was justified in cancelling the licences and need not have given them a hearing or reasons, the applicants having been aware of their excommunication and did not disclose to the Registrar.

According to the Respondent, marriage licences are only issued to Ministers who are appointed by particular churches and the Registrar has to get that authority in writing. In this case, there is no evidence that the applicants were authorized to by the church nor had the Registrar received any authority to issue to them the marriage books which contain the licences.

Would the applicants be entitled to Judicial Review orders? The case of **KENYA NATIONAL EXAMINATION COUNCIL VS. REPUBLIC CA 266 OF 1999** sets out the scope of Judicial Review orders. Mandamus commands an inferior tribunal to do a statutory duty pertaining to his office and which is of public nature. Where a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation has been placed, a mandamus cannot command that duty to be carried out in a specific way. In this case the Registrar has the duty to issue marriage licences but it is left to the Registrar to determine who is qualified to be issued with the same, one of the considerations being that the person must have been authorized by a particular church. In this case the court cannot force the Registrar to issue the licences if the requirements that the Registrar takes into account are not satisfied.

I have considered above that the applicants failed to disclose to the Registrar or even to this court that they had been excommunicated from the Full Gospel Churches of Kenya. The Court order of 12th November 2004 must have been given without knowledge of the existence of that state of affairs. Withholding of material facts is evidence of bad faith and the applicants would not be entitled to the exercise of the courts discretion in their favour. In any event Judicial Review orders are discretionary remedies and the court may decline to grant them even when deserved, if the court is of the view that they are not the most efficacious remedies in the circumstances. In the instant case, it may cause more trouble in the said Church if two warring factions were to be licenced to conduct marriages. The disputes as to leadership would need to be resolved first and that is what the Applicants should seek to do, apart from having their excommunication reviewed, set aside or quashed.

For all the above reasons, the orders of certiorari and mandamus are not merited and the Notice of Motion dated 18th July 2006 is hereby dismissed with costs.

Dated and delivered this 30th day of March 2007.

R.P.V. WENDOH

JUDGE