THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-649 -2012

1. **HON. SITENDA SEBALU**

2. **HON. MUKULA RICHARD AND OTHERS::::::::::APPLICANTS**

VERSUS

1. THE REGISTRAR OF CO-OPERATIVE SOCIETIES
2. BAGUMA ISOKE
3. MARY AMAJO
4. LOKERIS PETER
5. MUTEBI KITYO
6. HON. ERESU JOHN
7. HON. MATTE ROGERS ::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This is an application brought under the Judicature (Judicial Review) Rules, 2009 seeking declaratory judgment and orders of certiorari, prohibition, permanent injunction, general and punitive damages as well as costs.

The grounds of the application are contained in the motion and the supporting affidavits deposed by Hon. Sitenda Sebalu and Hon. Mukula Richard.

Briefly they are that:

1. The actions of the registrar of Co-operative Societies (herein after called the registrar) were ultra vires the NALECCO SACCO (hereinafter called the society) byelaws which require the registrar to call a special general meeting within fourteen days after the committee of the society has failed to act, upon receipt of a demand by the members to call such a meeting.

2. That the action of the registrar in allowing non members to participate in the said meeting and to vote using the wrong procedure to change and remove members of the committee is ultra vires.

3. The subsequent election is thus null and void.

The application was opposed and several affidavits in reply were filed. For the first respondent, two affidavits were filed. The 1st affidavit was sworn by Mr. F. E Mwesigye, the registrar who deposed that at the time of registration of the society on the 16th May 2007, there was an interim committee comprising of Sitenda Sebalu, Avitus Tibarimbasa, Besisira Ignatius, Vicky Kakoko Sebagereka, Kiwanda Godfrey, Aidah Mehangi and Mukula Richard. Furthermore, that on 16th June 2011 he received a letter from some members of society requesting for the convening of a special general meeting as per annexture “RI”.

Mr. Mwesigye deposed that upon perusal of the records of the society he noted that it had never filed its annual and management reports since its inception. Furthermore, that on the 15th August 2011 he caused a notice to be published in the

New Vision Newspaper calling for a special general meeting as per annexture "R2".

Mr. Mwesigye further averred that he appointed Mr. Johnson Abitekaniza to preside over the meeting which was held on 5th September 2011 at Hotel Africana in accordance with regulation 23(1) of the Cooperative Societies Regulations (hereinafter called the Regulations). He received a report from Mr. Abitekaniza about the special general meeting that was held and election of new office bearers conducted. He also stated that the act of convening the special general meeting was done within the confines of the law, in particular section 22(7) of the Co-operatives Societies Act (hereinafter called the Act) and regulation 21(4) of the Regulations.

The second affidavit in reply was deposed by Mr. Johnson Abitekaniza, a Senior Co-operatives Officer. He averred that he was appointed by the registrar to preside over a special general meeting whose agenda had earlier been indicated in the New Vision Newspaper of 15th August 2011. Mr. Abitekaniza stated that on 5th September 2011 he went to Hotel Africana, presided over the meeting and conducted election of the new office bearers as per minutes of the meeting marked "R4". He asserted that he did not allow any non members to participate in the meeting and also that the correct procedure was used in the conduct of the elections.

On 10th April 2012 each of the remaining six respondents filed affidavits opposing the application. Hon. Matte Rogers deposed that the two applicants among others were elected to the interim committee of the society at its registration in May 2007. He averred that the interim committee for five years never organised a general meeting of the society keeping the members in the dark about its operations.

Consequently a group of 20 members of the society sought the assistance of the registrar to summon a special general meeting of the society. He averred that the special general meeting was held on 5th September 2011 and a new committee elected. He denied the applicants' allegation that there was conspiracy to oust the interim committee of the society.

In his affidavit in reply, the sixth respondent, Hon. John Eresu reiterated what is stated in the affidavit of Hon. Matte but added that the interim committee mismanaged the affairs of the society operating it as a personal business. He also stated that he was not aware of any meeting organised by the interim committee as alleged by the applicants.

The 2nd respondent, Hon. Baguma Isoke also deposed an affidavit in reply wherein he stated that up to May 2011 the interim committee which the two applicants were part of had neither called a general meeting of the society nor caused its accounts to be audited.

In another affidavit in reply Mehangye Idah, a former Vice Chairperson of the interim executive committee of the society averred that she did not wish to be an applicant in the case as she was never consulted in the decision of the applicants to join other interim executive committee members.

The affidavits in reply deposed by Hon. Mary Amajo, Mutebi Kityo Henry and Besisira Ignatius basically reiterated what is stated in the other affidavits in reply whose contents are summarised above.

On 3rd February 2012, the first applicant filed an affidavit in rejoinder wherein he insisted that not all the petitioners who requested for the meeting on 16th June 2011 were registered members of the society. He asserted that the meeting held on 5th September 2011 was conducted in contravention of regulation 21(4), 23(1) of the Regulations and section 22(7) of the Act as some petitioners were not members of the society. He further stated that the election of new office bearers without an audit report was in contravention of section 22(7) of the Act.

On 6th February 2012 a supplementary affidavit in rejoinder was filed wherein the first applicant adduced the society's bye-laws as annexture "A" which included the alleged list of founder members. It was averred based on that list that some people who attended and were elected members of the new executive were not members of the society.

On 12th April the 1st applicant filed a supplementary affidavit in which he stated that there was no demand note from the petitioners to the registrar to the effect that the old executive had failed to convene a meeting.

In yet another supplementary affidavit in rejoinder filed on 16th April 2012, the 1st applicant maintained that Baguma Isoke, Matte Rogers and Mary Amajo who attended the meeting in issue were elected as new members of the executive committee when they were not members of the society. It was also stated that in the said meeting the first applicant was condemned unheard and that the minutes of the meeting were doctored. Further that the society was always holding meetings and about 116 meetings convened by the executive can be listed.

It was deposed further that the old executive employed a one Mary Rugadya as manager of the day to day running of the society and it was her responsibility to prepare and give returns to the registrar.

On 20th April 2012 Baguma Isoke the second respondent also filed an affidavit in rejoinder stating that he was a member of the society having joined it on 26th March 2008 and received an identity card No. NALECO 073 duly signed by the 1st applicant and marked annexture "C" to the affidavit. He also denied that the interim executive led by the 1st applicant ever held any meeting

On the same date Hon. Eresu John, the sixth respondent filed an affidavit in rejoinder stating that his position as RDC neither affected his membership in the society nor his following of the happenings in the same. He averred that he was not aware of any non member who petitioned for the special general meeting or who was elected to the new executive of the society. He also denied knowledge of any special general meeting held by the interim executive under the leadership of the 1st applicant.

Counsel for the parties filed a joint scheduling memorandum in which the agreed issues for determination of this court were:-

1. ***Whether the matter is properly before the court.***
2. ***Whether the registrar acted legally in convening the special general meeting.***
3. ***Whether the meeting was convened in a legal manner and whether the members who attended and those elected to the new committee were registered members of the society.***

4. ***Whether the new committee was legally put in office***.
5. ***Whether the applicants are entitled to the various reliefs sought.***

On 16th April 2012 when this application came up for hearing Mr. Justin Semuyaba represented the applicants, Ms. Kahwa Christine represented the 1st respondent while Hon. Ben Wacha represented the 2nd to 7th respondents. They agreed to file written submissions which they did. I must however observe at this juncture that all the counsel addressed the issues in an omnibus manner and not in the way they were framed. I believe they must have realised that all the issues were intertwined and attempt to consider them separately would have made the submissions long and repetitive. This court will consider the issues in the manner they were argued.

Counsel for the applicant in his written submission reproduced the content of the application and the several affidavits (in support and in rejoinder). He also reproduced passages from some cases that state the law on judicial review remedies. He never bothered to apply those principles to his clients' case. Neither did he address court on the grounds of the application. I find this style of submission where court is given the burden of sorting out the materials relevant to the party's case from what is presented deplorable and very careless of counsel.

Be that as it may, one of the cases referred to by counsel for the applicants that addresses the importance of the remedy of Judicial Review in as far as it relates to certiorari and prohibition is **Chief Constable of North Wales Police v Evans [1982] 3 ALL ER 141 al ap 143 h-1449** where Lord Hailsham L.C stated:

> ***"The purpose of judicial review is to ensure that the individual receives fair treatment, not to ensure that the authority after***

according fair treatment, reaches on a matter which it is authorised or joined by law to decide from itself a conclusion which is correct in the eyes of law".

The case of **Marko Matovu & 2 others v Mohamed Ssekasi & The Land Commission CACA no. 7 of 1978** was also cited for the principle that *audi alteram partum* (hear both sides) is a cardinal rule of natural justice; it is so central to our system of justice that it must be observed by both judicial and administrative tribunals.

Also the case of **Breen v Amalgamated Engineering Union [1971] ALL ER 1148** was cited where Lord Denning stated:

"It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard".

Counsel for the applicants also referred to the case of **General Medical Council v Spackman [1943] 2 All ER 337** where Lord Wright stated:

"If 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 departure from the essential principles of justice. The decision must be declared to be no decision at all".

Counsel for the first respondent argued the last issue as to whether the applicant was entitled to the remedies prayed for which in my view covers all the other issues. According to her, the applicants are not entitled to the remedies prayed for because the first respondent acted within the confines of the law.

In response to the applicant's contention that the 1st respondent acted ultra vires in failing to call a special general meeting within fourteen days after the committee of the society had failed to act upon receipt of demand by the members, it was submitted that for a decision to be referred to as ultra vires, the decision maker must have exercised powers he/she/it did not have. In addition, the action must be outside the jurisdiction of the decision maker or the decision maker must have purported to exercise a power he/she/it did not possess or else use a power for a purpose other than the purpose for which the power was granted. For a public body to take a decision or to embark upon a decision making process without authority or power means that it acts ultra vires or without jurisdiction.

For that proposition reference was made to the case of **Council of Civil Service Unions and Others v Minister for the Civil Service (1985) AC 374 at 410** and quoted with approval in the case of **Ibanda District Service Commission v Public Service Commission HCT-05-CU-MA-055-2009.**

Counsel for the 1st respondent further submitted that the special general meeting was called under section 22(7) of the Act and regulation 21(4) of the Regulations.

Basing on the affidavit of Mr. F.E Mwesigye, it was argued that audited accounts had not been filed by the society since inception thus it was in order to invoke the

provisions of the law. It was further argued for the 1st respondent that due notice was given by the registrar in the press and the applicants even attended it as members of the society.

Counsel for the 1st respondent addressed the court on the law concerning the writs of certiorari and prohibition stating that these two writs issue against lower courts or person or bodies exercising judicial or quasi judicial function or to statutory bodies making administrative decisions which affect the rights of citizens.

It was her submission that the 1st and 2nd applicants were not entitled to the prayers sought because the issues raised in the 1st applicant's subsequent affidavit were an afterthought. Additionally, it was contended that the other applicants did not wish to be parties to the applicants' case as they had deposed affidavits to disassociate themselves from the application and their affidavits supported the averment of the 1st respondent's witnesses that the chairman of the society was not executing his duties in accordance with the law and the society byelaws.

Finally, it was submitted for the 1st respondent that the 1st and 2nd applicants sought equitable remedies but had not come to court with clean hands to entitle them to the remedies.

Counsel for the 2nd to 7th respondents in his written submissions addressed the first issue by way of a preliminary objection. He argued firstly that the application was not properly before court because Parliament prescribed the procedure for dealing with the applicants' grievance but it had not been explored. The procedure prescribed in section 73 (1) of the Act is to the effect that a dispute touching the

business of a society among members or between a member and its committee shall be referred to an arbitrator or arbitrators for decision.

He submitted that a dispute touching on the business of a society was expounded by Rusell J in **Wakiro v Committee of Bugisu Co-operative Union [1968] EA 523 at 527** where it was held that such would include a dispute as to whether the election of certain persons as members of the committee was legal.

He referred to the case of **Speaker of National Assembly v Karume [1993-2009] 1 EAGR 572 at page 575** for the view that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

The second preliminary issue was that the application was defective and ought to be struck out because the supporting affidavits conclude by showing that they support a different subject matter from the orders prayed for in the motion. He argued that while the motion seeks for a declaratory judgment and orders of certiorari, prohibition, injunction, general and punitive damages among others, the supporting affidavits in paragraph 12 states the affidavit is in support of an application for a writ of mandamus to issue against the Treasury Officer Accounts Ministry of Finance and the Attorney General for the decretal sum and taxed costs. It was therefore contended that the notice of motion was unsupported by any affidavit and was not a complete application hence should be struck off.

Without prejudice to the preliminary issues raised, counsel for the 2nd to 7th respondents argued that the applicants had not established the grounds for the issue of the orders sought in their application. According to him, the applicant had to

prove excess or lack of jurisdiction, error of law on the face of the record, breach of natural justice or abuse of statutory authority.

It was submitted that the registrar acted within his power under the law to call the meeting and to cause a new executive of the society to be elected, the interim one having failed in its duties under the provisions of section 22(7) of the Act.

It was further submitted that the 1st applicant having fully participated in the proceedings of the special general meeting as per the minutes of the meeting could not turn around and plead breach of natural justice. The 2nd to 7th respondents' counsel added that the applicant's contention that Hon. Baguma Isoke and Hon. Amajo were not members of the society was refuted in the affidavit of Abitekaniza Johnson.

He contended that the order of prohibition cannot issue under the circumstances since it is meant to prevent the making of a decision. It looks to the future and cannot quash a decision which is already made. It was argued that prohibition cannot issue in respect to an existing fact since the new executive was duly elected on 5th September 2011 and they have already acted in their new offices. For that contention reference was made to the case of **Kenya National Examination Council v Gatheri Njoroge and Others Kenya Court of Appeal Civil Appeal No. 226 of 1996** to the effect that prohibition can only prevent the making of a decision.

It was further submitted by counsel for the 2nd to 7th respondents that the applicants have not in any way indicated that the incumbent executive was in office illegally because the present executive committee of the society derived its mandate from

the elections carried out on 5th September 2011. That similarly the registrar derived the powers to hold such election from the Act and the Regulations.

In addition, it was submitted that for purposes of the special general meeting, under the provision of regulation 22(2) there was quorum for the meeting and since there was membership, the resultant election were legal; thus there is no reason for preventing the elected executive from performing their duties.

Lastly, it was submitted for the 2nd to 7th respondents that the applicants have not adduced any evidence to show that they suffered damages because of any action of the 2nd to 7th respondents since the alleged defamatory statements have not been specifically pleaded nor attributed to any of the 6 respondents.

In rejoinder to the submissions, counsel for the applicants contended that the registrar had powers and the jurisdiction to convene a special meeting but used his powers wrongly when he allowed non members to participate in the meeting and ushered in non members in the leadership of the society.

He cited the case of **Kafuku and Others v Nsanjo Multipurpose Agricultural Marketing Primary Co-operative Society Ltd 2002 2 EA 88** where it was observed that every bye-law of a registered society shall upon registration be binding upon members who signed it and it excludes non members, by convening an illegal meeting the appellants contravened the Act.

It was also submitted for the applicants that there was no demand note advanced to the registrar that the petitioners had requested for such a special meeting as required by the bye-laws of the society.

It was argued that Hon. Baguma Isoke and Hon. Mary Amajo do not appear on the original list of members that was filed with the registrar at the time of forming the society. It was submitted further that there was no quorum for the meeting as required under regulation 22(2) of the Regulations as some of the people who attended the meeting consisted of non members.

All in all it was submitted that the registrar acted illegally in convening the special general meeting of the society as it was not conducted in a legal manner and the people who attended the meeting were not all registered members of the society. His view was that the new committee was illegally put in office.

Counsel for the applicants also submitted that the prerogative orders of certiorari and prohibition were appropriate in the circumstances as they were designed to control inferior courts, tribunals and administrative and statutory authorities in their application to administrative decision. He cited several cases which demonstrate the application of the writ of certiorari and prohibition.

In so far as the preliminary points of law are concerned, counsel for the applicants argued that the application was properly before court. He relied on Article 126 (2) (e) of the Constitution under which the courts are mandated to administer justice without undue regard to technicalities, if any, in the greater interest of justice.

As regards the issue of procedure for redress, counsel for the applicants referred to article 132 of the Constitution read together with section 14(2) of the Judicature Act for the contention that Ugandan courts have original jurisdiction in all matters. The same was restated by Madrama J. in the case of **Three Ways Shipping**

(Group) Ltd v Ken Group of Companies Ltd Misc. Application No. 406 of 2011 arising out of HCCS No. 440 of 2010.

It was his position that arbitration proceedings cannot oust the jurisdiction of the High Court. He cited the case of **Standard Chartered Bank v Club Cloud 1000 [1998-1990] HCB 84** to the effect that a specific rule excluding jurisdiction cannot restrict inherent jurisdiction under the statute.

I have carefully considered the grounds for and against this application as contained in the numerous affidavits on record and as argued by all the counsel. I wish to first deal with the preliminary points of law raised by counsel for the 2nd to 7th respondents to the effect that the application is not properly before this court as the procedure for dealing with the applicants' grievance has not been explored. I do agree with counsel for the applicants that this court has original jurisdiction in all matters as expressly provided for in Article 132 of the Constitution and section 14(2) of the Judicature Act. In fact that jurisdiction cannot be excluded under statute as observed in the case of **Standard Chartered Bank v Club Cloud 1000 (supra)**. This court is clothed with jurisdiction to entertain the matter at this stage regardless of the provision for arbitration proceedings.

In any case, it is the view of this court that if the 2nd to 7th respondents were mindful of the procedure for dispute resolution laid down in the Act they would have in the first place referred the dispute they had with the applicants for arbitration before seeking the intervention of the registrar . They chose not to do so and cannot at this point in time seek to have the matter arbitrated upon. For the above reasons, the first preliminary point is overruled.

As regards the 2nd preliminary issue that the application was defective because the supporting affidavits conclude by showing that they support a different subject matter from the orders prayed for in the motion, it is indeed true that the conclusion in paragraph 12 of the affidavits in support are not at all relevant to the prayers in the application. While the motion seeks for a declaratory judgment and orders of certiorari, prohibition, injunction, general and punitive damages among others, the supporting affidavits in paragraph 12 state as follows:

> ***12. That I swear this affidavit in support of an application for a writ of Mandamus to issue against the Treasury officer Accounts Ministry of Finance and the Attorney General for the decretal sum and taxed costs as now there is no further appeal.***

I do find that if one looks at paragraph 12 of the two affidavits in support of this application vis-a-vis the orders sought, there is no connection at all. Technically one could rightly say the application is not supported by affidavit. However, courts have now adopted a more liberal approach in dealing with defective affidavits. The Supreme Court of Uganda has held that the offending paragraphs could be safely severed and the rest admitted. See ***Col. (Rtd) Besigye Kizza v Museveni Yoweri Kaguta & Electoral Commission (Election Petition No. 1 of 2001) [2001] UGSC 3***.

I have looked at the rest of the facts as stated in the affidavits in support and I do find that they are adequate to support the application. I believe paragraph 12 was included as a result of some careless acts of “cut and paste” by the applicants’ lawyers which should not be visited on the applicants in the interest of ensuring that substantive justice is done.

In the premises, I find no basis for striking out the affidavits and I decline to do so because the offending part of the affidavit could be severed and the unoffending parts allowed. The second preliminary issue raised is also overruled.

I now turn to consider this application on its merits. The main issue is whether the applicants are entitled to the remedies sought. The law on judicial review has been adequately stated by counsel for all the parties as summarised above. As regards the prayer for a writ of certiorari, I have considered the circumstances under which it is issued. In the case of **Re: Bukeni Gyabi Fred [1999] KALR 918** Musoke-Kibuuka J. referred to **Harlsbury's Laws of England 4th Edition Vol. 1 Para. 147** which states;

> ***"Certiorari lies, on an application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they shall be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury."***

Hence for the applicants to obtain a writ of certiorari they must prove either of the following:

(i) Excess or lack of jurisdiction

(ii) Error of law on the face of the record

(iii) Breach of natural justice

(iv) Abuse of statutory authority.

Turning to the acts of the registrar sought to be declared ultra vires and quashed by this court, I do agree with the submissions of counsel for the 1st respondent on when a decision or an act is said to be ultra vires. In the instant case, I have made recourse to the Act and the Regulations from which the registrar is alleged to have derived the power to convene the meeting. I have also looked at the byelaws for the society.

According to the affidavit in reply by the registrar, the act of convening a special general meeting was done within the confines of the law and in particular section 22(7) of the Act. That section provides;

> ***"Where a registered society fails to cause its accounts to be audited in accordance to subsection (1),(2)and (5), the committee of that society shall be deemed to have relinquished its office, and the registrar shall convene a special general meeting to elect a new committee unless the registrar is satisfied that the failure was due to circumstances beyond the committee's control"*** **(emphasis added).**

Regulation 21 (4) of the Regulations also provides;

> ***"The Registrar may, at any time, convene a special general meeting of a registered society".***

It is clear that the above provisions of the law empower the registrar to convene a special general meeting of any society. Section 22 (7) of the Act is very explicit on the circumstances under which a special general meeting can be convened by the registrar and its purpose.

It was alleged by the respondents that the applicants failed to cause its accounts to be audited in accordance with the law. The registrar confirmed this in paragraph 6 of his affidavit where he stated that upon perusal of the records of the society he noted that it had not filed its annual and management reports since its inception. The applicants did not controvert this statement but only sought to blame the omission on the manager.

At the time the meeting was convened the applicants as members of the committee were deemed to have relinquished their offices in terms of section 22 (7) of the Act. The registrar was therefore justified in convening the meeting in accordance with the law to elect a new committee. For that reason, I find that there was nothing irregular about the registrar convening the meeting because the law clothed him with the power to do what he did.

A number of issues were also raised about the manner in which that meeting was convened and failure to follow procedures as laid down in the byelaws. I must observe firstly, that provisions of a byelaw cannot override provisions of a principal legislation and regulations made there under. Secondly, I find that the procedures the registrar is alleged to have flouted relate to convening of an annual general meeting (AGM) as opposed to a special general meeting convened by the registrar under the above provisions of the law.

In the premises, I find that what the registrar did was in accordance with the provisions of the Act and Regulations which are quite clear on the circumstances and mode of convening a special general meeting by the registrar. As such there was no requirement for the registrar to give the notice or comply with the time period stipulated in the byelaws. The notice calling for a special general meeting that was published in the media was adequate for purposes of convening a meeting under section 22 (7) of the Act.

Similarly, the other requirements like making the financial reports available to members, convening the AGM within 60 days of the closure of financial year and quorum for the meeting all relate to convening an AGM which was the duty of the applicants. They failed to perform that duty from inception of the society. The registrar was under no duty to comply with those requirements as they were not stipulated under the Act for convening a special general meeting.

I have also had the benefit of perusing the byelaws availed by the 1st applicant. I did not see any provision that requires the registrar to convene a special general meeting within 14 days after the committee of the society has failed upon receipt of a demand by the members to call such a meeting as alleged by the applicant. On the contrary, article 25 of the byelaws which provide for special general meetings state in (iii) that it is the members of the society who can convene a special general meeting if the committee fails to convene a meeting within 14 days following receipt of demand for the meeting. There is therefore even no such provision in the byelaws that relates to convening a special general meeting by the registrar apart from the general power given by the Act and restated at the beginning of article 25 (i) of the byelaws.

All in all, the provisions of the byelaws alleged to have been contravened by the registrar specifically relate to special general meetings convened by members of the society and not that convened by the registrar under section 22 (7) of the Act. For that reason, I do not find that the actions of the registrar were ultra vires the byelaws.

On the contention that the principle of natural justice was breached by failure to give the applicants a hearing, I find that there is evidence that the special general meeting was attended by the applicants as their names were registered and form part of the minutes of the meeting. If they had matters to raise they should have done so in the meeting since they were present. They did not adduce any independent evidence to corroborate their allegations in the affidavit that they were denied that opportunity. I do not therefore find any merit on that ground.

On the allegation that some non members took part in the process, Hon. Baguma Isoke has adduced evidence to show that he was a member of the society. Hon. Amajo Mary also stated on oath that she was a founding member of the society. Upon perusing the byelaws of the society I also find that article 7 provides for eligibility of members and allows admission of new members. This is contrary to the impression created by the applicants that the only members of the society were those registered at its inception. Hon. Baguma Isoke whose identity card signed by the 1st applicant joined after registration of the society. I would have no reason to dispute that other members who are alleged to be non members also joined the society later and their names could not have appeared on the original list. I therefore do not find any proof that non members participated in the special general meeting.

In conclusion on the prayer for certiorari, it is my well considered view that the registrar acted within his statutory power to call the special general meeting and followed the proper procedure. In the circumstances, I find no breach of statutory authority, breach of natural justice or misuse of power whatsoever. For those reasons, the applicants are not entitled to a writ of certiorari and it is denied.

The applicants also sought a writ of prohibition. I agree with the submission of counsel for the 2nd to 7th respondents that a writ of prohibition cannot issue in respect to an existing fact since the new executive was elected on 5th September 2011. The position of the law is that prohibition can only prevent the making of a decision. See **Kenya National Examination Council v Gatheri Njoroge and Others Kenya Court of Appeal** (supra).

Without wasting time to consider the instances in which the writ of prohibition is granted, I find that a decision has already been taken and therefore the remedy of prohibition which looks to the future is not available to the applicants. There is nothing to be prohibited at this stage because the change in the executive committee has already been effected and they are now running the affairs of the society. For those reasons, the applicants are not entitled to a writ of prohibition as prayed for.

The applicants also sought for a permanent injunction to restrain the 2nd to 7th respondents from interfering with the running of the society and passing on as its officials. The case for the applicants is that these respondents illegally assumed office. Having found that the registrar acted within his legal confines to convene the special general meeting that elected the 2nd to 7th respondents and there is no

proof that non members were elected, there is need now to establish if there was quorum for purposes of the special general meeting and conduct of the election.

Regulation 22(2) of the Regulations provides

> ***"When a meeting is convened by the registrar under regulation 21(4) of these Regulations, the members present at that meeting shall constitute a quorum."***

In the instant case the special general meeting held on 5th September 2011 as directed by the registrar was convened under regulation 21(4). At such a meeting the members present constitute the quorum. Indeed from the minutes of the meeting 43 members attended and hence quorum was constituted by their presence. They could therefore legally elect members of the committee as they did.

In light of that fact, there is no basis upon which the new executive should be restrained from running the activities of the society or acting in their due offices. The applicant has not afforded me sufficient reason to issue the permanent injunction.

Finally, the applicants sought for general and punitive damages for defamatory statements made against the names of all the old executive committee. While section 38 (2) of the Judicature Act as amended provides that the court may upon any application for judicial review, in addition to or in lieu of any of the reliefs specified in subsection (1), award damages, rule 8 (2) of the Judicature (Judicial Review) Rules, 2009 provides that rules 1 to 5 of Order 6 of the Civil Procedure Rules shall be applied relating to a claim for damages as they apply to a pleading.

In other words the applicant is required to specifically state the further and better particulars of the claim and the material facts on how it arose.

Whereas the above law allows award of damages in an application like this one, particulars of the alleged defamatory statements for which damages is sought by the applicants needed to have been stated in the application as required by law. This was not done. This court cannot therefore grant such damages without proof of the alleged defamatory statements and the particular respondent's alleged to have made them. In the circumstances, that claim cannot succeed basing on the material before this court and it is accordingly denied.

Before I make my final conclusion of this matter, I wish to observe that it was the duty of the interim committee chaired by the 1st applicant to prepare the financial reports and convene the AGM. They miserably failed in that duty and sought to blame it on the manager forgetting that it was equally their duty as the controlling authority both under the regulations and the society byelaws to supervise the manager. Their inaction led to the state of affairs that forced some members to seek the intervention of the registrar in accordance with the law.

In view of the above observations, I do agree with counsel for the 1st respondent's submission that the applicants have not come to court with clean hands. It is not difficult to discern that this application is merely intended to make the registrar a scapegoat for the applicants' failure to perform their duties as members of the interim committee. What is alleged as omissions of the registrar like failure to avail a financial report and convening the AGM within 60 days of the closure of the financial year are all duties that should have been performed by the applicants.

In the result, I find that this application is misconceived as there is no basis for it. Consequently, all the declaratory orders sought and the prayers are denied and the application is accordingly dismissed with costs.

I so order.

Dated this 31st day of January 2013.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Hon. Ben Wacha for the 2nd to 7th respondents who were present. The applicants and their counsel were absent as well as counsel for the 1st respondent.

JUDGE
31/01/13