



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT KERICHO

JUDICIAL REVIEW NO.5 OF 2019

SAMMY KIPLANGAT & 5 OTHERS.....APPELLANTS

- VERSUS -

CABINET SECRETARY FOR TRADE AND INDUSTRIALISATION1ST RESPONDENT

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....2ND RESPONDENT

AND

KENYA FARMERS ASSOCIATION LIMITED AND 9 OTHERS.....INTERESTED PARTIES

RULING

1. The Exparte Applicant filed the Notice of Motion dated 12th November, 2019 seeking the following Orders:-

- (a) **An order of CERTIORARI to remove into this Honourable Court and quash the decision of the 1st Respondent disbanding the Board of Directors of the 1st Interested Party, The Kenya Farmers Association Limited;**
- (b) **An order of CERTIORARI to remove into this Honourable Court and quash the 2nd Respondent's decision dated 24th of September, 2019 appointing the Caretaker Board of Directors of the 1st Interested Party, The Kenya Farmers Association Limited;**
- (c) **An order of Prohibition prohibiting the Respondents from maintaining in office the 2nd to 10th Interested Parties as the Board of Directors and/or reconstituting another Caretaker Board of the 1st Interested Party.**
- (d) **An order of PROHIBITION prohibiting the Respondents from interfering with the affairs of the 1st Interested Party, Kenya Farmers Association Limited.**
- (e) **Costs of an incidental to the Application be borne by the Respondents.**

2. The Application is supported by the Affidavit of SAMMY KIPLANGAT RUTTOH dated 12/11/2019 in which it's deposed as follows: - That in or about the month of September, 2019, the Cabinet Secretary for the Ministry of Trade, Industry and Co-operatives without jurisdiction and in excess of its powers disbanded the board of Kenya Farmers Association (KFA) Limited and the same was published in the Daily Standard newspaper dated 1st October, 2019. That following the said disbandment, the acting Commissioner for Co-operative Development on the 24th of September, 2019, unilaterally appointed a caretaker interim consisting of nine (9) members for a period of six (6) months.

3. It is averred that the respondents actions of disbanding the Board of Directors and subsequently appointing a caretaker board is ultra vires the law, irregular and contravenes the express provisions of the Companies Act, 2015, and the Fair Administrative Actions Act, as a limited liability company, can only be disbanded by either the Registrar of Companies, the members of the 1st interested party or the shareholders through a resolution.

4. The 1st, 2nd, 5th, 6th and 8th Interested Parties filed a Replying Affidavit dated 11/3/2019 sworn by DAVID OLE NAEKU in which he deposed as follows: - That the 1st interested party is a private company, duly incorporated and operating under the Companies Act and therefore, the respondents have no legal mandate in the management of its affairs. He stated that the respondents unlawfully and without any

legal mandate dissolved the board of directors of the 1st interested party and replaced it with a caretaker board, whereas the only legal organ mandated by law to remove or replace the board of directors of the 1st interested party would be the Registrar of companies, the court or the 1st interested party general meeting. He further stated that the actions of the respondents are in contempt of court of the orders issued in Nakuru High Court in the year 2003, as they were barred and prohibited from interfering with the affairs of the 1st interested party.

5. The Respondents filed a Notice of Preliminary Objection dated 24/2/2020 in the following terms:- (1) That this court has no jurisdiction to determine this application for reasons that:-

- (a) The subject matter of this Application is similar or substantially similar to the other matters filed in different courts namely Kapenguria JR No. 3 of 2019 and Nakuru HCC Constitutional Petition No. 25 of 2019.
- (b) There is a high likelihood of issuance of conflicting orders in the matter over the same subject matter to the embarrassment of the court.
- (c) Section 1A, 1B, 3A, 5 and 6 of the Civil Procedure Act expressly bar this court from entertaining this Application.
- (d) The entire application is frivolous, vexatious, a monumental procedural and substantive legal nullity and an unmitigated abuse of the court process.
- (e) The application offends the provisions of section 76 of the Co-operative Societies Act.

(2) That the Application is non-suited against the interested party which ceased to exist in 1984 by virtue of voluntary winding up.

6. The parties filed written submissions as follows: -

The ex-parte applicant submitted that the application dated the 12th of November, 2019 is competently before this court as it has jurisdiction to deal with issues before it. He stated that Article 47 and 53 of the Constitution of Kenya bequeaths the High Court with jurisdiction to scrutinize administrative actions and decisions to ensure that they are exercised in conformity to the law. He also submitted that section 8 and 9 of the Law Reforms Act and Order 53 of the Civil Procedure Rules gives this court special jurisdiction to issue writs of Certiorari, Mandamus and Prohibition, and that leave was sought and granted before bringing the application as is required under section 9 of the Law Reforms Act and Orders 53 rule 1 and 2 of the Civil Procedure Rules.

The ex-parte applicant also submitted that they are entitled to the orders sought, as the decisions by the respondents to dissolve the board of directors of the 1st interested party and subsequent appointment of a caretaker board was illegal, unjustifiable, and unreasonable and amounted to an abuse of power. It was also submitted that the preliminary objection by the respondents raises frail and unsustainable issues and should be dismissed and the respondents ordered to pay costs.

7. The 1st, 2nd, 5th, 6th, and 8th interested parties in their submissions stated that the 1st interested party is a limited liability company and as a result, the respondents have no authority to interfere and meddle with its affairs. It was submitted by the interested parties that the only way of removing the directors of a company is through an ordinary resolution at a meeting by its members or through a court process, hence the actions by the respondents were unlawful and without any legal backing. It was further submitted that the respondents are in contempt of court as there is an order issued in Nakuru High Court, barring the respondents from interfering in the activities of the 1st interested parties, and further that there is a suit filed in Kapenguria High court, challenging the actions of the respondents.

8. On the other hand, the 1st and 2nd respondents submitted on their Notice of preliminary objection and stated that the facts and reliefs sought in this present application is similar to the facts and reliefs sought in ***Kapenguria judicial review application no.3 of 2019*** and ***Nakuru High Court petition no. 25 of 2019*** and should therefore be dismissed for contravening the principle of *sub judice*.

9. The respondents also submitted on the application dated the 12th of November 2019, and stated that the 1st interested party is a co-operative society, under the Co-operative Societies Act and therefore the respondents have the legal mandate to regulate it. It was submitted by the respondents that the failure by the 1st interested party to adhere to the provisions of the Co-operative Societies Act and Rules led to the dissolution of the board of directors and subsequent appointment of a caretaker committee.

10. The respondents further submitted that the orders sought by the applicants have been overtaken by events, as the term of caretaker board that had been appointed already lapsed on the 24th of March, 2020 and as such the suit has been overtaken by events as the interested parties are no longer in office.

11. The issues for determination in the application dated 12/11/2019 are as follows:-

- (i) **Whether the Court has jurisdiction to determine this case.**
- (ii) **Whether the Exparte Applicants are entitled to the reliefs sought.**
- (iii) **Who pays the costs of this Application?**

12. On the issue as to whether this Court has Jurisdiction to hear this case, the Respondent filed a Notice of Preliminary Objection stating

that the suit before this court was filed despite the existence of another pending Judicial Review Case No.3 of 2019 filed by TOM LIHRU WANAMBISI at KAPENGURIA and a PETITION filed at NAKURU High Court by GEORGE OLE NAROK being NAKURU PETITION NO.25 of 2019 and both are seeking similar orders as sought in this case against the Respondents.

13. I find that the interested parties stated in their Replying Affidavit that the caretaker Board appointed by the Respondents never took office as the same was challenged in Court.

14. I find that the Respondents have attached the Order issued at KAPENGURIA JUDICIAL REVIEW APPLICATION NO.3 of 2019 dated 14/11/2019.

15. I therefore find that the application dated 12/11/2019 is subjudice as there is a similar case pending at KAPENGURIA High Court.

16. **Section 6** of the Civil Procedure Act, provides that: - ***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”***

17. The Court of Appeal in **Joel Kenduiywo versus District Criminal Investigation Officer Nandi & 4 others [2019] eKLR**, held as follows:- ***“Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”***

18. On the issue as to whether the Exparte Applicants are entitled to the reliefs sought, I find that the interested parties have confirmed that the Caretaker board never took office as the Court stopped the Caretaker board from assuming office. The Court will not issue orders in vain.

19. This Court having found that the Application dated 12/11/2019 is subjudice, the Exparte Applicants will await determination of the Judicial Review Application No.3 of 2019 pending at KAPENGURIA High Court.

20. I therefore find that the Exparte Applicants are not entitled to the reliefs sought. The Court at KAPENGURIA already issued stay orders.

21. On the issue as to who pays the costs of this Application, I direct that each party bears its own costs of the Application.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 25TH DAY OF MARCH, 2022.

A. N. ONGERI

JUDGE