



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

JUDICIAL REVIEW NO. E002 OF 2020

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT- MINISTRY OF AGRICULTURE, LIVESTOCK

FISHERIES AND CO-OPERATIVES- STATE DEPARTMENT FOR

CO-OPERATIVES.....1ST RESPONDENT

HESBON M’KIURA- PRINCIPAL AUDITOR MINISTRY OF

AGRICULTURE, LIVESTOCK FISHERIES AND CO-OPERATIVES -

STATE DEPARTMENT FOR CO-OPERATIVES.....2ND RESPONDENT

NICHOLAS NDIRANGU- PRINCIPAL AUDITOR MINISTRY OF

AGRICULTURE, LIVESTOCK FISHERIES AND CO-OPERATIVES-

STATE DEPARTMENT FOR CO-OPERATIVES.....3RD RESPONDENT

TUUNGANE TUJJENGE SAVINGS &

CREDIT CO-OPERATIVE SOCIETY LIMITED.....4TH RESPONDENT

AND

JAMES MUREITHI NJIRU.....EX-PARTE APPLICANT

RULING

1. Before this court is an ex-parte chamber summons dated 17.12.2020 filed by the ex-parte applicant herein and whereby he seeks leave to apply for an order of certiorari to remove into this court and quash the inquiry report, findings, recommendations and/or decision by the 2nd and 3rd respondents made in August, 2020 touching on James Mureithi Njiru and the adoption by the 4th respondent through the special general meeting and subsequent surcharge notice dated 14.10.2020 and further that the grant of leave do operate as a stay of the order until the hearing and determination of the substantive application seeking an order of certiorari and further for the costs of the application.

2. The said application is brought under the provisions of Order 53 Rules 1, 2 and 4 of the Civil Procedure Rules 2010 and Sections 7 and 8 of the Law Reforms Act and is premised on the grounds on the face of it and on the verifying affidavit, statement of facts by the ex-parte applicant. In a nut shell, it is the ex-parte applicant’s case that the 1st respondent through an inquiry order dated 22.04.2020 appointed the 2nd and 3rd respondents to conduct an inquiry into the by-laws, working and financial conditions and conduct of the past and present management committee of the 4th respondent wherein he had worked and had risen to the rank of Acting Manager before resigning.

3. That, after the said inquiry, the 2nd and 3rd respondents tendered their report wherein they observed that the management committee and the staff, had allegedly breached the trust bestowed on them by the members, occasioning the loss of Kshs. 5,158,680/- to the 4th respondent. That the inquiry erred in apportioning the loss of Kshs. 3,850,000/- amongst the 10 board members and employees without any legal basis and that during the enquiry hearing, he was not given a chance to be heard when the respondents recommended that he be surcharged for Kshs. 758,300/-. That the said decision has affected his rights since it was arrived at by a procedure which offends the principles of natural justice.

4. At the hearing of the application, Mr. Ngigi, the Learned counsel for the ex-parte applicant relied on the affidavit and the statement of fact in canvassing the same.

5. I have considered the application herein and the annexures thereto.

6. As I have already noted, the application herein is seeking leave to commence judicial review proceedings for orders of certiorari and which is a mandatory requirement under *Order 53 Rule 1* of the Civil Procedure Rules 2010. The reasons for such leave were explained by Waki J. (as he then was) in **Republic –vs- County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** and basically, leave is meant to **eliminate at an early stage any applications for** judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

7. As such, leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judicially.

8. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

9. To begin with, the application is dated 17.12.2020 and the impugned recommendations were made in August 2020. As such, the application was filed within the six months' time frame as provided for under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010 and as such its brought within the statutory timeframes.

10. The ex-parte applicant herein seeks orders of certiorari to remove into this court and quash the inquiry report, findings, recommendations and/or decision by the 2nd and 3rd respondents made in August, 2020 touching on him and the adoption by the 4th respondent through the special general meeting and subsequent surcharge notice dated 14.10.2020, on the grounds that he was not afforded an opportunity to be heard and to present his case by adducing evidence and production of documentary evidence and as such the said decision is null and void for failure to comply with the rules of natural justice.

11. The applicant annexed to the application, the letter dated 14.10.2020 signed by one Nzovu on behalf of the 1st respondent and which advised the applicant to comply with the results of the Inquiry report which found him liable to surcharge. Further, he annexed the inquiry report and on its page 69 it was recommended that the persons indicated at page 70 of the said report ought to be surcharged the amounts indicated against each of the said names. The applicant deposed that he was not involved in the procedure leading to the said recommendations.

12. It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include; where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. {See **Republic –vs- National Land Commission & another Ex-parte Farmers Choice Limited (2020) eKLR**}.

13. To this extent, and in light of the evidence adduced, and upon a cursory perusal of the evidence before court and without delving into the argument by the ex-parte applicant, it is my view that the applicant's case is sufficiently meritorious to justify leave. It cannot be said to be frivolous or vexatious or hopeless.

14. On the question of whether the said leave can operate as a stay of the impugned report, findings, recommendations and/ or decisions by the 2nd and 3rd respondents and the subsequent surcharge notice, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion, judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect: -

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

15. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In **Taib A. Taib –vs- The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** the court held

that: -

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act....”

16. In **R (H). vs Ashworth Special Hospital Authority (supra)**, Dyson L.J. held as follows: -

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”]

17. **It is therefore clear that** where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

18. In the present application, the report recommended the Director for Co-operatives Embu County to implement the report. It is therefore clear that the said report has not been implemented. There is need therefore to prevent the implementation of the said decision until the legality of the respondent’s decision is established, in light of the prejudice pleaded by the ex-parte applicant. It is my view that the order of stay is merited and the same is hereby granted as sought.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents

.....for the Exparte Applicant