



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E079 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDATORY INJUNCTION AND DECLARATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LABOUR,

SOCIAL PROTECTION AND SERVICES.....2ND RESPONDENT

THE NAIROBI COUNTY DIRECTOR OF SOCIAL SERVICES...3RD RESPONDENT

ALEXANDER HOOPS SHIHEMI.....4TH RESPONDENT

EX PARTE: PETER NJOROGE KANIKA &: PETER GITAU MUIRURI

TRUSTEES O/B OF SOWESAVA SELF HELP GROUP

RULING NO 3

1. The application coming up for ruling is a Chamber Summons dated 14th December 2020 filed by the *ex parte* Applicants herein, which was reinstated for hearing pursuant to a ruling delivered on 2nd February 2021. The *ex parte* Applicants state that they are trustees and officials of the Sowesava Self Help Group, and are seeking the following outstanding orders in the said application:

a. THAT leave be granted to the Applicant to apply for an order of mandatory injunction to compel the Principal Secretary, Ministry of Labour, Social Protection & Services to cancel the double, illegal 2nd Registration Certificate No. xxxx in the name of Sowesava Self Help Group issued to the 4th Respondent within Fourteen (14) days of the delivery of the judgment herein.

b. THAT leave be granted to the Applicant to apply for an order of mandatory injunction to compel the Principal Secretary, Ministry of Labour, Social Protection & Services to renew and re-issue the Applicants' original Registration Certificate No. xxxx/ SCSD/EMB/SHG/5/4/2015 (1651) in the name of Sowesava Self Help Group.

c. THAT the leave granted herein do operate as a stay of the operation and use of the double, illegal 2nd Registration Certificate No. xxxx in the name of Sowesava Self Help Group issued to the 4th Respondent pending the hearing and determination of this suit.

d. A permanent injunction be issued to the 4th Respondent, Alexander Hoops Shihemi and/or his Officers, Servants or Agents, illegal buyers or anyone claiming through him or his illegal group from trespassing, entering, erecting structures or dealing or interfering with the operations and the assets of the Applicants.

e. A declaration that the first and original Registration Certificate No. xxxx/ SCSD/EMB/ SHG/5/4/ 2015 (1651) of Sovesava Self Help Group issued to the Applicants and their 196 Members is the only valid, legal and lawful registration of the original Sovesava Self Help Group registered in 1997 by the Applicants.

f. THAT the Respondent s be condemned to pay the costs of this suit.

2. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 14th December 2020, and a verifying affidavit sworn on the same date by the 1st *ex parte* Applicant. In summary, the main ground is that the 1st, 2nd and 3rd Respondent on 5th April 2017 illegally issued a 2nd registration certificate to the 4th Respondent who has registered a parallel illegal group using the *ex parte* Applicants' name, being Sovesava Self Help Group.

3. The *ex parte* Applicants explained that the original officials and members of Sovesava Self Help Group were registered in 1997, which registration was renewed on 30th November 2004 and on 25th August 2015, and has remained valid to date. Further, that their advocate wrote to and issued a statutory notice to the 1st to 3rd Respondents demanding for the cancellation of the double and illegal Registration Certificate No . xxxx issued to the 4th Respondent and his illegal group, but was advised that only a judicial review Court can order the cancellation of the 2nd registration certificate.

4. The *ex parte* Applicants annexed copies of Sovesava Self Help Group's 1997 Registration Certificate; the renewed certificate dated 30th November 2004; a confirmation letter dated 21st April 2017 from the Ministry of Labour, Social Protection and Services that their group was legally and lawfully registered; a search issued by the said Ministry dated 12th February 2019 showing the group's double registration; and of the letter and statutory notice issued by their advocate, both dated 27th October 2020.

5. Alexander Hoops Shihemi, the 4th Respondent herein, filed a replying affidavit dated 29th April 2021, wherein he stated that he is a member and Chairman of Sovesava Self Help Group, after having been duly elected by the group's Members, and had the authority of the committee members to make and swear the affidavit, a copy of which he annexed. According to the 4th Respondent, Sovesava Self Help Group was originally d registered in the year 1997 and it was issued with a Registration Certificate which was subject to renewal annually, and which has since been continuously and consistently renewed, including for the year 2020 to 2021. He attached a copy of the Registration Certificate.

6. The 4th Respondent gave a background of the officials of Sovesava Self Help Group, and stated that the Group has consistently held elections in accordance with our constitution since the year 1997, which have been presided over by the Ministry of Labour, Social Protection and Services, and that he was elected Chairman of the group in election held on 4th May 2010. In addition, that his officials hold the Bank Account for the group and their introduction as signatories to the bank account was done by the Ministry of Labour, Social Protection and Services, a copy of which letter he attached.

7. Lastly, the 4th Respondent averred that the purpose of forming Sovesava Self Help Group was to protect squatters who were squatting on the public land at Donholm Phase 8 and preserve the public land , and that at all material times, the *ex parte* Applicants of have never been members of Sovesava Self Help Group neither are they squatters. The Respondent alleged that the *ex parte* Applicants are strangers who fraudulently seek to take the Self-help's group name and registration certificate to deny the squatters their land, and gave particulars of their alleged fraudulent acts.

The Determination

8. Gitau J. H. Mwaru Co. Advocates who are on record for the *ex parte* Applicants filed submissions dated 10th February 2021 in support of the application for leave. Reliance was placed therein on the decision of the Court of Appeal in **Mirugi Kariuki vs The Attorney General [1991] eKLR** that the initial stage of applying for leave is a preliminary step intended to invoke the jurisdiction of the High Court by compliance with the formal rules and is not stricto sensu, the time for going into the full merits of the substantive application for the prerogative orders.

9. According to the *ex parte* Applicants. In the present application the 2nd and 3rd Respondents who are the custodians of the Register of all self -help groups in the Country and in Nairobi county respectively have confirmed that there are two registration certificates issued to two different groups, and that only a Court of law can decide which of the registration certificate of Sovesava Self Help Group is genuine and order the cancellation of the illegal registration Certificate.

10. Wilfred K. Babu & Co Advocates who are on record for the 4th Respondent on their part filed submission dated 4th May 2021, wherein they largely submitted on the merits of the *ex parte* Applicant's application for a mandatory injunction, and on their allegations on the *ex parte* Applicants have no locus and fraudulent actions. In summary, the 4th Respondent's submissions were that the *ex parte* Applicants' application fails the test of the orders sought, they have come with dirty hands to court, as they forged the name and made double parallel registration of Sovesava Self Help Group, and they have never been members of the self-help group. Therefore, that the 3rd Respondent acted upon credible information, complaints and stopped the illegal and unlawful registration by the *ex parte* Applicants.

11. I have considered the pleadings and arguments by the parties herein, and note that the requirement for leave to commence judicial review proceedings, is provided in *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the said leave as 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**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

12. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a

Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

1. whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
2. whether the claimant has capacity to bring a claim for judicial review;
3. whether the claimant has a sufficient interest to bring a claim for judicial review;
4. whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
5. whether the claim is otherwise an abuse of process;
6. whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
7. whether the claim has been brought promptly;
8. whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

13. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Other grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

14. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) I WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

15. In the present application, it is evident that the question of who are the proper and lawful officials of Sovesava Self Help Group is contested, and will require to be resolved first, before the legality or otherwise of the registration certificates issued for the said group is determined. The dispute as regards the lawful officials of the group is one that can only be resolved through examination of evidence produced by the parties in this regard, and argument thereon.

16. Therefore, while it is indeed the position that the dispute is one that can be resolved by a court process, this can only be through a normal civil trial process, and not through judicial review proceedings. The dispute between the parties is therefore one that is not amenable to resolution by way of judicial review.

The Disposition

17. In the premises, it is the finding of this Court that the *ex parte* Applicants' have not demonstrated an arguable case for the foregoing reasons, and the application by Chamber Summons dated 14th December 2020 is not merited.

18. I accordingly order as follows:

I. The prayers sought in the *ex parte* Applicants' Chamber Summons dated 14th December 2020 are hereby declined, and the said application is hereby dismissed.

II. The *ex parte* Applicants shall meet the 4th Respondent's costs of the Chamber Summons dated 14th December 2020.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE