REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

J.R.NO.1 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF CO-OPERATIVES.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF

TRADE AND CO-OPERATIVES..... 2ND RESPONDENT

ENGINEER PAMOJA SACCO SOCIETIES.....EX-PARTE APPLICANT

JUDGMENT

Pursuant to leave granted to the ex parte applicant, Engineer Pamoja Sacco Society by this court on 22/1/2016, the applicant filed the Notice of Motion dated 22/1/2018 seeking the following Judicial Review orders:-

> **3. That the 1st respondent be prohibited from closing down the Ex-parte applicant's operation, business or in any other way interfering with the operations of the Ex-parte applicant;**
>
> **4. That the decision by the 1st respondent to cancel the license of the applicant on 12/5/2017 be brought before this court and quashed.**
>
> **5. That the 2nd respondent be compelled by way of mandamus to determine the appeal pending before her.**

The Notice of Motion is premised on the statement of facts dated 16/1/2018 and affidavit sworn by Rosalind Wanyeki on the same date and filed together with the Chamber Summons that sought leave. Rosalind Wanyeki described herself as the chairlady of the applicant; that the applicant was registered as a Society on 9/11/2016 as per copy of certificate of registration (RW1); that they recruited staff, got office space and commenced operations in February 2017 with 8 members of staff. In addition, they obtained a trade license from Nyandarua County Government, RW2); that as of May 2017, they had over 100 members and have complied with the all applicable laws; that the District Co-operative Officer (DCO), Mr. David Irungu visited their office, the Sacco and intimated to them that they needed to get his permission on whom to employ; that on 13/3/2018, the said Mr. Irungu asked them to return the Registration Certificate to him but they declined and on 29/3/2018, he went to their office and carried away the copy they had framed; that they sought intervention of County Director of Co-operatives who held a meeting with them together with the DCO on 6/4/2017 but later, the DCO went to their office again and informed them that he would ensure their license was cancelled; that the DCO went around informing the public that the applicant was not registered; that by a Kenya Gazette Notice dated 12/5/2017 their Registration Certificate was cancelled without them receiving any complaint of malpractice nor were they given any reasons for the cancellation or an opportunity to explain themselves; that on 22/5/2017, they lodged an appeal with the 2nd respondent which was duly received on 31/5/2017 (RW3) but the same has never been heard or decided. Rosalind further deponed that on 8/1/2018, by came across a letter by the 1st respondent to the Director of Cooperatives Nyandarua, to ensure that they did not exist (RW5); that the act of the 1st respondent is prompted by bad faith, malice and without regard to rules of natural justice.

The application was served on the respondent on 2/2/108 as evidenced by the affidavit of service filed in court on 19/2/2018. The respondents neither filed a response to the application nor appeared at the hearing.

I have considered the grounds upon which the application is based, the affidavit in support thereof and annextures thereto.

In the book "Judicial Review" by ***Michael Supper stone QC and James Gondie QC, 1992 Edn Butterworth Chap 3,*** the authors defines the

ambit of Judicial Review (JR):

> **"Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for J.R is made, but the decision making process itself. In Chief of the North Wales Police Vrs Evans, Lord Bingham said: "Judicial review" as the words imply is not an appeal from the decision, but a review of the manner in which the decision was made. He observed, J.R is concerned, not with the merits of the decision, but with the decision making process. Unless that restriction on power of the court is observed, the court will, in my view, under the guise of preventing abuse of power by itself, be guilty of usurping".**

The purpose of JR orders was aptly captured by Lord Hailsham at page 1160 of the Evans case above

> **"The remedy vastly increased in extent and rendered over a long period in recent years of infinitely more convenient access than provided by the prerogative writs and actions for a declaration, intended to protect the individual against the abuse of powers by a wide range of authorities, judicial, quasi judicial and as would originally have been thought when it is not intended to take away from those authorities the powers and discretions properly vested in the bylaw and to substitute the court as the bodies making the decisions.**
>
> **It is intended that the relevant authorities use their powers in a proper manner."**

In a nutshell, JR orders are meant to check the excesses of public officers or public bodies in decision making. It is not an appeal from the decisions made by Public Officers or Tribunals. It is only concerned with the review of the decision making process.

The applicant attached a certificate of Registration of the applicant (RW1) dated 9/11/2016. Before registration of the applicant, the Commissioner for Co-operative Development must have satisfied himself that the applicant met the basic requirements for registration of a Co-operative. The applicant was also issued with the Single Business Permit dated 21/2/2017 which was to expire on 31/12/2017. For the County Government to issue the said permit, it must have satisfied itself that the applicant had complied with the requirements of the Single Business Permit.

Where an authority is clothed with very wide and unfettered discretion, it is trite law that the court will intervene in the exercise of the said discretion:

(i) Where there is abuse of discretion;

(ii) Where the decision maker exercises the discretion for an improper purpose;

(iii) Where the decision maker is in breach of the duty to act fairly;

(iv) where the decision maker had failed to exercise statutory discretion;

(v) Where the decision maker acts in a manner as to frustrate the purpose of the act donating the power;

(vi) Where the decision maker fathers the discretion given;

(vii) Where the decision maker fails to exercise the discretion;

(viii) Where the decision maker is irrational or unreasonable.

See ***Republic v Minister for Home Affairs*** and others ex parte Sitamze ***HCC 1652 of 2004 (2008) LEA 323***

The applicant has complained that the decision to dissolve the applicant was arbitrary and no reasons were given. On the duty to give reasons, Halsbury's Laws of England Judicial Review (Vol.61(2010) 5th Edition) states as follows:

> ***"Although it is still correct to say that there is no general duty arising from requirements of procedural fairness, to give reasons for an administrative decision, in a substantial number of cases, a duty to provide reasons has been found to exist on the particular facts of the case. In these cases, the conclusion was that having regard to the nature of the interest contained and the impact of the decision on the interest, and all other relevant considerations, a reasoned decision was required. Reasons may also be required if a decision appears to be aberrant and requires explanation."***

Article 47 of the **Constitution** confers a right to administrative action. It provides as follows:

> **i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;**
>
> **ii. If a right or fundamental freedom of a person as been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the actions;**
>
> **iii. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –**

a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) Promote efficient administration

It is clear from Article 47 of the Constitution that where ones rights is adversely affected, the decision maker should give the reasons for the said decision. In the case of ***Kenya National Exam Council Vrs Republic Ex parte Gathenji and others (1997) KLR the Court of Appeal*** said:

> **"The cancellation of the candidate's results was obviously an administrative action which was required to be expeditious, efficient, lawful reasonable and procedurally fair. The first respondent was or ought to have been aware that the cancellation of the candidate's results was likely to affect the candidates under Article 43 (i) (f) of the Constitution, hence the candidates were entitled to reasons for the action. Where the applicant seeks an order of certiorari to quash cancellation, the council might well be required to justify to the court the reason(s) why it thought the respondents had cheated. In this case therefore, the 1st respondent was expected to justify to the court why he thought there was collusion amongst the candidates.....".**

See ***Republic v KNEC Ex parte HNG (2016) KLR***.

Again in **Hardial Singh and others 1979 KLR 18 (1976 – 80) 1 KLR 1090** the court emphasized the need to give reasons for administrative decisions and the court expressed itself as follows:

> ***"The ordinary way and particularly in cases which affect the life, liberty or property, a minister should give reasons and if he gives none, the court may infer that he had no good reasons. The minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that in the circumstances prevailing his Nyanza, the holding is fully developed.***
>
> ***The conclusion is therefore that the minister misdirected himself on the facts. The courts would be no rubber stamp of the executive and if parliament gives great powers to the minister, the courts must allow them to him; but at the same time, they must be vigilant to see that he exercises them in accordance with the law.***
>
> ***He must act within his lawful authority.....An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to review of the courts on certain grounds. The minister must act in good faith; extraneous considerations ought not to influence him; and he must not misdirect himself in law.....it is clear that both Section 187(i) and (4) require the minister to be "satisfied". It gives him discretion; and it is his discretion to act upon the facts before him and not for the court to sit on appeal so as to impose judgment on the facts upon the minister. There is no doubt that the minister acted in good faith. But the minister had to have certain facts before him.***
>
> ***.....It is clear that the reasons given in the order for sale illustrate that the minister had asked himself the wrong questions, it being a question not enjoined upon him by the Act. He had thereof misdirected himself in law and that order is null and void".***

The impugned decision is contained in the letter dated 8/5/2017 and gazette notice of 12/5/2017 which followed the letter of 8/5/2017. The gazette was issued pursuant to Section 61 of the Co-operatives Act Cap 40 which reads as follows:-

> ***(1) If the Commissioner after holding an inquiry under Section 58 or making an inspection under Section 59 of the Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.***
>
> ***(2) Any member of a Co-operative Society who feels aggrieved by an order under sub section (1) may, within two months after the making of such order, appeal against the order to the Minister with a final appeal to the High Court.***
>
> ***(3) Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Minister or by the High Court, as the case may be***
>
> ***(4) Where the Commissioner makes an order under sub section (1) he shall make such further order as he thinks for the custody of the books and documents and the protection of the assets of the society.***
>
> ***(5) No cooperative society shall be dissolved or wound up save by an order of the Commissioner.***

Under ***Section 61 of the Act, the Commissioner of Cooperatives*** has the power to make an order dissolving a society after an enquiry into the affairs of the Society by the ***Registrar under Section 58 of the Act or under Section 59*** of the ***Act*** which provides for inspection of books of an indebted society. Save for stating that the applicant did not comply with the bylaws, both the letter dated 8/5/2017 and the gazette notice do not mention the reasons for the dissolution of the applicant. If an inspection or enquiry was done on the applicant, it would be expected that the Commissioner would give reasons why the applicant was dissolved following the findings by the respondent. The respondent was served with this application but did not appear nor was any reply filed. So, far this court has no idea whether the applicant was given the reasons for the decision to dissolve the applicant. The only conclusion this court can arrive at is that the respondent acted arbitrarily in making the decision for dissolution of the applicant.

In the instant case, the Commissioner failed to give any reason for his decision. He had a discretion to make the decision pursuant to ***Sections 58 and 59*** of the Co-operatives Act but without any reasons being given to the applicant, it cannot be discerned how the Commissioner arrived at the decision.

Section 61 (2) gives an aggrieved party leave to appeal to the Minister within 2 months of the Commissioner's decision. The applicants exhibited a copy of their appeal to the Cabinet Secretary, Ministry of Trade, Industry and Co-operatives dated 22/5/2017 and received by that office on 31/5/2017 but there has been no reply to the said appeal.

The applicant had a right of appeal to the High Court from the Minister's decision but since decision has been forthcoming, the applicant had the right to come before this court to challenge the decision of the Commissioner by way of Judicial Review.

Under Section 61(3) of the Act, upon lodging of the Appeal and since the appeal had not been determined, the order of 12/5/2018 was not supposed to take effect. It means that the applicant should have continued with its operations till the appeal was heard and determined. I have seen the letter dated 8/1/2018 addressed to the Director of Co-operatives and Industrialization by the Commissioner of Co-operatives where she stated "***While the determination of the appeal against cancellation is being awaited for, make sure the Society does not continue with its operations***."

The above statement contravenes Section 61(3) of the Act. It is expected that the Commissioner knows the law. From the manner in which the letter is framed, i.e. ***"make sure the society does not…."*** is suggestive of ill motive being behind the cancellation.

The Commissioner had a duty to act within his authority, in good faith and to give reasons for his decision. Failure to do so goes against the tenets of natural justice and was also in breach of the law that donates power to him. Therefore, this court has a duty to intervene. In the end, I find that the applicant is entitled to an order of *certiorari* as prayed and I hereby call for the decision of the 1st respondent through the Kenya Gazette dated 12/5/2017 and hereby quash the decision by an order of *certiorari*. I also grant an order of Prohibition to prohibit the respondent from closing down the ex parte applicants/operations/business/operations.

Since the decision of 12/5/2017 is quashed, it would be in vain to grant an order of mandamus as prayed, and the same is declined.

The respondents will bear costs of this application.

Dated, Signed and **delivered** at **Nyahururu** this ***24th*** day of ***May***, **2018.**

.....

R.V.P Wendoh

JUDGE

PRESENT:

Mr. Wanjiru holding brief for Mr. Chuma for applicant

C/Assistant – Soi