



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 168 OF 2017

IN THE MATTER OF AN APPLICATION BY KENYA COM RABBIT CONSORTIUM LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION UNDER ORDER 58(1),(2), (3) AND 7 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT CAP 490 LAWS OF KENYA SECTION 35

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015 SECTIONS 3,4,5,6,7,8 AND 9

BETWEEN

KENYA COM RABBIT CONSORTIUM LIMITEDAPPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVES.....RESPONDENT

RULING ON LEAVE

1. The chamber summons dated 31st March 2017 and filed in court on 6th April 2017 under certificate of urgency and supported by statutory statement and verifying affidavit sworn by Robinson Kariuki the Managing Director of Kenya Com Rabbit Consortium Limited seeks from this court:

i. leave of court to institute Judicial Review proceedings seeking for certiorari to quash the decision by the Commissioner for Co-operatives issuing an Agency notice to the Co-operatives Bank of Kenya Gikomba Branch to collect kshs 1,340,000 on behalf of BI Mashinani Farmers Co-operatives Society from A/C No. [particulars withheld] being operated by the applicant;

ii. That leave be granted to apply for mandamus compelling the Commissioner for Co-operatives to cause to be put back all monies so far collected from the said Bank and account held by the applicant;

iii. That leave granted do operate as stay of the Agency Notice pending final determination of this application; and costs of the application.

2. According to the applicant and as per its affidavit and grounds as argued by its counsel Mr Munyao on 26th April 2017, the proper procedure was not followed as stipulated in Section 35 of the Co-operatives Societies Act which requires the Commissioner to first institute proceedings before the Co-operatives Tribunal for recovery before issuing Agency Notice.

3. That the Agency Notice was being issued on behalf of BI Mashinani Farmers Co-operative Society which was then not in existence at the time the money was allegedly collected and that the applicant was never accorded a hearing before Agency Notices were issued.

4. That it is the applicant that promoted the formation of the BI Mashinani Co-operative society and that the action by the respondent Commissioner violated Article 47 of the Constitution, it was illegal, arbitrary and malafides and has paralysed the operations of the applicant.

5. I have read Section 35 (2) of the Co-operative Societies Act Cap 490 Laws of Kenya. Under the Section 35, the Commissioner may institute proceedings for recovery of monies due to a member of a co-operative society where such monies have been deducted from a member but not remitted to the Co-operative Society. And in doing so, the Commissioner must first give notice.

6. The said Section 35(2) provides that the Commissioner may institute court proceedings for recovery of such monies but it is not clear whether such recovery must be preceded by a suit.

7. Nonetheless, the applicant laments that it was never issued with notice before Agency Notices were issued to the bank and that the Agency Notice is arbitrary and offends the provisions of Article 47 of the Constitution on fair administrative act and the Fair Administrative Action Act.

8. At this stage the applicant need not delve into the merits of its case but must demonstrate that it has a prima facie arguable case for indepth investigations at the substantive stage.

9. In my view, the complaint by the applicant is not frivolous and therefore I shall grant the leave sought to apply for Judicial Review orders sought in the chamber summons.

10. The main motion to be filed and served within 10 days from todate. The interested party who is BI Mashinani Farmers Co-operative Society to be served as well.

11. On the prayer that leave granted do operate as stay Order 53 Rule 4 of the Civil Procedure Rules permits the court granting leave in an application for prohibition and certiorari only, to order that such leave do operate as stay.

12. In this case, the applicant seeks for leave for certiorari and prohibition. The court can therefore order for stay. The applicant complains that if the stay is not granted, its operations will be grounded; and therefore the application if successful will be rendered nugatory.

13. I agree that where money is concerned, the applicant may be grounded if it cannot access its funds. It is for that reason that I exercise my discretion and suspend the Agency Notice issued to the Co-operative Bank, Gikomba Branch by the respondent, Commissioner of Cooperatives which account is operated by the applicant, until the motion once filed is heard and determined or until further orders of this court whichever is the earlier.

14. Costs in the cause. Mention of the main motion on 8th May 2017 for directions on the hearing.

Dated, signed and delivered in open court at Nairobi this 27th day of April, 2017.

R.E. ABURILI

JUDGE