Republic v Sacco Societies Regulatory Authority; Maiyo & 3 others (Exparte) (Judicial Review Application 489 of 2017) [2017] KEHC 8345 (KLR) (Judicial Review) (19 December 2017) (Ruling)

Republic v Sacco Societies Regulatory Authority Ex Parte Joseph Kiprono Maiyo & 3 others [2017] eKLR

Neutral citation: [2017] KEHC 8345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION 489 OF 2017

GV ODUNGA, J

DECEMBER 19, 2017

IN THE MATTER OF THE SACCO SOCIETIES ACT, NO. 4 OF 2008

AND

FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

REPUBLIC ..... APPLICANT

AND

SACCO SOCIETIES REGULATORY AUTHORITY ..... RESPONDENT

AND

JOSEPH KIPRONO MAIYO ..... EXPARTE

DR. GERALD JUMA ..... EXPARTE

JULIUS NJERU NDUBAI ..... EXPARTE

N. OTIENDE ..... EXPARTE

RULING

Introduction

1. By a Chamber Summons dated 3rd August, 2017, the ex parte applicants herein seek leave to commence reliefs in the nature of judicial review in particular orders order removing into this Court to quash the directive/letter of the Respondent dated 28th July, 2017 removing the applicants and prohibiting them

as officials of Chuna Co-operative Savings & Credit Society Limited as well as a prohibition seeking to prohibit the Respondent from acting on the said directive.

Applicants' Case

2. The application is based on the fact that the applicants who are Executive Committee Members of Chua Co-operative Savings & Credit Society Limited (hereinafter referred to as "the SACCO") on 28th July, 2017 received letters from the Respondent, the regulator of Sacco Societies in Kenya, removing them from the office as officials of the Sacco and barring them from holding such an office for a period of three (3) years.

3. According to the applicants there was no reasonable grounds at all why the Respondent took such action save for malice, bad faith, unreasonableness and abuse of power. It was revealed that the Respondent had been investigating allegations into the affairs of the Sacco and wrote to the applicants accusing them of having failed to implement lawful administrative directives issues by the Respondent, failure to notify the Respondent of the resignation, removal and appointment into office of the Chief Executive Officer of the Sacco within the prescribed period and misleading the Respondent into undertaking its regulatory mandate. While the Respondent found no basis in respect of the first ground, it did so in respect of the other two grounds.

4. It was however averred that the Co-operative Tribunal had injuncted the Respondent from proceedings under the first allegation in Tribunal Case No. 342 of 2017 while with respect to the other two allegations, the applicants had informed the Respondent that the said executive officer had not finalised certain tasks within the Sacco and could not therefore be released. Accordingly there was no new substantive appointment made.

5. It was the applicants' case that though the decision was ratified by the full Board, the action was discriminately taken only against the applicants as members of the Finance and Administration Committee of the Board while none was taken against the other members of the Board. This action, it was contended violated the applicants' constitutional right to fair administrative action as provided in sections 4 a 5 of the *Fair Administrative Action Act*.

6. It was further contended that the said action was irrational, in bad faith, procedurally unfair and disproportionate to the interest sought to be protected. To the applicants, in so acting the Respondent abused its discretion and power and failed to take into account relevant consideration but instead considered extraneous factors in arriving at its decision.

7. The applicants therefore sought leave to commence these judicial review proceedings.

8. On behalf of the applicant, it was submitted by Miss Maina that the application was merited due to the fact that the applicants were barred from holding office for 3 years despite the fact that they were not officials of the SACCO. According to learned counsel, the applicants were challenging the procedure adopted in removing them and relied on Sylvana Mpabwanayo Ntaryamira vs. Allen Waiyaki Gichuhi & Another Judicial Review Application No. 449 of 2015.

9. In learned counsel's view, the material placed before the Court was sufficient to warrant the grant of the leave. As regards the issue of sub judice, it was submitted that since what is pending before the Cabinet Secretary is an appeal and not judicial review, the two processes are distinct since in these proceedings what is being challenged is the procedure based on jurisdiction and illegality in the process. It was submitted that in these proceedings the applicants do not intend to touch on the merits of the matter which is what is before the Cabinet Secretary. In learned counsel's view, the remedies being sought herein cannot be entertained in the said appeal which is challenging the decision and not the procedure.

10. It was disclosed that the applicants are nolonger holding office and are not interested in doing so but are simply concerned about being barred from holding any other office. In this respect reliance was placed on Thiba Min. Hydro. Co. Ltd vs. Joseph Karu Ndwiga [2013] eKLR and it was submitted that the substantive issue before the Cabinet Secretary s not the substantive issue before this Court.

Respondent's Case

11. The application was however opposed by the Respondent.

12. According to the Respondent, the application is sub judice, contrary to *Sacco Societies Act*, the *Fair Administrative Action Act* and is otherwise an abuse of the court process. It was averred that the application was incompetent and fatally defective as the applicants had failed to exhaust the mandatory hierarchal statutory dispute resolution mechanisms or forums under the *Sacco Societies Act*, demonstrated exceptional circumstances to depart therefrom and or obtained requisite exemptions under the *Fair Administrative Action Act*.

13. The applicants were accused of forum shopping as they were pursuing but had not exhausted parallel pending proceedings before the Cabinet Secretary under whose portfolio the matter falls thereby exposing the Court to risk of embarrassment that may result in absurdity of two divergent decisions on the same dispute by the Court and the Cabinet Secretary.

14. It was averred that at the material times the applicants herein were officers of the Sacco within the meaning of section 2 of the *Sacco Societies Act* being members of the Board of Directors of he said Sacco. It was averred that sometimes between the months of April 2017 and May 2017 the Respondent in the course of exercising its supervisory and regulatory mandate over the said Sacco determine that there were reasonable and probable reasons that the said Sacco's business and activities was being conducted in a manner contrary to the provisions of the said Act and the Regulations made thereunder. In order to protect the members' funds, the Respondent in the exercise of its supervisory enforcement powers under the Act and the said Regulations intervened in the management and oversight of the Sacco by commencing and instituting appropriate supervisory enforcement actions against the Sacco and the ex parte applicants. Accordingly, the Respondent directed the applicants' suspension from the service of the Sacco pending the determination of the allegations made against them and called on then to answer to the said allegations. It was averred that the said allegations were answered by the applicants after consideration of the responses some of the said grounds were proven.

15. Consequently in the exercise of its statutory mandate the Respondent directed the immediate removal of the applicants from the service of the Sacco which directives were served upon the ex parte applicants. It was the Respondent's case that it followed all the due process of the law, including fair administrative justice procedures before arriving at its decisions.

16. It was averred that a person aggrieved by the decision of the Respondent has a right pursuant to Regulation 72(8) of the Regulations, 2010 to appeal to the relevant Cabinet Secretary. According to the Respondent while this application had been filed on 4th August, 2017 and was thus pending, each of the applicants on or about 21st August, 2017 filed appeals to the Cabinet Secretary in accordance with the Act and Regulations, seeking the reversal of the Authority's Directives dated 28th August, 2017 which appeals are still under consideration of the Cabinet Secretary. It was therefore the Respondent's case that the applicants ought to have exhausted the legal remedies available to them, which was to appeal to the Cabinet Secretary instead of commencing these proceedings. The applicants were accused of action in bad faith by failing to disclose to the Cabinet Secretary that they had commenced these proceedings hence subjecting the Cabinet Secretary to deal with a matter which was sub judice.

17. According to the Respondent as the deponent of the verifying affidavit had not exhibited any authorisation from the other applicant to swear the same the said affidavit was bad in law an abuse of the court process and should be struck out. It was further averred that the said affidavit was not commissioned in accordance with the law and should be struck out.

18. The Respondent denied that the operations of the Sacco had been adversely affected as a result of the said decision and asserted that the application for leave does not meet the legal threshold for the grant thereof.

19. On behalf of the Respondent, it was submitted by Miss Savini that the issues herein are before the Cabinet Secretary and that the *Sacco Societies Act* is self-contained. It was reiterated that the applicants have not exhausted the appellate process before coming to this Court hence they have contravened section 9 of the *Fair Administrative Action Act* as well as Article 159 of *the Constitution* as read with Regulation 72(8) of the Sacco Regulations.

20. According to learned counsel, the pending appeal ought to be allowed to proceed before coming before this Court and in this regard reference was made to Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992.

Determinations

21. I have considered the issues raised herein.

22. The requirement for leave was explained by a three judge bench comprising Bosire, Mbogholi-Msagha & Oguk, JJ in Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993 in which the Court held that it is supposed to exclude frivolous vexatious or applications which prima facie appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.

23. Waki, J (as he then was), on the other hand, in Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996 put it thus:

> " The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly 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. The requirement that leave must be obtained before making an application for judicial review is designed 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... Leave may only be granted therefore 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. It is an exercise of the court's discretion but as always it has to be exercised judicially".

24. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

25. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

> " If he [the Applicant] fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers..."

26. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

> " Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

27. This position was appreciated by Majanja, J in Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others in which the learned Judge expressed himself as follows:

> " I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the

facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

28. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a prima facie arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

29. In this case, the main ground for opposing the application is that there is an alternative remedy available to the applicants which remedy the applicants have in fact invoked.

30. Rule 72 of the Sacco Societies (Deposit-Taking Sacco Business) Regulations, L.N. 95/2010, provides as follows:

(1) The Authority may prohibit any individual seeking to be a director or employee of a Sacco Society, if the individual has been charged or convicted with a crime involving monetary loss, fraud, perjury, or breach of contract of a licensed financial institution.

(2) The Authority may prohibit an individual from seeking to be a director or employee if he or she is likely to pose a threat to the interest or threaten to impair public confidence in the Sacco Society.

(3) A person against whom disciplinary action has been taken by way of removal from office shall be ineligible to hold office in any Sacco Society for a period of three years or such other period as may be determined by the Authority.

(4) The Authority may direct a Sacco Society not to conduct business or discontinue conducting business with an individual or legal entity that has been charged with a crime involving monetary loss, fraud, perjury, breach of contract or a crime which may pose a threat to the interest of the Sacco Society or threaten to impair public confidence in the Sacco Society.

(5) The prohibition order shall be addressed to the Sacco Society board of directors and the prohibited party, stating specifically the reason for the prohibition and that it shall take immediate effect.

(6) The Authority or Sacco Society may remove an officer from office, if the officer—

(a) directly or indirectly violates the Act, these Regulations or the Sacco societies bylaws;

(b) engages or participates in any unsafe or unsound practice in connection with the Sacco Society;

(c) has a non- performing loan or becomes a bad debtor; and

(d) commits any act, or practice or fails to take appropriate action, thereby committing a breach of fiduciary responsibility, resulting in or likely to result in—

(i) a Sacco Society suffering financial loss or other damage;

(ii) members' interest being prejudiced; or

(iii) any party receiving unfair financial gain or other benefit.

(7) A notice to remove an officer from office by the Authority shall contain specific statement of facts constituting the grounds for removal and shall take immediate effect.

(8) A person aggrieved by the removal order may appeal to the Minister.

31. It is clear beyond peradventure that the action being challenged before this Court falls squarely with the aforesaid Regulation.

32. Section 9(2), (3) and (4) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

33. It is however my view that the onus was upon the applicant to satisfy the Court that she ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in Republic vs. National Environment Management Authority [2011] eKLR, where the Court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

> " The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

34. Therefore as was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

> " Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..."

35. This Court in Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013 held that:

> " ...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."

36. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, where it held that;

> " Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

37. It is now a cardinal principle that, save in the most exceptional circumstances the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In Re Preston [1985] AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

38. Lord Chancellor, Lord Hailsham of St. Marylebone in the House of Lords decision in Chief Constable vs. Evans [1982] 3 ALL ER 141, stated at p 143 as follows with respect to the judicial review remedy:

> " This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration,is intended to protect the individual against abuse of powerby a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative.It is not intended to take away from those authorities the powers and discretions properly vested in them by lawand to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".

39. Mumbi Ngugi, J in Rich Productions Limited vs. Kenya Pipeline Company & Another [2014], explained why the Court must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> " The reason why *the Constitution* and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of *the Constitution* to supervise bodies such as the 2nd Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not."

40. In this case it was not contested that there are in fact proceedings pending before the Cabinet Secretary challenging the Respondent's decision. However, the applicants contend that the grounds upon which these proceedings are brought are different from those upon which the appeal has been lodged.

41. A perusal of the substantive reliefs in all the said appeals is that the applicants seek to have the Respondent's decision made and conveyed by the letter dated 28th July, 2017, set aside. In these proceedings the substantive order being sought is an order removing into this Court to quash the directive/letter of the Respondent dated 28th July, 2017 removing the applicants and prohibiting them as officials of Chuna Co-operative Savings & Credit Society Limited. The other relief is for prohibition seeking to prohibit the Respondent from acting on the said directive.

42. What comes out clearly is that the application as framed is not just limited to the decision barring the applicants from holding office for three years a was submitted herein, but the decision removing the applicants from office and barring them from being officials of the Sacco.

43. In my view it is clear that a determination of either these proceedings or the appeal in favour of the applicants will have the effect of disposing off the other proceedings. If however the applicants lose either, there is a possibility that they may succeed in the other thus leading to an untidy situation of having two conflicting decisions on the same matter.

44. In my view section 9(2) of the *Fair Administrative Action Act* is clear that this Court is barred from reviewing an administrative actions or decisions thereunder unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The Legislature must be taken to have been aware that these proceedings only challenge the process while an appeal challenges the merits of the case yet they still, in their wisdom, provided that parallel proceedings are not permissible as long as they challenge the same decision. Accordingly, if what is sought to be achieved by the appeal is substantially the same as what is sought in the judicial review proceedings, a party ought not to be allowed to have a double-pronged attack on the same decision. In my view even without the provisions barring such a course, to proceed in that manner would amount to playing lottery with the Court and render legal proceedings a circus. That clearly is an abuse of the Court process.

45. Instances that constitute abuse of the Court process were set out in Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229 as including the following cases:

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness." [Emphasis added].

76. It is therefore clear that a party cannot invoke two jurisdictions at the same time merely because he is relying on different grounds in both matters. As was held in Mitchell and others vs- Director of Public prosecutions and Another (1987) LRC (const) 128

" ....in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties". [Emphasis added].

46. Whereas, this Court may in exceptional cases excuse the failure to invoke the alternative dispute resolution mechanisms provided under the law, where such mechanisms have in fact been invoked, to abandon the same midstream without terminating the same and proceed to commence judicial review proceedings or vice versa amounts to abuse of the process of the Court.

47. In my view by granting the applicant permission or leave to commence judicial review proceedings as sought herein would amount to this Court abetting abuse of its process. Since the decision whether or not to grant leave is discretionary, one of the factors which the Court will consider in deciding whether or not to grant it is the conduct of the applicant.

48. In this case it is my view and I hereby hold that the applicants' conduct, which amounts to playing lottery with the due process, disentitles them to the leave sought and the same ought not to be granted.

Order

49. In the premises I decline to grant leave and without such leave these proceedings are rendered still-born.

50. It follows that these proceedings are incompetent and are hereby struck out but with no order as to costs as the judicial review proceedings proper were yet to be commenced and as the merit of the applicants' case is yet to be determined. I also consider the fact that this dispute revolves around

the operation of a co-operative society hence under Article 159(2)(c) this Court ought to promote reconciliation within the co-operative movement.

51. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwai for Miss Maina for the Applicant

Mr Litoro for the Respondent

CA Ooko