



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR APPLICATION NO. 30 OF 2015

**IN THE MATTER OF AN APPLICATION BY BEATRICE WAMBUI MATHENGE, RAHMA
ADAN JILLO AND GEORGE OTIENO OCHICH FOR ORDERS OF CERTIORARI,
MANDAMUS AND PROHIBITION.**

AND

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

AND

IN THE MATTER OF THE CO-OPERATIVE TRIBUNAL

BETWEEN

BEATRICE WAMBUI MATHENGE.....1ST APPLICANT

RAHMA ADAN JILLO.....2ND APPLICANT

GEORGE OTIENO OCHICH.....3RD APPLICANT

AND

THE CABINET SECRETARY,

MINISTRY OF INDUSTRIALIZATION &

ENTERPRISE DEVELOPMENT.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF INDUSTRIALIZATION &

ENTERPRISE DEVELOPMENT.....2ND RESPONDENT

THE CHAIRMAN,

CO-OPERATIVE TRIBUNAL.....3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd February, 2015, the ex parte applicants herein seek the following orders:

1.An order of certiorari be issued to bring into this high court and quash the decision of the 3rd Respondent made on 27th January 2015 and 29th January 2015 stopping the applicants from attending the cooperative tribunal's sittings and preventing the tribunal from discharging its functions on Mondays and Tuesdays.

2.An order of mandamus be issued to compel the Respondents to procedurally and lawfully undertake their statutory duties under the Co-operative Society Act Cap 490 Laws of Kenya and ensure that the Co-operative tribunal holds its sittings and performs its functions fully and completely as provided for in the Co-operative Society Act, Cap 490 Laws of Kenya.

3.An order of prohibition be issued restraining the 3rd Respondent from in any way unilaterally making decisions on scheduling of sittings, constitution of benches the tribunal, removal of members from panels hearing various cases, where the tribunal sessions will be held generally running the affairs of the tribunal unilaterally.

4. **The costs of this application be paid for by the Respondents.**

Ex Parte Applicants' Case

2. According to the applicants, they were appointed members of the Co-operative Tribunal (hereinafter referred to as "the Tribunal"), a Tribunal established under the *Co-operative Societies Act* (hereinafter referred to as "the Act") dealing with disputes arising from the Co-operative Societies affairs in the country. The said Tribunal was chaired by **Mwangi Timothy Kariuki**, the 3rd Respondent herein.
3. It was the applicants' case that they had experienced difficulties in discharging most of their duties and responsibilities due to the actions of the 3rd Respondent, who amongst other actions, removed them from the panel of members hearing particular cases, prevented them from participating in all proceedings, refused to consult them when making administrative decisions affecting the Tribunal and usurped the powers of the Minister by constituting and dissolving benches, resulting in a complaint to the Judicial Service Commission.
4. To the applicant the actions of the 3rd Respondent occasioned loss of public resources as they are full time members of the Tribunal. Despite rising their concerns with the 3rd Respondent no remedial action was taken.
5. It was averred by the applicants that the 3rd Respondent had persisted with this conduct and had also been excluding and choosing members to sit in panels in a haphazard manner, actions which amounted to establishing benches and which were ultra vires the provisions of the Act. Despite lodging an official complaint with the 1st Respondent, no action was taken. This state of affairs, it was contended adversely prejudiced the litigants whose cases had to be adjourned at the last minute on the ground, *inter alia*, of lack of quorum on the instructions of the 3rd Respondent. To the applicants, the 3rd Respondent's said actions were not only adversely affecting the dispensation of justice by the Tribunal and occasioning an injustice to innocent litigants but also amounted to waste of public resources.
6. According to the applicants, it was when they raised complaints that the 3rd Respondent

unilaterally made a decision stopping the Applicants from attending tribunal sittings, an action which was unlawful and ultra vires since it amounted to preventing the Applicants from discharging their statutory duties.

7. To the applicants, the Tribunal was established to justiciably and expeditiously deal with disputes relating to Co-operative Societies. Further, as a quasi-judicial body, the Tribunal is bound by provisions of the Constitution relating to fair administration of justice and access to justice. In the circumstances, the Court ought to exercise its supervisory power and ensure that the Tribunal undertakes its duties and functions, by allowing this application.

Respondents' Case

8. In opposition to the respondents contended that the 1st and 2nd Respondents received serious complaints against the Applicants touching on their lack of integrity, unethical conduct, incompetence, non-performance and ineligibly to serve as members of the tribunal from litigants and the Secretary of the Tribunal. Apart from that, advocates practicing before the tribunal and who are involved in over 80% of the cases before the tribunal also petitioned the 2nd Respondent to remove the three Applicants as members of the tribunal on the grounds of misconduct, incompetence, non-performance and ineligibly to serve as members of tribunal.
9. Due to the seriousness of the issues raised against the Applicants, the 1st Respondent as the appointing authority for part time members under the provisions of Section 77 (1) (b) (c) and (d) of the Act, commenced an inquiry to establish the veracity of the complaints pursuant to the provisions of Section 77 (1) (b) (c) and (d) of the Act. On 7th January 2015 as the inquiry was underway and in view of the seriousness of the complaints raised against the Applicants, the 3rd Respondent consulted the 2nd Respondent under whom the tribunal operates to seek directions on how to handle the tribunal sittings when the three Applicants usually attend session as well as the circuit sittings in which the Applicant would be involved and was instructed by the 2nd Respondent to inform the Applicants not to attend sittings until the issues raised against them were investigated and a decision made about their fate by the 1st Respondent.
10. It was averred that the instructions of the 2nd Respondent were based on the fact that in the event of the Applicants being found to be irregularly and illegally serving as members of the tribunal after the inquiry was finalized, all the proceedings in which they may have participated in and any decisions they may have made would be rendered null and void and would be quashed in an application for judicial review. Therefore, it was contended, the instructions to the Applicants to await the outcome of the probe by the Respondents were issued as a precautionary measure intended to protect the integrity and proprietary measure intended to protect the integrity and proprietary of the proceedings of the tribunal and also prevent an avalanche of judicial review applications to set aside and quash the proceedings that the Applicants may have participated in and the decisions made with their input. To the 3rd Respondent, he never made any decision to stop the Applicants from attending the tribunal sessions but was merely conveying instructions given by the 2nd Respondent, a fact that was clear from the applicants' own exhibits annexed in support of the application.
11. However, after learning of the probe against them, the Applicants launched a scathing attack on the 3rd Respondent accusing him of pursuing their removal from the membership of the tribunal and at the same time put him on notice that they would be moving to court to challenged their removal.
12. With regard to the 1st Applicants, it was contended that she was interviewed and given a letter of appointment by the Judicial Serviced Commission (JSC) as the Chairperson of the Co-operative Tribunal pursuant to the provisions of Article 172 (1) (C) of the Constitution of Kenya 2010 which she declined for reasons best known to her. She further returned the salary paid to her by the judiciary with an explanation that she had not accepted the JSC appointment.
13. To the Respondents, the provisions of section 77 (1) (a) of the Act that deal with the appointment of the chairperson and deputy chairperson tribunal by the Minister for the time being responsible for co-operative affairs were superseded by the provisions of Article 182 (1) (c) as read with Articles 260 and 2 (4) of the Constitution of Kenya 2010. Hence the advertisement and

- recruitment of the chairperson and deputy chairperson by the JSC on 25th November 2011. However the powers of the Minister under the provisions of Section 77 (1) (b) and (c) of the Act of appointing part time members of the tribunal were not disturbed by the passing of the Constitution of Kenya 2010. Therefore only the JSC has the sole mandate under the Constitution to appoint, discipline and dismiss judicial officers who include the presiding officers of tribunals established under Article 169 (1) of the Constitution of Kenya 2010. It was therefore the Respondents' position that by declining the JSC appointment the 1st Applicant remained in her previous employment as a civil servant attached to the Ministry of Industrialization and Enterprise Development and there is no provision under Section 77 (1) of the Act that allows a civil servant to be appointed as a deputy chairperson or serve as a member of the tribunal.
14. With regard to the 2nd and the 3rd Applicants, it was contended that they were purportedly appointed as experts on Cooperative matters under Section 77 (1) (d) of the Act. However, based on information received from the Human Resource Department of the Ministry of Industrialisation and Enterprise Development as well as the Co-operative Alliance of Kenya (CAK) the two did not even possess the ten years minimum experience in the field of co-operative management and practice required for appointment as members of the tribunal and further, the apex society i.e. the Co-operative Alliance of Kenya (CAK) was never consulted when the two were gazetted by the former Minister for the defunct Ministry of Co-operative Development and Marketing. It was therefore contended that the allegations that the three Applicants are irregularly and illegally serving as members of the tribunal were not frivolous and there was a basis to investigate the same.
15. To the Respondents, the present application was brought in bad faith and the Applicants were not entitled to the orders sought.

The Interested Party's Case

16. According to the interested party, the Co-operative Alliance of Kenya, it is the National Apex Organization for Kenya's co-operative movement duly established as such pursuant to the provisions of section of the Act, as a successor to the erstwhile Kenya National Federation of Co-operatives, with a membership of over 14,000 registered co-operatives comprising the National Co-operative Organisations, Co-operative Unions and Primary Co-operative Societies. According to it, among its objectives, as set out under sections 2 and 4 of the Act are to promote co-operative development and represent the interests of co-operative societies locally and internationally, as well as to promote the welfare and economic interests of its members which objectives are, a response to the need by the co-operative movement to have a single voice in addressing its concerns on the national and international platform especially by lobbying and advocating for a favourable policy and legal environment in addition to collaborating, networking, representing and promoting the growth and developing the co-operative movement, as stated above. In recognition and furtherance of its objectives aforesaid, the Interested Party has a mandate under the Act to consult with the Cabinet Secretary for the time being for Industrialisation and Enterprise Development and give its input where required on the affairs touching on the co-operative movement in Kenya.
17. It was contended that the Act is among the laws existing before the Effective Date under the Constitution of Kenya, 2010 and which is, therefore, saved by Section 7(1) under Part 2 of the Sixth Schedule to the Constitution and which, therefore, continues to be in force and is construed as such with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. Accordingly, the requirements of consultation under the Act, between the Interested Party and the Cabinet Secretary, aforesaid, must be construed to be and, indeed, are in conformity with the national values and principles of good governance, rule of law, democracy and participation, integrity, transparency and accountability, among others, which bind all State organs, State officers, public officers and all persons as pronounced under Articles 10, 73 (2) (a), (b), (c), (d) and (e) and 232 of the Constitution.
18. The interested party disclosed that it became aware of the wrangles within the Tribunal through correspondence exchanged between, among other parties, the Applicants herein and the 3rd Respondent, as well as the 2nd Respondent and which correspondence was also copied to the Interested Party. In its view, given the concerns raised by the said correspondence and in a bid to

- exercise its mandate and objectives under the Act, the Interested Party perused the appropriate records in its custody realised that nothing in its records indicated that it was ever consulted before the 2nd and 3rd Applicants were appointed to their positions on the Tribunal as required under section 77(1)(d) of the Act and was therefore of the view that in the absence of consultation aforesaid, their appointment was un-procedural.
19. Apart from the foregoing, the Interested Party having made further inquiries at the Ministry of Industrialisation and Enterprise Development was not clear whether the 2nd and 3rd Applicants attained the minimum qualification of ten years' experience in the field of co-operative management and practice as a prerequisite, under the Act, for their appointment to the Tribunal.
 20. In its view, the various complaints of misconduct and professional impropriety raised against the 2nd and 3rd Applicants were grave and that the same ought to have been inquired into first as contemplated under section 77 (4) of the Act with a view to safeguarding the integrity and posterity of the Tribunal, as well as to win back the confidence of litigants in the Tribunal and to ensure that the Tribunal was able to continue rendering justice to the litigants devoid of favouritism and/or partiality.
 21. It was therefore its position that in the absence of a conclusive process of inquiry regarding the appointment, experience/knowledge and complaints raised against the 2nd and 3rd Applicants, aforesaid, the Court ought to find that the Applicants' application as filed and presented before the Honourable Court was premature and was otherwise aimed at preventing and frustrating an otherwise lawful process of inquiry.
 22. The Court was urged to exercise its judicial discretion with a view to promoting the principles and values entrenched under Articles 10, 73 (2), (a), (b), (c), (d) and (e) and 232 of the Constitution and with further regard to the co-operative movement in Kenya, as well as the general public.

Determinations

23. I have considered the positions adopted by the respective parties to this application.
24. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

25. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
26. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review

proceedings with a view to determining contested matters of facts with a view to resolving the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits. In this case, it is contended that there were serious complaints raised against the Applicants touching on their lack of integrity, unethical conduct, incompetence, non-performance and ineligibility to serve as members of the co-operative tribunal and as long as the said complaints remained unresolved it was imprudent to permit the applicants to continue sitting as members of the Tribunal. These are issues which cannot possibly be determined by affidavit evidence.

27. Apart from that, during the pendency of these proceedings the Tribunal was reconstituted with the result that the applicants and the 3rd Respondent are no longer members of the Tribunal. A perusal of the orders sought in this application clearly show that they were premised upon the applicants continuing as members of the Tribunal. The said Tribunal having been reconstituted, to grant the orders sought herein would in effect amount to reversing the decision reconstituting the Tribunal when there is no such prayer before me.

28. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”
[Emphasis added].

29. This position was reiterated by this Court in Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR where it was held that:

“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

30. In my view, the orders sought herein are no longer efficacious. In effect these proceedings have been overtaken by the events.

31. In the premises this Motion is disallowed but with no order as to costs.

32. Orders accordingly.

Dated at Nairobi this 26th day of January, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anzala for the Applicants

Mr Odhiambo for the Respondents

Mr Sifuma for Mr Ashitiva for the Interested Party

Cc Patricia