



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 104 OF 2016**

**GITHARA CHUCHU & 9 OTHERS.....APPLICANTS**

**VERSUS**

**THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 10<sup>th</sup> March, 2016, the *ex parte* applicants herein, **Githara Chuchu & 9 Others**, seek the following orders:

1. **THAT an order of mandamus do issue ordering that the Commissioner for Co-operative developments at Nairobi to release to the applicants their registration certificate in the name of Kimathi Coffee Growers Co-operative Society Ltd.**
2. **That the costs of this application be provided for.**

2. According to the applicants, they are members of Kimathi & Giagithu Factories who on 30<sup>th</sup> November, 1979 were allowed to form their own independent society at a special general meeting held at Githunguri Stadium. According to them, the minutes of the said special meeting were forwarded to the relevant authorities and stakeholders by their advocate's letter dated 4<sup>th</sup> December 1979 as required by the law. Thereafter, the District Co-operative Officer, Kiambu gave them the application form and Bylaws in compliance with the said resolution and instructed them to fill and or complete them and return the two documents which the applicants did for onward transmission to the Commissioner for Co-operative Development Nairobi. In their view, by forwarding their said documents to the Commissioner of Co-operative Development at Nairobi, and copying the same to relevant governmental agencies and stakeholders, the District Co-operative Officer, Kiambu officially commenced the process of having the applicants registered as an independent society in accordance with the decision of the Members of Gititu Coffee Growers Co-operative Society Ltd, dated 30<sup>th</sup> November 1979.

3. Due to the delay by the Commissioner of Co-operative Development at Nairobi in the registration process, the Applicants filed Misc. Civil Application No. 81 of 1980 on the 3<sup>rd</sup> March 1980 and the parties thereto were ordered to hold a special general meeting and by consent the meeting was held on 10<sup>th</sup> December, 1980 at which a resolution was passed on the 18<sup>th</sup> December 1980, allowing the applicants to split and form their own society.

4. It was averred that the Commissioner of Co-operative Development received the above minutes/resolutions and approved the outcome of the meeting and advised the applicants to apply for registration. It was disclosed that the 2 prayers in Misc. application No. 81/1980 come to an end on 19<sup>th</sup> April, 1983, the 1<sup>st</sup> Respondent having been ordered to register the new society (the applicants herein) on

7<sup>th</sup> March, 1980 and, to return to the Applicants the sum of Kshs 561,600/= vide their special account at KPCU on 23<sup>rd</sup> November, 1982. According to the applicants, the above two resolutions were passed in the presence of the Commissioner for Co-operative Development whose role is supervisory only and that the same was confirmed by the Commissioner's letter dated 16<sup>th</sup> January 1979.

5. It was averred that on 4<sup>th</sup> June, 1984, the applicants' litigation name changed from Githara Chuchu & 9 Others to a new name, that is to say- "Githara Chuchu and 473 others but since then the Commissioner of Co-operative Development has not issued them with their registration certificate for reasons not known to the Applicants and to the applicable law. To make the matter worse, the Commissioner for Co-operative Developments allowed them to pay for their registration as an independent society on the 20<sup>th</sup> August 2003 but without issuing them with their registration certificate.

6. The applicants asserted that the Commissioner for Co-operative Development (hereinafter the "Commissioner") has not even bothered to write to them giving reasons for his failure to issue the said registration certificate, as he is legally required to do despite their demands for the same. Following their complaint to the then Commissioner, for Co-operative Development, a **Mr. F.F. Odhiambo**, ordered an investigation to establish the reason why the certificate has not been issued even though they had complied with the legal requirements but the results therefor have never been released to them.

7. The applicant averred that they were subsequently advised to make a fresh application for registration which they did but were informed to change the name of their proposed society from Kimathi Coffee Farmers' Co-operative Society Ltd to another name, because there existed another society with a name similar to their.

8. In the Applicants' view, this was a trick to change the Applicants' name from the one in the receipt in order to continue denying the Applicants their constitutional right. However, a new file was opened for the applicants in the name of Miathathia Coffee Farmers' Co-operative Society Limited. She did this in my presence and in her office.

9. The Applicants then proceeded to narrate their frustrations at the hands of the officers of the Respondent and sought that the orders sought herein be granted.

10. Section 47 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that:

***Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.***

11. It is therefore my view that the Respondent has power to reject registration of documents where the same do not comply with the law. However in exercising the said discretion or power the Respondent is expected to comply with Article 47 of the Constitution which provides that:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

12. The said Article was the subject of judicial interpretation in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

**"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national**

**values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”**

13. It follows that the Respondent was duty bound to consider the applicants’ application for registration of the documents lodged by the applicant and furnish the applicants with the reasons for not registering the same in the event that it made a decision not to do so.

14. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

15. This position was adopted in **R vs. Secretary of State for Home Department ex p Venebles [1998] AC 407** to the effect that:

**“a person on whom power is conferred cannot fetter the future exercise of its discretion by committing himself now as to the way in which he will exercise his power...By the same token, the person on whom power has been conferred cannot fetter the way in which will use that power by ruling out of consideration on the future exercise of power factors which may be relevant to that exercise”**

16. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. To deliberately set out not to exercise a power properly conferred by the law without legally recognised justification in my view is as much an abuse of power as to purport to exercise a power which is not conferred. According to **Prof Sir William Wade in his Book *Administrative Law***:

**“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”**

17. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

18. As I have found hereinabove, the Respondent has the power to decline to register a document presented to it which discretion must be exercised lawfully. This is so since public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by Parliament in my view without proper reasons would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

19. In the instant case, the applicant's position is that the Respondent has declined to give any reason for the failure to register them and issue them with the certificate. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view the Respondent is under an obligation to consider an application to register a document and the failure to do so amounts to abuse of discretion. However, this Court cannot by way of an order of *mandamus* compel the Respondent to register them. The Court can only compel the Respondent to consider the same and make a decision one way or the other. However the Respondent is obliged under

Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant. Where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. This position is clearly legislated in section 6(4) of the *Fair Administrative Action Act, 2015* which provides that:

***Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.***

20. This was the jurisprudence prevailing before the enactment of the above statute and enunciated in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, where the Court expressed itself as follows:

**“In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons...It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void.”**

### **Order**

21. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus compelling the Respondent to consider the applicant’s application for registration of their Co-operative Society, Kimathi Coffee Growers Co-operative Society Ltd and furnish the applicants with reasons therefor if its decision is adverse to the interest of the applicants within 30 days from the date of service of this order. In default of such reasons, the Respondent will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondents to register the said Society and issue the applicants with the Certificate of Registration therefor forthwith.

22. The applicants will have the costs of this application.

**Dated at Nairobi this 17<sup>th</sup> day of May, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of;**

**Mr Nabutete for the Applicant**

**Cc Mutisya**