



KENYA REPUBLIC OF
IN THE HIGH COURT OF KENYA AT NAIROBI
(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)
JUDICIAL REVIEW MISC APPL. NO. 414 OF 2015

IN THE MATTER OF AN APPLICATION BY ONESMUS KAUNA MWATI JEREMIAH WILLIAM SILA, FLORENCE NDUKU MUINDI CHRISTOPHER KYALO KIUI, GABRIEL, MATEI MUKUNGA, OSEPH MBITI KILONZO, ZIPPORAH MUKONYO KIMEU, LENA SYOMBUA, STEPHEN MUTISYA, VINCENT MWANTHI, GABRIEL MUATHA ELIJAH MUTISYA, ALBERT MUENDO, SIMON MWANGANGI, DAMIANAH MITISO, FREDRICK KIVUNZA, TIMOTHY KILONZI, JACKSON WAMBUA MWENDWA ONESMUS, DAMIANAH MUTISO, FREDRICK KIVUNZA, TIMOTHY, JACKSON WAMBUA MWENDWA ONESMUS, JOSEPH MUTIE (Suing as the Officials of:-UKAMBA AGRICULTURAL INSTITUTE) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF COMPANIES ACT, CAP 486 THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT
 THE REGISTRAR OF COMPANIES.....1ST RESPONDENT
 STEPHEN NDAMBUKI MULI.....2ND RESPONDENT
 ERIC MUTINDA MUTISYA.....3RD RESPONDENT
 GEORGE NZOMO NZOKA.....4TH RESPONDENT

AND

EX-PARTE APPLICANTS:-

ONESMUS KAUNA MWATI

JJEREMIAH WILLIAM SILA

FLORENCE NDUKU MUINDI

CHRISTOPHER KYALO KIUAI

GABRIEL MATEI MUKUNGA

JOSEPH MBITI KILONZO

ZIPPORAH MUKONYO KIMEU

LENAH SYOMBUA

STEPHEN MUTISYA

VINCENT MWANTHI

GABREIL MUATHA

ELIJAH MUTISYA

ALBERT MUENDO

SIMON MWANGANGI

DAMIANAH MUTISO

FREDRICK KIVUNZA

TIMOTHY KILGNZI

JACKSON WAMBUA

MWENDWA ONESMUS

JOSEPH MUTIE (Suing as the Officials of:- UKAMBA AGRICULTURAL INSTITUTE)

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th January, 2016, the *ex parte* applicants herein seeks the following orders:

1. THAT this Honourable Court be pleased to grant leave to the Applicant to apply for an Order of Mandamus compelling the Respondents to confirm that the legal officials of the UKAMBA AGRICULTURAL INSTITUTE (UKAI) are ONESMUS KAUNA MWATI, JEREMIAH WILLIAM SILA, FLORENCE NDUKU MUINDI, CHRISTOPHER KYALO KIUAI, GABRIEL MATEI MUKUNGA, JOSEPH MBITI KILONZO, ZIPPORAH MUKONYO KIMEU, LENAH SYOMBUA, STEPHEN MUTISYA, VINCENT MWANTHI, GABRIEL MUATHA, ELIJAH MUTISYA, ALBERT MUENDO, SIMON MWANGANGI, DAMIANAH MUTISO, FREDRICK KIVUNZA, TIMOTHY KILONZI, JACKSON WAMBUA, MWENDWA ONESMUS, and JOSEPH MUTIE pursuant to the elections

conducted on 19th August 2015 thereby effect their registration as such.

2. THAT this Honourable Court be pleased to issue an Order of prohibition against the 2nd 3rd & 4th Respondents prohibiting them from dealing in any manner whatsoever the assets of the Applicant and/or interfering in the affairs of the Applicant as its officials or otherwise.

3. THAT the costs of this Application be provided for.

Applicants' Case

2. According to the applicants, on the 13th February 2015, this Court in JR. Misc. Appl. No. 277 of 2010 delivered its Judgment in which it ordered the Respondent to organize for an Annual General Meeting for Ukamba Agricultural Institute (UKAI) the Applicant herein (hereinafter referred to as "the Company") and give directions as necessary. Following the said judgment, the 1st Respondent failed to call, convene and/or supervise for the Annual General Meeting through which the Applicant would elect new officials and/or directors despite several meetings and correspondences to do so from the Applicants' members.

3. The applicants averred that subsequently in accordance with the Company's Memorandum and Articles of Association the Applicants herein through **Mr. Gabriel Matei** notified the Respondents and other members of the company by way of Public Notice dated 24th July 2015 that the company would be holding its Annual General Meeting on 19th August 2015 with the election of officials of the company, being the main item on the agenda and that indeed the Applicants circulated the notice of the meeting to all members through print media and proceeded to conduct peaceful elections on the 19th August 2015 in which the Applicants were elected as the new officials of the company with the full knowledge of the Respondents. After the elections, the Applicants filed the Annual Returns of the Company annexed with Minutes of the Annual General Meeting but the 1st Respondent refused and or deliberately failed to register the officials who were elected.

4. According to the Applicants, the action of the 1st Respondent has allowed the 2nd 3rd and 4th Respondents to continue being in office and or act as officials of the Company whilst they are for all intents and purposes strangers to the Applicants, their term of office having elapsed are no longer being eligible to be elected to hold office. It was averred by the applicants that the 2nd Respondent's stay in office has resulted in the unlawful dealing in and/or misappropriation of the Company's assets and unwarranted meddling of the Company's affairs generally as the 2nd 3rd & 4th Respondents herein have continued to collect an approximate sum of Kshs. 1,300,000/= being rental income derived from lease of the Company's land property known as L.R. No. 209/10350 within Nairobi County which sums has been used for their own individual enrichment and selfish gain at the detriment of the Company and its members. Further, the 2nd 3rd & 4th Respondents have engaged in numerous fraudulent dealings which have resulted in the Company being sued in multiple suits.

5. It was contended by the applicants that the actions of the Respondents have shown total disregard of the Memorandum and Articles of Association of the Company and is contrary to the provisions of the Constitution of Kenya 2010, the rules of Natural Justice and the provisions of the **Companies Act**, Cap 486 Laws of Kenya. It was further contended that the 1st Respondent is in blatant disregard of and in contempt of the Orders of this Honourable Court given on the 13th February 2015 and that by Failing and/or refusing to register the Applicants as officials of the Company, the 1st Respondent has breached and defied the legitimate expectation of the Applicants to fair administrative action yet being a public body, it is expected to exercise its discretion fairly, legally and in accordance with the rules of Natural Justice.

6. It was therefore contended that the actions by the Respondents are illegal, irregular and unwarranted thus the Applicants are apprehensive that if the orders sought are not granted, the 2nd Respondents will continue to deal meddle, interfere with the company's affairs and misappropriate its assets to the detriment of the its members.

1st Respondents' Case

7. According to the 1st Respondent (hereinafter referred to as “the Registrar”), this Court vide NRB HC JR Case No 277 of 2010 delivered judgement on 13th February, 2015 which directed the Registrar to proceed and organize for the Annual General Meeting for the Company and give directions, as necessary. However, from the time the Judgment was delivered the Registrar has not been in a position to comply with the order.

8. It was however averred that in an attempt to comply with the court order the Registrar wrote to the UKAI factions and convened various stakeholders meetings to prepare for the AGM and to agree on the way forward on the issue of the register of members to be used but regrettably that the process was extremely slow for the reason that the two groups failed to agree on the register of members to be used for the purposes of calling for an AGM with each faction submitting their own version of the register. It was deposed that on the 26th March 2015 the Applicants herein submitted a register of members made up to the year 2015 alleging that it was harmonized which allegations were disputed by the other faction which on 4th June, 2015 submitted another register made up in the year 2008-2009. This list was however objected to by the Applicants.

9. According to the Registrar, this state of affairs necessitated the calling of the meeting for both stakeholders of the two factions to agree on which register to be used for the calling of the AGM and forge the way forward and in a joint stakeholders meeting of 11th June, 2015 held in the Registrar Generals Office, the parties were unable to agree on the register of members and the Registrar directed that the register of members to be used in the proposed AGM be the Register for the year 2008-2009, whereby the 2nd Respondent herein was directed to submit the original register on or before 25th June, 2015 being the register kept in the registered office of the company before the dispute which resulted to previous suit.

10. It was averred that on 19th June, 2015, the Registrar made follow up letter to the two factions highlighting the consents and directives issued in the meeting of 11th June, 2015 informing them of the need for the AGM to be held on 30th July, /2015 subject to submission of the members' register by the 2nd Respondent herein and compliance with the other directives issued and on 26th June, 2015, the 2nd Respondent, submitted a members' register for the year 2008 as earlier requested and the same was forwarded to the Applicant for perusal and information. However, the Applicant objected to the use of the said register of 2008-2009.

11. According to the Registrar, it has no locus to determine who should or should not be a member of a company as stipulated under section 118 of the *Companies Act*.

12. It was however disclosed that in the course of organizing for the AGM, one of the factions moved to court as a result of which the 1st Respondent was served with a court injunction dated 9th June, 2015 in NRB CMMC Misc Appl. No 508 of 2015 restraining the Applicants herein from interfering with the affairs of UKAI until the matter is determined by the Court and the Registrar of Companies wrote to both factions informing them on her predicament and her intentions of moving the court for directions as the factions were not able to agree on the register of members to be used in the anticipated AGM.

13. It was contended that despite the said order having been issued, a notice was published by one **Gabriel Matei** who claimed to be member of UKAI, however whose name did not appear in the Register of Members of 2008, went ahead and issued a notice of an AGM to be held on 19th August 2015 without consulting the Registrar, who was mandated by the Court to prepare and supervise the AGM in total disregard of this Court's orders. On 12th August, 2015, the Registrar wrote to the Advocate of the disgruntled faction informing them of disobeying the Court order by proceeding on their own volition to call for the AGM. However, no action was taken and they went ahead and held the AGM.

14. According to the Registrar, in view of the foregoing, she was not able to issue the CR. 12 and in

regard effecting the new changes as submitted by the applicant because the membership of the company had been disputed thus could not know whether the members who were in attendance of the disputed AGM were *bona fide* members of the company. The Registrar however contended that she has not refused to issue the Cr.12 since the AGM that was allegedly held by the applicant is disputed and requested for the Court intervention to deal with the arising issues and the role of the Registrar be limited to implementing the Court order issued on 13th February, 2015 and to give directions on the other arising issues more so the register to be used.

2nd to 4th Respondents' Case

15. In opposition to the application, the 2nd, 3rd and 4th Respondents filed the preliminary objections:

Determinations

16. Before delving into the matter on merit, the applicants seem to have been of the view that judicial review orders can issue against the 2nd to 4th Respondents who are individuals sued in their capacity as persons purporting to be officials of the Company. Judicial review application is a public law remedy hence private individuals are generally not expected to be respondents in such proceedings unless they are exercise powers of a public nature. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194, Hancox, JA** as he then was held:

“The order of judicial review is only available where an issue of “public law” is involved but the expressions “public law” and “private law” are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of certiorari might well be available if the health authority is in breach of a “public law” obligation but would not be if it is only in breach of a “private law” obligation.”

17. It was accordingly held in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998**, by the Court of Appeal that *Certiorari* covers every case in which a body of persons of a public as opposed to private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.

18. It follows that it was therefore not in order to join the 2nd to 4th respondents in these proceedings as respondents. They could, however, be joined as an Interested Party since Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

19. However, the joinder of the said respondents in these proceedings did not render the proceedings incurably incompetent. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies

with the guidelines set out by this Court”.

20. It follows that the misjoinder of the said respondents in these proceedings is not fatal to the application though it is an issue this Court may take into consideration when it comes to the exercise of its discretion on costs. However the orders sought cannot issue against them.

21. On 13th February, 2015, this Court (**Korir, J**) dismissed an application which was instituted by **Ukamba Agricultural Institute, Stephen Ndambuki Muli, Eric Mutinda Mutisya and Mary Ndinda Kimwele** substantially the 2nd to 4th Respondents herein in which they had sought order quashing the decision of the Registrar in revoking the list of directors of the Company and prohibiting the Registrar from calling an Annual General Meeting to elect new directors. Having dismissed the application, the Court clarified the position that the Registrar was at liberty to organise an Annual General Meeting for the Company and give necessary directions.

22. It is therefore clear that the Court did not grant any mandatory orders directing the Registrar to organise the said AGM. It could not do so as there was no prayer seeking that sort of relief. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

“The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court’s consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law...Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari*, prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable.”

23. Therefore it was upon the Registrar to proceed and call for the AGM and give the necessary directions.

24. The applicants in this case seek an order compelling the Registrar to register them as officials of the Company. However, from the material placed before the Court the validity of the elections which the Registrar is being compelled to give effect to is highly disputed. In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

25. To embark on the process through which the purported elections of the applicants were conducted, in order to arrive at the finding that the applicants are the proper officials of the Company, hence deserving of registration as such, would necessarily entail an investigation into the merits of the dispute since the

Court would be obliged to inquire into how the elections were conducted and who participated therein. Judicial review however, is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“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.”

26. 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 **Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60;** R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

27. The matters which the applicants and respondent have adumbrated before this Court are matters which will require that certain findings be made on merits which findings may well amount to the making of certain declarations. However, where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review and since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal, the **Civil Procedure Act** does not apply. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**

28. Judicial review applications only determines such issues as 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 the parties to a judicial review application have embarked on a voyage through which the Court would be required to make determinations on merits such course is not available to the judicial review Court and the Court would decline to permit itself to be dragged along that path and instead leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

29. In this case it is my view that the real dispute before this Court revolves around the validity of the elections of the applicants hence the applicants ought to seek appropriate declaratory reliefs in the normal manner and in a forum in which evidence will be taken and appropriate reliefs granted.

30. I must also point out that the applicants on one hand and the 2nd to 4th Respondents have perfected the art of solving their disputes in Courts rather than by way of internal mechanisms in their constitution. This Court does not relish being turned into a forum at which disputes of private companies are resolved since it is not the duty of the Court to run and manage private companies. As a result of several suits filed by the members of the company herein the Courts in this Republic are being inundated by several cases which could have been resolved by the Company simply organising an AGM. As a result, the members of the Company are hogging unto themselves the limited time available for the Courts to resolve disputes thereby denying other litigants their fair portion of the judicial resources.

31. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:**

“A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

“It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges’ time as is necessary for the proper determination of the relevant issues.”

At page 493 of the same case *Lord Templeman* delivered himself thus:

...“an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge.”

.....

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it.”

.....In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice... The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellants. All these in our view constitute abuse of process.”

32. This was the position adopted by Nyamu, J in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** when he expressed himself as follows:

“In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time.”

33. If the members of the Company cannot run their affairs in an orderly manner in accordance with the rules and regulations which they themselves set for the conduct of their business, may be it is time the Registrar invoked the powers conferred upon that office under the provisions of the ***Companies Act***.

34. Consequently this application fails and is dismissed with costs to the 1st Respondent.

Dated at Nairobi this 25th day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr AGN Kamau for Miss Munyaka for the 2nd to 4th Respondents

CA Mwangi