



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NUMBER 144 OF 2014
BETWEEN
DR. MUSSOLINI KITHOME.....APPLICANT
AND
THE ATTORNEY GENERAL.....1ST RESPONDENT
THE CABINET SECRETARY, MINISTRY OF AGRICULTURE
LIVESTOCK AND FISHERIES.....2ND RESPONDENT
JUDGMENT

Introduction

1. By his Notice of Motion dated 23rd July, 2014, the *ex parte* applicant herein, **Dr. Mussolini Kithome**, the Co-ordinator of the Agricultural Sector Co-ordinating Unit (hereinafter referred to as “the Unit” or “ASCU”), an inter-ministerial unit that facilitates the implementation and co-ordination of the Agricultural sector strategies seeks the following orders:

a. An order of Certiorari removing to this Honourable Court for purposes of being quashed and to quash the administrative decision of the Cabinet Secretary in charge of the Ministry of Agriculture, Livestock and Fisheries dated the 27th day of February, 2014 and contained in the Kenya Gazette Notice Number 1363 establishing a Task Force on implementation of the Agriculture Fisheries and Food Authority.

b. An order of Certiorari removing to this Honourable Court for purposes of quashing and to quash the decision of the Principal Secretary State Department of Agriculture, Livestock and Fisheries dated the 27th of March, 2014 directing the Ex-Parte Applicant to step aside immediately and to cease from operating any official business relating to the Agricultural Sector Co-ordinating Unit and to hand over the office inventory and documents to Internal Auditor, Mr. Francis Njau.

c. An order of Prohibition prohibiting the Cabinet Secretary in charge of Agriculture, Livestock and Fisheries by himself, agents and/or servants from interfering in any way whatsoever with the work and operations of the Agricultural Sector Co-ordinating Unit (ASCU)

d. An order of prohibition prohibiting the Cabinet Secretary by himself, agents and/or servants from taking any disciplinary actions and or initiating and/or continuing any criminal complaint and/or prosecution against the Ex-Parte Applicant or any of the officers of the ASCU.

e. An order of Mandamus compelling the Cabinet Secretary Ministry of Agriculture Livestock and Fisheries to open and allow the Ex-Parte Applicant and his staff access into their offices situated at Kilimo House Building, Nairobi and thereafter to remove ASCU property there from and into their newly acquired office premises at NSSF building.

2. In support of the application, the *ex parte* applicant swore two affidavits on 9th April, 2014 and 23rd April, 2014.

3. It was the *ex parte* Applicant's case that the Unit was formed in 2005 as a secretariat and the interface for the Agricultural and Rural Development Ministries and non-state actors tasked with implementing the sector development. In the Applicant's view the ASCU by its nature and operation is an independent inter-ministerial unit funded by multi-sectoral partners and which reports to an inter-ministerial committee. The Applicant also stated that the ASCU has been operating offices based at Kilimo House, Nairobi and thereby sharing the same compound with the headquarters of the Ministry of Agriculture, Livestock and Fisheries.

4. It is not in dispute that on the 17th of January, 2014 pursuant to Section 1 of the **Agriculture Fisheries and Food Authority Act** No. 13 of 2013, the Cabinet Secretary Ministry of Agriculture Livestock and Fisheries ("the Cabinet Secretary") by Legal Notice No. 4 appointed the 17th of January, 2014 as the commencement date for the **Agriculture Fisheries and Food Authority Act** ("the Act"). It is also agreed by the parties that the Cabinet Secretary deferred the commencement of paragraph 9 of the First Schedule of the Act which recognized the Agricultural Sector Coordinating Unit (ASCU) as the Interim Secretariat of the newly formed authority, Agriculture Fisheries and Food Authority (hereinafter referred to as "the Authority" or "AFFA").

5. The Applicant contended that on the 27th of February, 2014 vide Gazette Notice Number 1363, the Cabinet Secretary by an administrative decision appointed a task force known as the Interim Management Committee (IMC) which comprised of 10 members, to operationalize AFFA.

6. The Applicant deposed that by the terms of reference in the Gazette Notice, number 4, this task force is solely answerable to the Minister. He added that by its terms of reference numbered 1 (a-k), and 2 (a) and (b) the Taskforce effectively took over as the Secretariat to AFFA in total violation of Paragraph 9 of the First Schedule to the Act. It was also the position of the Applicant that the IMC was established to spearhead the implementation of AFFA and as such the taskforce is a duplicate of the ASCU.

7. It was the Applicant's deposition that the decision of the Cabinet Secretary is unreasonable, arbitrary and *ultra vires*. It was the Applicant's belief that the Taskforce is mandated to recruit staff and hold such meetings and hold meeting with the 2nd Respondent. The Applicant held the view that the ASCU is mandated by law to work as the Secretariat of AFFA and as such the 2nd Respondent had no legal authority to appoint another secretariat which would duplicate the roles of ASCU. The Applicant also asserted that the ASCU already has sufficient experience and knowledgeable staff and therefore there is no need to hire new staff and thereby expend unnecessary resources. The Applicant pointed out that the Taskforce expenditure was unnecessary and wasteful of scarce public resources contrary to Article 201(d) of the Constitution which demands prudence and responsibility in usage of public resources.

8. The Applicant affirmed that at a meeting of the Inter-ministerial co-ordination committee held on the 6th of November, 2013 the 2nd Respondent alluded to the ASCU being a multi-faceted institution which wasn't under the control of any one single ministry in the sector. He added that in the same

meeting the 2nd Respondent called for the re-branding and re-launching of the ASCU so that its efficiency and effectiveness could be enhanced at both national and county level.

9. The Applicant also referred to a meeting held on the 13th of March 2014 which he termed as an inter-ministerial breakfast meeting attended by a cross-section of over 30 sector players and which was chaired by a Dr. Wilson Songa, Principal Secretary in the Ministry of Industrialization and Enterprise Development. According to the Applicant various observations were made at this meeting such as the relocation of the secretariat to a neutral place to reduce the risk of capture by any one sub-sector, rebranding and relaunching the sector secretariat as well as a reminder that the ASCU was created in 2005 to encompass all actors tasked with the implementation of the sector agenda. The Applicant also observed that the meeting resolved that the ASCU should take over the sector secretariat duties in the interim because of its inherent experience and expertise and to move with speed to converge all actors on the value chains.

10. The Applicant deposed that on the 28th of March 2014 the 2nd Respondent acted outside his mandate when he set up an audit team of five members to audit the fund of the ASCU. He added that this audit was to be carried out between the 3rd of March 2014 and the 21st of March, 2014. The Applicant averred that the ASCU can only be audited by external auditors as agreed by the stakeholders and that an audit had already been carried out on the 31st of January, 2014 by the firm of Deloitte & Touche.

11. The *ex parte* Applicant asserted that the ASCU had secured premises at the National Social Security Fund Building (NSSF) where it intended to move its operations away from the compound of the Ministry of Agriculture at Kilimo House and that on the 21st of March 2014 after securing these temporary offices at the NSSF the ASCU staff began moving their items from Kilimo House. It was contended that ASCU had secured a gate pass duly signed by the concerned officers from Kilimo House. However it was the Applicant's contention that the 2nd Respondent accused the ASCU of moving their items without the authority and official clearance from the Ministry's caretaker and security and the staff of ASCU were threatened with disciplinary action. The Applicant also stated that the office equipment and files that they managed to transfer to the temporary offices were confiscated by the Principal Secretary of the Ministry of Agriculture and taken to an unknown destination and that they reported this incident to Capitol Hill Police Station but to date, the items still remain missing.

12. The Applicant further stated that on the 27th of March 2014, the 2nd Respondent through a letter of even date asked the applicant to step aside and hand over to the Internal Auditor, a **Mr. Francis Njau** (the person who was deployed to investigate the ASCU). To the applicant, this letter is *ultra vires* because he is not an employee of the Ministry and as such the Ministry of Agriculture has no legal basis to ask him to step aside. Instead he added that any complaint against him should be addressed to the Inter-Ministerial Co-ordinating Committee. The Applicant concluded that this Honourable court should grant the orders prayed for so as to bring good order and deter continued interference by the Ministry in the affairs of the ASCU.

13. The Applicant swore a supplementary affidavit on the 23rd of April, 2014 in which he sought to clarify a few issues that were raised in the 2nd Respondent's replying affidavit. It was the averment of the Applicant that the Inter Ministerial Committee is a sub-committee of the National Steering Committee composed of the Permanent Secretaries of the Sector Ministries and it is chaired on a rotational basis by the Permanent Secretaries. The Applicant therefore contends that the Ministers/Cabinet Secretaries have never been the Chairman of the ICC; but are only briefed by their respective Permanent Secretaries.

14. It was the Applicant's position that the ASCU reports to the ICC and if the 2nd Respondent had any issues with either the Applicant or any staff of ASCU then he should have raise these issues with the ICC who would then take necessary action.

The 2nd Respondent's Case

15. The 2nd Respondent, **Felix Kiptarus Koskei** the Cabinet Secretary in the Ministry of Agriculture swore a replying affidavit on the 22nd of April, 2014 in response to the judicial review application filed by the Applicant.

16. It was the 2nd Respondent's position that the ASCU is not a legal entity independent of the Ministry of Agriculture but an administrative unit housed and supervised by the Ministry of Agriculture, which is the chair of the Inter-Ministerial Coordinating Committee (ICC). The 2nd Respondent averred that the ASCU was formed by his predecessors and development partners to coordinate the implementation of sector strategies which were scattered in various ministries.

17. According to the 2nd Respondent the new constitutional dispensation brought changes within the executive where several ministries were collapsed and others amalgamated. To this end, the Agriculture Ministry was merged with the Livestock and Fisheries dockets. The 2nd Respondent referred to the Executive Order No. 2 of 2013 which was issued by the Office of the President in which the ASCU has not been mentioned as a government department, instead after the ministries were merged and their budgetary allocating allotted to them, the ASCU was administratively retained so as not to disrupt the ongoing programmes. The 2nd Respondent asserted that as such he exercises both administrative and oversight functions of the ASCU by dint of being the chair of the ICC.

18. The 2nd Respondent averred that the ASCU is a unit funded by public funds from the government and this means that it cannot be independent to the extent that it does not report to any particular chain of command or line ministry; and in the case of the ASCU the 2nd Respondent stated that the buck stops with him.

19. While confirming that his ministry housed the ASCU at Kilimo House, rent free, the 2nd Respondent agreed that on the 17th of January, 2014 pursuant to Section 1 of the ***Agriculture Fisheries and Food Authority Act*** No. 13 of 2013 by Legal Notice No. 4 he appointed the 17th of January, 2014 as the commencement date for the Act. He also confirmed that he deferred the commencement of paragraph 9 of the First Schedule of the Act which recognized the Agricultural Sector Coordinating Unit (ASCU) as the Interim Secretariat of the newly formed authority Agriculture Fisheries and Food Authority (AFFA). The 2nd Respondent however retorted that through Gazette Notice Number 36 dated the 14th of March 2014 he removed the suspension and the Act is now operational in its entirety.

20. The 2nd Respondent further added that through Gazette Notice Number 1363 he appointed a taskforce, of 11 members, known as the Interim Management Committee to operationalize the said Act and that the terms of reference and mandate were well within the ambits of the AFFA Act 2013 hence none of the provisions under the Terms of Reference of the taskforce are in contravention of the Act. He added that on the 13th of March 2014 the ASCU Coordinator, the Applicant herein forwarded names of officers to join the AFFA Secretariat and the formal appointment of these officers to the Secretariat was confirmed on the 26th of March 2014 by the Principal Secretary in the State Department of Agriculture. It was the 2nd Respondent's opinion that these appointments are in line with the Gazette Notice number 1363 and Section 9 of the First Schedule of AFFA. The 2nd Respondent affirmed that the Authority is yet to be formed and as such he put in place a taskforce to have the authority up and running.

21. The 2nd Respondent contended that AFFA is an amalgamation of eight (8) current parastatals as stipulated in Section 1 of the First Schedule of the Act, under the Ministry of Agriculture, Livestock and Fisheries each with assets and liabilities and members of staff who need to transit to the Authority hence the need for a taskforce to manage this transition. The 2nd Respondent urged this Honourable court to read Section 9 of the First Schedule of Act together with Section 10. He reiterated that AFFA

is an amalgamation of 8 former institutions which had their own secretariats and asserted that each of these former institutions will form directorates under AFFA. Therefore the statutory provision to have a central and neutral secretariat for the Authority is satisfied through ASCU.

22. The 2nd Respondent distinguished the duties of a secretariat and interim management functions adding that the latter provides the strategic management function while ASCU provides the secretariat functions during the transition period. The 2nd Respondent insisted that the IMC does not perform the work of the secretariat hence there is no duplication of the roles and this he added was evident from the terms of reference of the IMC.

23. In regard to wasting public funds, the 2nd Respondent asserted that the appointment of the taskforce will not result in irresponsible use of money but will instead allow for proper rules and regulations, structures and systems to be put in place so as to allow for the efficient and prudent use of public money by the yet to be operationalized AFFA. The 2nd Respondent averred that he is the one with the authority to appoint persons to the taskforce if any albeit with consultation.

24. The 2nd Respondent proceeded to compare the staffing in the ASCU and IMC and stated that most of the staff in the ASCU are on secondment from his ministry and their qualifications and expertise is limited. However he stated that the members of the IMC are seasoned professionals with a wealth of wide ranging experienced professional expertise with the speciality to perform the tasks assigned.

25. The 2nd Respondent also contended that the issue of operationalization of AFFA is separate and distinct from the issue of the systems audit of ASCU which he ordered as the Cabinet Secretary for the time being responsible for the Ministry of Agriculture, Livestock and Fisheries and as the Chair of the ICC.

26. The 2nd Respondent admitted that he chaired an Agriculture Sector Development Strategy (ASDS) Inter-ministerial coordinating committee meeting on the 6th November 2013 held at the Inter-continental hotel but clarified that what he said at the meeting did not in any way change the fact that though ASCU is a multi-sectoral programme and is not independent of any ministry's exercising oversight functions. He added that as the chair of the ICC he must ensure that there is accountability within the ICC.

27. The 2nd Respondent admitted that the Applicant organized and drafted his talking notes for the 6th November, 2013 meeting; and the Applicant in his letter forwarding the talking notes acknowledged that the 2nd Respondent being the Chairperson of the ICC was the direct supervisor of the ASCU. He further confirmed that he ordered a systems audit of the ASCU on the 20th of February, 2014 so as to prepare the ASCU for its role as a secretariat of AFFA but that AFFA resisted this and as such he sought and obtained guidance from the National Treasury on the 4th of March 2014. On the 12th of March 2014 the National Treasury responded wherein they agreed with the 2nd Respondent and vetoed his appointment of a special audit team to conduct the systems audit. The 2nd Respondent's refutes the position that he unilaterally ordered the audit and qualifies that this audit is now being carried out on behalf of the National Treasury by his ministry and as such any prayers to stop the audit is an exercise in futility. The 2nd Respondents asserted that the Principal Secretary in his ministry was in order to ask the Applicant to step aside so that the audit exercises could be carried out. This he added was done because the Applicant had begun interfering with this exercise by illegally removing crucial documents from the offices.

28. The 2nd Respondent drew this courts attention to the difference between a financial audit and a systems audit. To him, he did not attend purported meeting of the inter-ministerial breakfast held on the 13th of March 2014 and as such the resolutions reached at that meeting are not binding on his ministry which was unrepresented. One such resolution was the purported relocation of the ASCU

offices wherein the Applicant stated that they secured a temporary office on the 21st of March 2014 and obtained a gate pass to move their stuff to new location. The 2nd Respondents contended that instead the Applicant applied for office space on the 24th of March 2014 and they received a letter of offer on the 26th of March, 2014 as such it is impossible that they secured a temporary office space on the 21st of March, 2014.

29. According to the 2nd Respondent, it was odd that it is the Principal Secretary for the Ministry of Industrialization and Enterprise, who purportedly chaired the 13th March, 2014 meeting, who introduced the ASCU to their purported new landlords. He was however, not surprised that the documents which were removed from the ASCU offices were found in Block A 23rd Floor of the NSSF building in the Ministry of Industrialization offices. These documents, he averred included cheque books, current payment vouchers, imprest warrants, LPOs and LSOs among other documents which were related to the period under audit review. The 2nd Respondent also contended that the alleged gate pass which was obtained by the Applicant, was acquired by concealing material facts because the Applicants allegedly stated that they were moving project equipment and old box files to the GiZ offices and not to NSSF buildings, where the Applicant's alleged new temporary offices were situate. The 2nd Respondent added that the GiZ offices are not situated in NSSF building and highlighted that the gate pass was authorized by the ASCU Project Accountant and verified by the ASCU Financial Accountant. The 2nd Respondent's position was his officers took action to forestall further removal of the vital documents from the ASCU offices. According to him, the actions by the ASCU coordinator were carefully crafted to avoid accountability and the systems audit and that there were attempts by the employees of the ASCU to hide and/or destroy evidence by moving documents and/or other evidentiary materials from their offices at Kilimo House to the newly acquired abode at NSSF building. The 2nd Respondent also averred that as the Chair of the ICC he ordered for the closure of the ASCU offices to prevent the attempts by the employees of the ASCU to hide and/or destroy evidence by moving documents and/or other evidentiary materials from their offices at Kilimo House to the newly acquired abode at NSSF building.

30. The 2nd Respondent however agreed that his officers reported this matter to Capitol Police Station and the matter is still under investigation. He confirmed that the Principal Secretary in his ministry asked the Applicant to step aside because it was believed that he was interfering with the systems audit ordered by the National Treasury. The 2nd Respondent added that the investigations and systems audit are yet to be finalized, and once this is done the 2nd Respondent asserted that he would take the appropriate and commensurate action on those who are culpable including the Applicant, if he is implicated.

31. It was the opinion of the 2nd Respondent and on the advice of his Advocates that, courts should not intervene in the executive functions by granting judicial review orders because there is a clear separation of powers between the arms of government and as such the court cannot direct the executive on how to run the government. The 2nd Respondent averred that the executive has the right to conduct systems audit and to operationalize AFFA without any court interference. He concluded his deposition by stating that his actions of appointing the taskforce are justified, warranted, fair and within the law and as such this should not be subjected to judicial review.

32. The Respondents submitted that for one to succeed in a judicial review application he/she must demonstrate that there was an illegality, impropriety of procedure and irrationality and relied on the holding of **Korir, J in Republic vs. Public Procurement Administrative Review Board & Another Exparte Gibb Africa Ltd & Another (2012)**.

33. The Respondents submitted that it is incumbent upon a party in a judicial review application who seeks issuance of any of the orders to demonstrate irrationality which in this case the Respondents contends he was not irrational. The Respondents further submitted that the court has pronounced itself severally that for it to quash a decision on the arm of it being irrational, the

applicant has to prove that it was not only unreasonable but grossly unreasonable as to defy logic.

34. It was the submission of the Respondents that his decisions were not so outrageous as to defy logic as under the new constitutional dispensation, the procedure appointing a Chairman, Board Members and Chief Executive Officers has to go through a competitive process which requires advertisement and time. As such in order to breathe life into the new formed authority, the 2nd Respondent saw it prudent to form a taskforce in the interim so that mechanisms and measures are put in place and for the effective and efficient running of business at the onset of operations. The 2nd Respondent argued that the Applicant nominated 3 members from the ASCU to join the taskforce; and this in his view means that the Applicant was well aware of the demarcation between the ASCU and the Taskforce. The 2nd Respondent insisted that his decision to form the taskforce was legal and well within his mandate. He added that once AFFA is fully operational with the Board in place then ASCU will offer its secretariat services as provided for in the AFFA Act.

35. The Respondents also submitted that the decision made by the Principal Secretary State Department of Agriculture, Livestock and Fisheries in directing the Applicant to step aside immediately and to cease from operating any official business of the ASCU so as to facilitate for the systems audit was not illegal or unreasonable but was done in the 2nd Respondent's capacity as the ICC chair and the direct supervisor of ASCU.

36. It was the submission of the Respondents that an order of prohibition is not efficacious in the circumstances because it is trite law that prohibition looks at the future and not the past and relied the holding in **Civil Appeal Number 266 of 1996 - Kenya National Examination Council vs. Republic** for the holding that prohibition cannot quash a decision which has already been made; and it can only prevent the making of a contemplated decision.

37. It was submitted that the Applicant seeks to prohibit the Cabinet Secretary in charge of Agriculture, Livestock and Fisheries by himself, agents and/or servants from interfering in any way whatsoever with the work and operations of the Agricultural Sector Co-ordinating Unit (ASCU) and from taking any disciplinary actions and or initiating and/or continuing any criminal complaint and/or prosecution against the Ex-Parte Applicant or any of the officers of the ASCU, which in the view of the Respondent have already taken place. To him, it would be absurd to prohibit him, his agents and/or servants from initiating and/or continuing any criminal complaint and/or prosecution against the *ex-parte* Applicant or any of the officers of the ASCU because once the office equipment was taken out of the office illegally, the Respondent reported the same to Capitol Hill Police Station and as such this is now beyond his mandate but within the mandate of the Director of Public Prosecutions who is not a party to this suit.

38. To the Respondents, the Applicant is challenging the decision and not the procedure employed in reaching the decision. It was the Respondents' view that this court is not an appellate court and the orders sought cannot issue.

Determination

39. I have considered the application, the affidavits both in support of and in opposition thereto as well as the submissions on record.

40. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

41. It is also not axiomatic that as long as the grounds exist the Court must grant the said orders. The decision whether or not to grant them is an exercise of judicial discretion and whether or not the Court will grant them depends on the circumstances of the case. This position is recognised in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270 where the learned authors state:

“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.’”

42. In this case the *ex parte* applicant's case was that Agricultural Sector Co-ordinating Unit (the Unit or ASCU) is an inter-ministerial unit that facilitates the implementation and co-ordination of the Agricultural sector strategies formed in 2005 as a secretariat and the interface for the Agricultural and Rural Development Ministries and non-state actors tasked with implementing the sector development. According to him, the unit is an independent inter-ministerial unit funded by multi-sectoral partners and which reports to an inter-ministerial committee. However, the 2nd respondent appointed a task force known as the Interim Management Committee (IMC) which comprised of 10 members, to operationalize AFFA the effect of whose terms of reference are to effectively take over the mandate of the Unit and hence is a duplicate of the ASCU. To the applicant, the 2nd respondent's action was unreasonable, arbitrary and *ultra vires*. Secondly, the Unit being a multi-sectoral unit not under the control of the 2nd respondent, the 2nd respondent had no powers to appoint an auditor to audit it.

43. The 2nd respondent's position on the other hand was that the unit is not a legal entity independent of the Ministry of Agriculture but an administrative unit housed and supervised by the Ministry of Agriculture, which is the chair of the Inter-Ministerial Coordinating Committee (ICC). The unit, according to him was formed by his predecessors and development partners to coordinate the implementation of sector strategies which were scattered in various ministries. On the onset of the new constitutional dispensation which brought changes within the executive several ministries were collapsed and others amalgamated. To this end, the Agriculture Ministry was merged with the Livestock and Fisheries dockets. As a result, the Executive Order No. 2 of 2013 issued by the Office of the President the unit is not mentioned as a government department. However, the unit was administratively retained so as not to disrupt the ongoing programmes. The 2nd Respondent asserted that as such he exercises both administrative and oversight functions of the ASCU by dint of being the chair of the ICC.

44. It is therefore clear that the dispute herein revolves around the status of the ASCU. No instrument was exhibited by the *ex parte* applicant to show either how it was set up or even its mandate. Apart from contending that it was is an inter-ministerial unit that facilitates the implementation and co-ordination of the Agricultural sector strategies formed in 2005 as a secretariat

and the interface for the Agricultural and Rural Development Ministries and non-state actors tasked with implementing the sector development, there is really no material disclosed to show its legal status, its powers or duties and to which body it is answerable.

45. There is clearly therefore no evidence upon which this Court can find that the 2nd respondent by setting up a task force known as Interim Management Committee on operationalization of the Agricultural Fisheries and Food Authority (AFFA) exceeded its powers. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001:**

“a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

46. In this case, it is neither proved nor disproved that the task force is a duplication of the Unit or that it has in effect taken over the duties of the Unit. This allegation accordingly is not proved.

47. It was also contended that the 2nd Respondent’s decision to appoint an auditor to audit the Unit was *ultra vires* since the Unit is answerable to Inter-ministerial Co-ordinating Committee. While admitting that the Unit is a multi-sectoral programme, the 2nd respondent however contended that it is not independent of any ministry’s exercising oversight functions and as the Chair of the ICC, it behoves him to ensure that there is accountability within the ICC.

48. Whereas it may well have been proper for the 2nd respondent to operate within the auspices of the ICC, he however has not shown that he had powers to unilaterally take action against the Unit otherwise than through the ICC.

49. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

50. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

51. In this case there is no evidence that the 2nd Respondent had the legal authority or power to unilaterally take action against the Agricultural Sector Coordinating Unit otherwise than through the Inter-Ministerial Coordinating Committee.

Order

52. Having considered the instant application the orders which commend themselves to me and

which I hereby issue are as follows:

- 1) I decline to grant an order of certiorari quashing the 2nd Respondent's decision contained in Kenya Gazette Notice No. 1363 establishing a Task Force in the implementation of Agricultural Fisheries and Food Authority.
- 2) I grant an order removing into this Court for the purposes of being quashed the decision of the Principal Secretary State Department of Agriculture, Livestock and Fisheries dated 27th March, 2014 directing the *ex parte* applicant to step aside and cease operating any official business relating to the Agricultural Sector Coordinating Unit and to hand over the office inventory and documents to Internal Auditor Mr Francis Njau, which decision is hereby quashed.
- 3) I further grant an order of prohibition prohibiting the 2nd respondent from unilaterally interfering with the work and operations of the Agricultural Sector Co-ordinating Unit or taking any disciplinary actions against the *ex parte* applicant or any of the officers of the Unit.
- 4) I however decline to grant an order prohibiting the 2nd respondent from initiating or continuing any criminal complaint and/or prosecution against the applicant or any of the officers of the Unit since to grant the order as sought would have the effect of permanently barring the 2nd respondent from taking such action whatever the circumstances.
- 5) I grant an order of mandamus compelling the 2nd respondent to open and allow the *ex parte* applicant and its staff access to their officers situated at Kilimo House Building, Nairobi to remove the property of the Unit therefrom to their new offices.
- 6) As the applicant has not succeeded in all his prayers each party will bear own costs.

53. Those then shall be the orders of this Court.

Dated at Nairobi this 26th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Aduda for the Applicant

Mr Odhiambo for the Respondent

Cc Patricia