



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

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 169 OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF COMPANIES.....RESPONDENT**

**KENYA NATIONAL CHAMBER**

**OF COMMERCE AND INDUSTRY.....INTERESTED PARTY**

**Ex-parte**

**STEPHEN MBUGUA**

**JUDGEMENT**

By way of a Notice of Motion dated 18<sup>th</sup> May, 2013 and filed in Court on 20<sup>th</sup> May, 2013, the Applicant Stephen Mbugua seeks the following orders:

1. **That this Honourable Court be pleased to grant an Order of Certiorari to quash the decision of the Respondent herein on of 27th March, 2013 in registering any Directors of the Interested Party purported to have been elected following the impugned Annual General Meeting held on 18th June, 2012 at the Railway Club, Nairobi.**
2. **That an Order of Mandamus do issue directed at the Respondent to convene an Annual General Meeting of the Interested Party right from the grassroots to the national level as directed by the Honourable Justice Mwera in Nairobi HCCC 253 of 2009.**
3. **That the Respondent be condemned to pay the costs of this Application.**

The application is premised on the grounds on its face as summarised herein. On the 18th June, 2012, this Court (Githua, J) granted leave to the Kenya National Chamber of Commerce and Industry ('the Chamber') to apply for judicial review orders. At the same time the Court ordered that the said leave would operate as stay of the registration of any new directors or taking over office of any such directors purported to have been elected following an Annual General Meeting held on the 18th June, 2012 at the Railways Club, Nairobi.

The stay orders were extended on the 12<sup>th</sup> March, 2013 and when the same came up for mention on 19<sup>th</sup> March, 2012 before Justice Ougo, the interim stay orders were not extended. Pursuant to the failure to extend the said orders, the Registrar of Companies ('the Registrar') who is the Respondent herein

registered the officials of the Chamber (now the 1<sup>st</sup> Interested Party) elected on 18<sup>th</sup> June, 2012. The elected officials who were later enjoined in these proceedings as the 2<sup>nd</sup> to 6<sup>th</sup> interested parties took over the affairs of the Chamber.

It is the Applicant's case that the registration of the 2<sup>nd</sup> to 6<sup>th</sup> interested parties by the Respondent and their subsequent taking over of the management of the Chamber (1<sup>st</sup> Interested Party) was unprocedural, illegal, irregular, an abuse of power, dishonest and an utter abuse of the Court process and only serves to entrench impunity and animosity within the Chamber. The Applicant avers that the decision of the Respondent on the 27<sup>th</sup> March, 2013 to register the 2<sup>nd</sup> to 6<sup>th</sup> interested parties as officials of the 1<sup>st</sup> Interested Party/Chamber is arbitrary, irrational, unreasonable, irregular, oppressive, manifestly unjust and an utter frustration of the Applicant's legitimate expectation.

The Applicant contends that there are orders from Justice Mwera (as he then was) of 6<sup>th</sup> May, 2011 and 19<sup>th</sup> July, 2012 in High Court Civil Case Number 253 of 2009 directing that elections of the Chamber be conducted from grassroots to the national level under the direction of the Respondent, which orders have not been implemented. The Applicant further asserts that the Respondent as an officer of the Court and a custodian of public interest is under a public duty to observe and implement the decisions of the Court and failure to do so is an abrogation of the said duties.

It is the Applicant's case that the Court stands to be brought to ridicule unless it urgently intervenes and reviews the decision of the Respondent.

The application was opposed through the replying affidavits of Colleta Maweu in her capacity as the Assistant Registrar General, in the Attorney General's office, Mr. Kiprono Kittony the Chairman of the 1<sup>st</sup> Interested Party and Laban Onditi Rao on behalf of the other interested parties.

Through the replying affidavit sworn on 1<sup>st</sup> November, 2013 by Colleta Maweu, the Respondent asserts that the failure of the Applicant's counsel to apply for extension of the stay orders when the matter was mentioned before Justice Ougo cannot be said to have been a mistake on the part of the Judge. It is the Respondent's case that advocates, should at all material times be diligent in furthering their clients' position, as on the material date the Applicant was represented by an advocate on record and as such, it cannot turn around after two months and allege that the orders were inadvertently not extended.

The Respondent contends that she was fully involved, through an all-inclusive task force, in the preparation of the elections of the Chamber in compliance with the orders issued by Justice Mwera (as he then was) in HCCC No. 253 of 2009. The Respondent also contends that the Applicant was fully involved in the activities towards the preparation of the election, both in person and through his advocate. The task force shepherded the process that culminated in the passing of a new Memorandum and Articles of Association under which elections were to be held.

The Respondent states that under the new Memorandum and Articles of Association, the Chamber appointed an Independent Electoral Board (IEB) led by one Patrick Oboth to hold the grassroots and national elections of the Chamber in consultation/supervision of the Respondent and the Ministry of Trade officials. The Respondent avers that the IEB successfully conducted grassroots elections in 42 counties on 30<sup>th</sup> April, 2012 but the same were postponed after the Applicant lodged a complaint with her office on the conduct of the grassroots elections. The Respondent avers that her office convened meetings on 28<sup>th</sup> April, 2013; 30<sup>th</sup> April, 2013; and 4<sup>th</sup> May, 2013 which meetings were chaired by the Attorney General. In those meetings it was agreed that all the civil matters in court be withdrawn. It was also agreed that the Respondent was to audit the concluded county elections within two weeks and order repeat elections where necessary. Fresh notices of the national elections and repeat county elections were to be issued concurrently not later forty five days from 30<sup>th</sup> April, 2013. The Applicant, however, later refused to sign the draft consent. The Respondent avers that after conducting audit on the county elections she did not order any repeat and on 18<sup>th</sup> June, 2012 national elections were held. The Respondent asserts that after the issuance of the court order in JR No. 251 of 2013, she obeyed the order.

It is only after the order lapsed on 19<sup>th</sup> March, 2013 that she proceeded to register the new directors on 27<sup>th</sup> March, 2013. The Respondent therefore contends that she acted within the law when registering the new officials of the Chamber since there was no court order against such action at that time.

In the replying affidavit sworn on 25<sup>th</sup> June, 2013, Mr. Kiprono Kittony opposed the application, firstly, on the ground that it is fatally defective; an abuse of the court process; and that it does not disclose any grounds for grant of judicial review orders. Mr. Kiprono Kittony avers that the Chamber has been undergoing a reform process initiated by interested key stakeholders among them the Kenya Sector Private Alliance (KEPSA), the Ministry of Trade and the Office of the Registrar General pursuant to orders issued on 20<sup>th</sup> July, 2011 by Justice Mwera (as he then was) in HCCC No. 253 of 2009. Mr. Kiprono Kittony avers that the Applicant participated in the meetings that led to the elections and it is only after he sensed defeat that he filed JR Misc. Application No. 251 of 2012 and obtained orders staying the registration of the newly elected officials. He avers that the Applicant obtained the said orders from Justice Githua without disclosing to her the existence of HCC No. 253 of 2009. On learning of the existence of the civil case the Learned Judge sent the file to Justice Waweru so that he could deal with both the civil case and the judicial review application. Mr. Kiprono Kittony states that after his team was registered they resolved to withdraw JR No. 251 of 2012 since the Chamber had been named as the applicant in that matter. He avers that the Applicant did not exhaust the internal dispute resolution mechanism availed to any aggrieved member of the Chamber by the Memorandum and Articles of Association. Further, he contends that the application hangs in the air since the Applicant does not seek to impeach the legality of the Annual General Meeting held on 18<sup>th</sup> June, 2012 at the Railways Club, Nairobi. He asserts that the elections were held in compliance with the law and the Applicant even attempted to stop the elections on 15<sup>th</sup> June, 2012 but Justice Waweru denied him the order. It was then that he caused JR Misc. Application No. 251 of 2012 to be filed in the name of the Chamber without disclosing that a similar application had been rejected by Justice Waweru.

Laban Rao Onditi (the 3<sup>rd</sup> Interested Party) swore a replying affidavit on 25<sup>th</sup> June, 2013 on his own behalf and on behalf of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties. The said affidavit is mirrored on that of Mr. Kiprono Kittony. The interested parties assert that the application before this Court is a disguised attempt to review the orders in JR Misc. Application No. 251 of 2012 and the same cannot succeed since this court cannot review the decisions of a Court of concurrent jurisdiction.

Having gone through the pleadings and the respective arguments of the parties herein, I find that the issues for the Court's determination are whether the judicial review court is the proper forum for the determination of this matter and if so, whether the orders sought should be granted.

From the pleadings before Court what one gathers is that the Applicant and the 2<sup>nd</sup> to 6<sup>th</sup> interested parties have been entangled in a protracted dispute over the management of the 1<sup>st</sup> Interested Party/Chamber.

The starting point is to understand the scope of judicial review. In **VOLUME 1(1), 4<sup>TH</sup> EDITION OF HALBURYS LAWS OF ENGLAND** at page 116, Paragraph 59 the learned authors describe the nature and purpose of judicial review as follows:

***“Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.....***

***Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is thus different from an ordinary appeal. 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: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for***

***that of the authority constituted by law to decide the matters in question.”***

A judicial review application is thus directed at the process through which an individual is taken whenever he comes into contact with a public body.

The question would then be whether the Applicant has directed his firepower at the treatment he was given by the Respondent. The Applicant's verifying affidavit and statutory statement clearly shows that the Applicant's complaint is about the registration of the 2<sup>nd</sup> to 6<sup>th</sup> interested parties as officials of the Chamber by the Respondent. The Applicant appears to say that since there was JR Misc. Application No. 251 of 2012 the Respondent ought not to have registered the new officials. The Applicant, however, does not deny the fact that there was no order barring the Respondent from doing what she did since the stay orders had lapsed. He appears to blame Justice Ougo for 'inadvertently' failing to extend the stay orders. He, however, forgets that it was the duty of his counsel on record to seek the extension of the orders.

The Respondent and the interested parties submitted, correctly, in my view, that the Applicant is attempting to seek a review of the orders in JR Misc. Application No. 251 of 2012. That is a no go zone for this Court for the Constitution clearly states that this Court **“has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”** - Article 165(6).

The Applicant contends that the decision of the Respondent to register the new officials was irrational, unreasonable and an abuse of power. The Applicant did not, however, demonstrate how the decision of the Respondent is irrational, unreasonable and an abuse of power. Judicial review orders are not granted simply because an applicant has stated the grounds for granting judicial review in his application. He must go ahead and show the irrationality or illegality and/or breach of the rules of natural justice by the authority. It is not disputed that the Respondent was mandated to register the new officials. It is also not disputed that there was no Court order barring her from doing so at the time she registered the officials of the Chamber. There is nothing irrational or illegal in the action she took.

The Applicant has also contended that the orders that were issued by Justice Mwera (as he then was) in HCCC No. 253 of 2009 were not complied with and that the Respondent being an officer of the Court is under the obligation to enforce them. That may sound like a good argument but if he indeed felt that the Court orders in that case were being disobeyed or not being complied with to the letter the best thing to do was to approach the Court that issued the orders for a remedy. From the look of things, one is tempted to agree with the Respondent and the interested parties that in filing this matter and JR Misc. Application No. 251 of 2012 the Applicant was trying to run away from HCCC No. 253 of 2009. The Applicant cannot be allowed to question the regularity of the elections of 18<sup>th</sup> June, 2012 when it is clear that he can get a remedy in HCCC No. 253 of 2009 being the case that paved the way for the holding of those elections. In any case, it is not a good policy for parties to file a multitude of cases involving the same parties or their agents or proxies and litigating over the same subject matter.

The application before me has no merit and the same fails. Considering all the facts surrounding this case, I would not have granted any orders even if the Applicant had established grounds for issuance of judicial review orders. This is one matter which borders on an abuse of the court process. The Applicant's application is dismissed with costs to the Respondent and the interested parties.

Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of February, 2014

**W. K. KORIR,**

**JUDGE OF THE HIGH COURT**