



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 271 OF 2013

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

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

AND

IN THE MATTER OF CO-OPERATIVE TRIBUNAL CASE NO.410 OF 2012 (JOHN MULWA KANGAATU & 6 OTHERS VS. THE MANAGEMENT COMMITTEE, KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY)

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN, CO-OPERATIVES TRIBUNAL.....1ST RESPONDENT

THE COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....2ND RESPONDENT

JOHN MULWA KANG'AATU

PAULMUTHOKA MBOLE

MULI KATHUKU

WILLIAM MWILU KITINGA

STEPHEN KIMUYU MUTHEMBWA

JOHN MUTUKU MBUVI

MBAI KALA MULUNIINTERESTED PARTY

THE MANAGEMENT COMMITTEE KONZA RANCHING & FARMING

CO-OPERATIVE SOCIETY LTDEX-PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 6th September, 2013, the *ex parte* applicant herein, **The Management Committee Konza Ranching & Farming Co-Operative Society Ltd**, seeks the following orders:

- 1. An order of certiorari to remove into the High Court for the purpose of its being quashed the ruling and order made by the Chairman, Co-operative Tribunal whereby it was ordered on the 19th day of July 2013 that the Commissioner of Co-operative Development do exercise his powers under section 3(3) of the Co-operative Societies Act, Cap 490 and organize for the election of the interim committee members who will direct the affairs of the respondent society only for the duration of the pendency of the appeal (High Court Civil Appeal No.22 of 2013).**
 - 2. An order of prohibition prohibiting the Commissioner of Co-operative Development implementing, executing and or acting upon the order of the Chairman, Co-operatives Tribunal made on the 19.7.2013 ordering him to organize for the election of the interim committee members who will direct the affairs of the respondent society only for ht duration of the pendency of the appeal (High Court Civil Appeal No. 22 of 2013).**
 - 3. A declaration that the current management committee members are legally in office unless removed in accordance with the society's by-laws or under the provisions of the Co-operative Societies Act, Cap 490 Laws of Kenya and are therefore entitled to transact all business in relation to, for and on behalf of the society.**
 - 4. An order for costs.**
 - 5. Such further and other relief be granted to the applicant as this court deems fit.**
2. The application was supported by an affidavit sworn by **David M. Mutangili**, the chairman of **Konza Ranching & Farming Co-Operative Society Ltd (hereinafter referred to as the Society)** on 23rd July, 2013.
 3. According to the deponent, the applicant herein was sued in Tribunal Case No.410 of 2012 which suit sought among other things an order that the current committee had ceased to be members of the committee. The said suit was filed contemporaneously with an application dated 20th September, 2012 seeking orders that pending the hearing of the main suit an interim committee be formed to run the affairs of the society pursuant to which *ex parte* Interim orders were granted restraining the applicants from transacting the affairs of the society.
 4. According to the deponent, these orders had the effect crippling the Society and they were thus varied on 1st October, 2012 and further on 5th October, 2012 following the applicant's application dated 27th September, 2012 for review or variance thereof. It was further deposed that at the time of appearance the applicant also filed a Preliminary Objection dated 1st October, 2012 on the grounds that the application and the main suit were filed prematurely and contrary to the provisions of sections 21 and 58 of the **Cooperative Societies Act** (hereinafter referred to as the Act). The said objection was heard and dismissed on 8th January, 2013 prompting the applicant to file the High Court Civil Appeal No.22 of 2013 on 8th February, 2013 which appeal is yet to be heard and determined.
 5. Thereafter, on the same date, the applicant did a letter to the chairman of the Tribunal seeking to be supplied with certified copies of the proceedings to enable it compile its record appeal and on 14th February, 2013, the applicant made another application for stay of proceedings pending the hearing and determination of the Appeal which application was canvassed by way of written submissions and a ruling thereon delivered on 19th July, 2013, by which the chairman granted

- Stay of Proceedings but on condition that the Commissioner of Cooperative Development do organize for the election of members of the interim committee to run the affairs of the society pending the hearing and determination of the Appeal on the ground that the applicant had not taken any steps to prosecute the appeal since its filing.
6. According to the applicant, the order was ultra vires as the chairman lacked such judicial review powers and further, the Chairman acted in open bias and abuse of power by refusing to supply the applicant with the proceedings despite various efforts and as such standing in the way of the applicants appeal. In the deponent's view, the said orders also amounted to a breach of natural justice as the applicant was condemned unheard since the ordering of an interim committee removed them from office without us ever being heard on the matter. According to him, the finding that the failure to prosecute the appeal was mischievous in itself since it was the Chairman that had really hampered its prosecution and the applicant could not be blamed for it and that even as at the time of delivery of his ruling, the Chairman had not yet supplied the proceedings which proceedings are imperative for the prosecution of the appeal.

1st Respondent's Case

7. In opposition to the application, the 1st Respondent, **Mwangi Timothy Kariuki** filed a replying affidavit sworn on 9th September, 2013.
8. According to him, on 20th of September, 2012 some members of Konza Ranching & Farming Co-operative Society filed suit No.410 of 2012 in the Co-operative Tribunal seeking an order that the current Committee of **Konza, Ranching & farming Co-operative Society Ltd.** automatically ceased being members of the Committee; nullification of the balloting exercise of the Society land; an Audit report be caused out of the sold movable and immovable properties of the Society and all other aspects of the Society; and any other and or further relief this Court may deem fit and just to grant." The said suit was filed contemporaneously with a Notice of Motion dated the same day brought under a Certificate of Urgency. Pursuant to the foregoing interim Orders were issued and the matter fixed for interpartes hearing for 5th October, 2012. However, on the 27th of September, 2012 instead of filing a Replying Affidavit or grounds of opposition as required under rule 11(2) of the Cooperative Tribunal (practice and procedure) Rules, 2009, the Applicant filed a counter application seeking inter alia an Order that the order of the Tribunal issued on 20th September, 2012 be discharged, varied and or set aside and before the two applications could be heard the Applicants herein filed a Notice of preliminary objection dated 1st October, 2012 which was argued on 21st November, 2012 and the ruling delivered on 8th January, 2012.
9. Subsequently, on 18th January, 2013, one **Ms Mutuku** Advocate, holding brief for **Mr. Mulei**, Advocate for the Applicants herein appeared in Chambers and applied for leave to file an appeal against the aforementioned ruling of the Tribunal which application was allowed and it was directed that they be supplied with a certified copy of the proceedings and rulings. On 8th February 2013 the Applicants through their advocates applied to be supplied with certified copies of the proceedings dated 8th January, 2013 for purposes of compiling a record for their appeal and the ruling and proceedings requested for were certified on 19th of March, 2013.
10. It was therefore deposed that it is not true that the deponent refused to supply the Applicants with the proceedings they had applied for. Similarly, it was not true that at the time of the ruling dated 19th July, 2013 the proceedings requested for had not been supplied since it is the Applicants who have failed to collect the requested proceedings since 19th March, 2013.
11. According to the 1st Respondent, from the history of this matter, it is clear that the Applicants have never been keen to have the matter proceed and be determined on merit but have since the institution of Tribunal Civil Case No.410 of 2012 filed a preliminary objection, two applications, an appeal and now this application for judicial review all in a bid to delay the expeditious disposal of the suit. To the deponent, the conduct of the applicants clearly contravene the principles set out under Article 159 of the constitution of Kenya particularly Article 159(2) (b) (d) and (e).
12. In his view, under the provisions of Section 80 (1) (3) and (4) of the Act, the Chairman of the Co-operative Tribunal has the power to make the Orders that he made in his ruling dated 19th of July, 2013 and thus did not act ultra vires the Act and if the Applicants were aggrieved by the said

Orders, their recourse lay in filing an appeal under section 81 of the Act and not a Judicial review application as they have done. To him, the consequence of granting leave to operate as stay of decision of the Tribunal dated 19th July, 2013 would be to indefinitely extend the Applicant's term of office which is the subject matter of CTC No.410 of 2012.

1st Interested Party's Case

13. The 1st interested party in opposition to the application filed an affidavit sworn on 2nd August 2013.
14. According to him, on 20th September 2012 together with his co-interested parties they filed an application contemporaneously with statement of claim before the Co-operative Tribunal seeking inter alia orders of injunction stopping the Management Committee from transacting, dealing in or conducting the affairs of Konza Co-operative Society. The ex-parte applicant herein has however gone out of their way to ensure that they did not comply with initial interim orders and the final determination of the injunction application before the tribunal.
15. Upon the dismissal of a preliminary objection and an application for stay of proceedings pending the hearing of an appeal before the High Court against the dismissal of the preliminary objection, the Tribunal dismissed the application for stay of proceedings and issued an injunction order as both applicants were heard together.
16. In his view, the Tribunal has power and authority to issue temporary injunction as it did after hearing all parties as they were represented by counsel. To him, the ex-parte applicants intentionally delayed the finalization of the matter before the Tribunal and that ensured their continued stay in office, which was an issue for determination by the Tribunal. To him, it is unfortunate that the Commissioner of Co-operatives, through the District Co-operative Officers, has overseen the continuous violation of the Act, the Rules made thereunder and the Society' by-laws in ensuring that the committee led by **Mr. D. Mutangili** remains in office which committee has been in office since 1998 – a period – of over 15 years consecutively as against the maximum 6 years period vide Rule 23 Co-operative Societies Rules.
17. It was the deponent's averment that in making the ruling the Tribunal acted within the law and considered all the material placed before it, most of which is not before this Court and made orders capable of being implemented and were not illegal, irrational or irregular. Therefore if the ex-part applicants are aggrieved by the orders of the Tribunal they have a remedy in the civil Court by way of appeal or review and hence a right to Judicial Review does not lie.

Applicant's Submissions

18. On behalf of the applicant it was submitted that by ordering the 2nd Respondent to organise for elections of the interim members to run the affairs of the society during the pendency of the High Court Civil Appeal No. 22 of 2013, the 1st Respondent exceeded his powers. It was submitted that the 1st Respondent lacks judicial review powers to make such orders and that such powers are derived from section 58 of the Act and are donated to the 2nd Respondent after an inquiry and not the 1st Respondent. According to the applicant, section 3(3) of the Act which donates the general mandate to the 1st Respondent does not supersede the said section 58. In support of this line of submission the applicant relied on **Alex Malikhe & Wafula & 7 Others vs. Elias Nambakha Wamita & 4 Others Bungoma High Court Petition No. 7 of 2012.**
19. In the applicant's view the order issued by the Respondent was an order of mandamus and hence not within its jurisdiction to grant. It was further submitted that the said order was made in breach of the rules of natural justice as the applicant was not heard before it was made.
20. According to the applicant the order was unlawful in that it was for an indefinite period contrary to section 58(4)(b) of the Act which provides for a period of 90 days.
21. It was further submitted that the 1st Respondent hampered the prosecution of the appeal by refusing to supply the applicant with the proceedings hence was biased and abused his powers. It was submitted that the finding that the applicant had not prosecuted the appeal when the 1st Respondent had failed to supply the proceedings for the purpose was mischievous.

1st Respondent's Submissions

22. On behalf of the 1st Respondent, it was submitted that the applicant had not proved that the procedure adopted by the 1st applicant was marred with impropriety or illegality or that it was ultra vires its jurisdiction. In the 1st Respondent's view the applicant was challenging the merit of the decision and relied on **Republic vs. Commissioner of Customs Services ex parte Africa K-Link International Ltd [2012] eKLR.**
23. It was further submitted that the order which was granted was a temporary injunction and 1st Respondent had jurisdiction under section 80(4) of the Act to grant the said order.
24. It was further submitted that the conduct of the applicant in the impugned proceedings does not merit the discretionary orders sought and relied on **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and *Halsbury's Laws of England* 4th Edition Vol. II page 805.

Interested Parties' Submissions

25. On behalf of the interest parties, it was submitted that based on Article 159 of the Constitution to grant the orders sought would be unjust and unfair to the interested parties since by seeking the orders herein the applicants want to continue running the affairs of the Society without involving the members.
26. To the interested parties the orders of the 1st Respondent are not illegal, irrational or irregular and the Tribunal had the powers to act in the manner it did.

Determination

27. I have considered the foregoing as well as the submissions filed herein.
28. It is now trite that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
29. In my view sound legal principles would dictate that the Court takes a pragmatic approach to the resolution of the dispute before it. In this case an application for injunction was granted ex parte and the applicant, as it is perfectly entitled to applied for the said ex parte order to be set aside. However it seems that the said application was not heard and what was heard was instead a preliminary objection raised by the applicant. It is the ruling arising from the said objection that is the subject of the intended appeal. Therefore it would seem that the inter partes hearing of the application is yet to commence. Similarly the applicant's application for setting aside the ex parte orders is yet to kick off. This, in my view is not a very pleasant situation. If the application had been heard inter partes a ruling would have now been handed down and parties would have made a decision on the way forward. Instead the parties have decided to engage both the High Court and the Tribunal in several applications and suits thus denying other litigants an opportunity for their cases to be similarly heard and determined. A court of law ought not to countenance such a course. As was held by **Kimaru, J** on the issue of abuse of the court process in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No.**

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

30. This Court is under a Constitutional obligation pursuant to Article 159(2)(b) not to delay justice.
31. Further as was held in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.
32. That the Tribunal had the powers to grant the application for stay of proceedings conditionally is not in doubt. What the applicant is challenging are the conditions imposed to the grant of the said stay.
33. In my view where a lower Court or tribunal grants a conditional stay which conditions a party is aggrieved with the Court to which the appeal is preferred is perfectly entitled to vary or set aside the said order. To challenge the conditions attached to the order staying proceedings by judicial review application is in my view not the most efficacious way of dealing with the matter.
34. With respect to the prayer for a declaratory order I wish to draw the applicant’s attention to **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where it was held:

“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 to determine 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.”

35. It therefore follows that as the remedy of declaratory orders is not one of the remedies provided for in section 8 of the ***Law Reform Act***, that remedy does not avail an applicant in judicial review proceedings.
36. I have looked at the decision in **Alex Malikhe & Wafula & 7 Others vs. Elias Nambakha Wamita & 4 Others** (supra). In my view that decision is distinguishable from the present case. In that case what the Court was dealing with was the jurisdiction of the Tribunal to grant mandatory injunctions or judicial review orders. In this case this Court is called upon to deal with the jurisdiction to grant conditional stay of proceedings and whether the conditions attached to the stay are proper. As I have held the Tribunal has jurisdiction to grant conditional stay and whether

the conditions are proper or not ought to be dealt with by a proper application for setting aside or variation thereof.

37. With respect to bias, that issue in my view goes to the merits of the decision since it revolves on the determination of the issue whether or not the Tribunal ought to have made such a finding.

38. In the result I find no merit in the Notice of Motion dated 6th September, 2013 which I hereby dismiss with costs to the Respondents and interested parties

Dated at Nairobi this day 20th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Luseno for Mr Mulei for the applicant

Mr Makundi for interested parties