REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 313 OF 2013

REPUBLIC .....APPLICANT

VERSUS

REGISTRAR OF SOCIETIES .....1ST RESPONDENT

HIGHRIDGE CHIEF .....2ND RESPONDENT

ATTORNEY GENERAL .....3RD RESPONDENT

PETER KIMANI CHEGE.....INTERESTED PARTY

EX-PARTE

SAMUEL MAINA,

JOHN KINGORI GATURU, &

JAMES KARANJA

RULING

By way of the chamber summons application dated 28th August, 2013 Samuel Maina, John King'ori Gaturu and James Karanja who identify themselves as the Chairman, Secretary and Treasurer of City Park Hawkers Development Project (the association) seek leave to apply for **"an ORDER OF CERTIORARI to quash the decision of the 2nd Respondent to terminate the management of City Park Hawkers Market and consequently appoint an interim committee comprising of the interested party herein."** The applicants also pray for leave to **"apply for an ORDER OF PROHIBITION to restrain the 1st Respondent from in any way registering the names of the purported officials elected by the interested party herein pending the hearing and determination of this Application."** The applicants ask that if leave is granted it should **"operate as stay pending the hearing and determination of the application."**

In the application, the Registrar of Societies, Highridge Chief and the Attorney General are named as the 1st, 2nd and 3rd respondents respectively. Peter Kimani Chege who is **"sued as chairman of Digital Traders"** is named as an Interested Party.

The application is supported by grounds on its face, a statutory statement, a verifying affidavit sworn by Samuel Maina and a supporting affidavit sworn by the said deponent plus annexures to the affidavits.

In summary, the applicants' case is that on 14th August, 2013 a group known as Digital Traders which is led by the Interested Party purported to hold an election in which the applicants were dethroned from the leadership of the association. It is the applicants' case that the said election was conducted and supervised by the 2nd Respondent and the same was in clear contravention of the provisions of the Societies Act, Chapter 108. The applicants therefore pray for leave to commence judicial review proceedings and seek orders to quash the alleged election and to prohibit the 1st Respondent from registering the Interested Party's team as officials of the association.

Ms. Chege for the respondents and Mrs. Fundi for the Interested Party opposed the application and their main argument is that the decision the applicants seek to challenge has not been attached to the application and there is therefore no decision which can be attacked through judicial review.

It is now established law that leave to commence judicial review proceedings should be granted once a *prima facie* case or an arguable case has been established by an applicant. This view was affirmed by the Court of Appeal in the case of **AGA KHAN EDUCATION SERVICE KENYA v REPUBLIC & OTHERS E.A.L.R. [2004] 1 E.A.1 (CAK)** when it stated that:-

> **"So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.....**
>
> **We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and in very clear-cut cases, unless it is contented that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there are, therefore no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

The principle is that where a case has no prospects of success, then the best medicine is to kill it at the leave stage. It would be a waste of judicial resources to grant leave to an applicant with a hopeless case only for the respondents and or interested parties to apply for the leave to be set aside.

Mr. Albert Khaminwa for the applicants has submitted that he has established that the purported election was conducted outside the provisions of the Societies Act. If the applicants can show that an election was held, the court without holding further enquiry should find that an arguable case has been established and leave to commence judicial review proceedings ought to be granted.

However, the respondents and the Interested Party have submitted that granting leave to the applicants would be an exercise in futility since they have not established that there is a decision which can be quashed by this court or which can be acted upon by the 1st Respondent.

For this court to issue a quashing order there must be an identifiable decision. In the case before me, Simon Maina has annexed three exhibits marked SM 1-3 to the supporting affidavit he swore on 28th August, 2013. SM1 is a letter dated 24th July, 2013 addressed to the 1st Respondent by one Mr. Joel Muthiani Musau. In the said letter he identifies himself as the Organizing Secretary of the association and complains about an illegal election scheduled for 8th August, 2013. The 2nd exhibit marked as SM2 is a letter dated 13th December, 2012 from the 2nd Applicant to the Registrar of Societies. The said letter

is forwarding a copy of a newly adopted Constitution to the Registrar. Annexed to the letter is a copy of a notice of a special general meeting that was to be held on 1st November, 2012.

The third exhibit marked SM3 is a receipt from Royal Media Services Ltd dated 27th October, 2012 for kshs.1148.40. Attached to the receipt are minutes for the association's special general meeting held on 1st November, 2012 and a campaign poster titled Digital Traders which has pictures for thirteen people vying for various posts in an unidentified organization. At the bottom of the poster are the words **"Vote Digital Traders Team 2013 – Biashara na Maendeleo."**

I have detailed the contents of all the exhibits so as to show that there is no document related to an election held on 14th August, 2013. The respondents and the Interested Party are therefore correct when they say that there is no decision that can be impugned through these proceedings. In the case of **REPUBLIC v PROFESSOR MWANGI S. KAIMENYI ex-parte KIPPRA, Civil Appeal No. 160 of 2008** the Court of Appeal held that the court cannot act against a non-existent decision. These are the words of the Court:-

> **"The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed."**

Without an identified decision that can be challenged by way of judicial review proceedings, the court will be acting in vain if it grants leave to the applicants. In short, the applicants have not established a *prima facie* case and leave to commence judicial review proceedings cannot be granted. The applicants' application is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 9th day of September , 2013

W. K. KORIR,

JUDGE