



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIRIOBI
JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION
MISCELLANEOUS APPLICATION NO. 318 OF 2013

**IN THE MATTER OF: AN APPLICATION BY FRANCIS
KIRIMA M'IKUNYUA, JOHN WAINAINA NDUNG'U AND PETER
KIBE MUTIGA (SUING AS THE OFFICIALS OF ZIMMAN
SETTLEMENT SCHEME) FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDER OF CERTIORARI AND MANDAMUS**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SOCIETIES ACT, CAP 108 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

**FRANCIS KIRIMA M'IKINYUA, JOHN WAINAINA NDUNGU AND PETER KIBE MUTIGA
(SUING AS THE**

OFFICIALS OF ZIMMAN SETTLEMENT SCHEME SOCIETY).....APPLICANT

VERSUS

THE REGISTRAR OF SOCIETIESRESPONDENT

AND

BENEDICT HONGO ODHIAMBO.....1ST INTERESTED PARTY

JULIUS GIKONYO KANYUIRA.....2ND INTERESTED PARTY

FRANCIS KIBE WAGACHA.....3RD INTERESTED PARTY

EDWIN GRAHAM ODALO4TH INTERESTED PARTY

JAMES MBURU NUTHU.....5TH INTERESTED PARTY

PETER MWARAGANIA.....6TH INTERESTED PARTY

PETER MUTHEE KIHUYU.....7TH INTERESTED PARTY

COLLINS OCHIENG8TH INTERESTED PARTY

DAVID MAMBO MAIRU.....9TH INTERESTED PARTY

JOSEPH NDUATI NGOBU.....10 INTERESTED PARTY

BEDAN MWANGI MIRINGO11TH INTERESTED PARTY

BENEDICT HONGO ODHIAMBO, JULIUS GIKONYO KANYUIRA AND FRANCIS KIBE

WAGACHA(SUED AS THE OFFICIALS OF GITHU ZIMA SOCIETY).....12TH INTERESTED PARTY

RULING

1. By an ex parte Chamber Summons dated 5th September 2013, the *ex parte* applicants herein, **Francis Kirima M'ikinyua, John Wainaina Ndungu and Peter Kibe Mutiga**, seek the following orders:
 1. **THAT this Application be certified urgent and be heard forthwith.**
 2. **THAT owing to the urgency of this matter service of notice upon the Registrar be dispensed with in first instance.**
 3. **THAT this Honourable Court be pleased to grant leave to the Applicant herein to apply for an order of Certiorari to bring before this court and quash the decision of the Respondent dated 2nd September, 2013 purporting to appoint a Committee comprising of the 1st to 11th Respondents to manage the affairs of the Applicant.**
 4. **THAT this Honourable Court be pleased to grant leave to the Applicant to apply for an Order of mandamus compelling the Respondent to confirm that the legal officials of the Applicant are Francis Kirima M'ikinyua, John Wainaina Ndungu, Peter Kibe Mutiga, George Oluoch Omondi, Joseph Musyoka Wambua, Kennedy Ochieng Ondoro and Anthony Maina Waihuni pending the expiry of the term of the current officials and or the conducting of an all inclusive general election by Zimman Scheme Settlement Society.**
 5. **THAT the grant of leave do operate as a stay of the decision of the Respondent dated 2nd September, 2013 and all its intended consequences pending the hearing and determination of this suit or further orders of the court.**
 6. **THAT the costs be provided for.**

EX PARTE APPLICANT'S CASE

2. The application is supported by a supporting affidavit sworn by Francis Kirima M'ikunyua, who deposed that he was the chairman of the applicant Zimman Settlement Scheme Society (hereinafter referred to as the Society).
3. According to the deponent, in or around the year 2008 he was elected as the Chairman of the Applicant herein and was again re elected in the year 2011 and has therefore held the position of the chairman of the Society since then.
4. Following the election in the year 2011 they filed their annual returns on the 30th December, 2011 confirming the Officials of the Applicant as indicated in the said returns together with notification of change of officers dated 30th December, 2011 copies of which was exhibited. According to the deponent, Article 46(b) of the Applicant's Constitution provides that the elected Officials are entitled to serve for three years and are eligible for re election and consequently the term of the current officials expires on the 30th December, 2014 which position was acknowledged by the Respondent by way of letter dated 28th February, 2012 in which the Respondent confirmed that they had received the returns filed by the Applicant and further confirmed that as per their records the secretary of the Applicant is **Brian Kibe Mutiga**, the Treasurer is **George O Oluoch** while the deponent was the chairman.
5. However the 1st, 2nd and 3rd Interested Parties filed HCC NO. 133 of 2012 challenging the outcome of the said election wherein the Court ordered that no election of the Society was to be carried out during the pendency of the said suit and Judicial Review Cause No 145 of 2011. This suit was on the 9th July, 2013 withdrawn wholly on the grounds that they are no longer Officials of the Applicant and following the said withdrawal and the express acknowledgment by the Interested Parties that they are not officials of the Applicant there is no dispute on the leadership and the management of the Applicant to warrant the meddling and or intervention of the Respondent.
6. Despite that position the Respondent has by way of letter dated 2nd September, 2013 purported to constitute a committee comprising of and headed by the same 1st, 2nd and 3rd Respondent to manage the affairs of the Applicant including the mandate to call for elections within sixty days yet the 1st, 2nd and 3rd Interested Parties are not members of the Applicant and have also expressly stated that they are not officials of the Applicant. It is further deposed that the 3rd Interested Party, who has been expelled from the Society due to gross misconduct, has a pending Criminal Case Number 483 of 2011 at the Chief Magistrates Court in Kiambu in which the Applicant herein is the complainant and it is simply untenable and inconceivable the Respondent can now purport to appoint him into a committee to manage the affairs of the Applicant while the said Criminal Case is still pending in court.
7. It is averred that the Applicant herein was formed and registered to take care of the welfare and interest of over 400 squatters living on all that parcel of land known as Land Reference Number 57/26 (Nairobi Block 123/1 – 279) while the 12th Interested Party is a rival society which was also formed and registered to take care of the interest and welfare of another group of squatter living on the same parcel of land hence it is clear that the Applicant and the 12th Interested Party are two independent and rival societies representing the interest of different squatters within the same land.
8. The deponent's position is that the Applicant and the 12 Interested Party had formed a joint management team in coalition which was agreed on by the Officials of the two Societies to facilitate the smooth management of the Settlement Scheme but the said coalition was dissolved by mutual consent on the 16th January, 2012 to ensure independence and void and prospect of one society interfering in the internal affairs of the other and the notice of dissolution served on the Respondent. Pursuant thereto, on 8th January, 2013 the Respondent issued an official confirmation of the name of the officials of the two societies and another letter dated 22nd March, 2013 the Respondent withdrew its earlier letter and confirmed that the 1st, 2nd and 3rd Respondents as the Officials of the 12th Interested party and that decision is the subject of High Court Misc. Application Number 309 of 2013 which is pending before this court and in which the Respondent and the 1st Interested party have all sworn affidavits confirming that the 1st, 2nd and 3rd Interested Parties are the officials of the 12th Interested Party.

9. By way of letter 22nd August, 2013 the Respondents summoned the Officials of the Applicant herein including for a meeting at his office on the 28th August, 2013 at 10.30 am which letter was however received on the 27th August, 2013 and the applicants immediately instructed their Advocates to request the Respondent to reschedule the meeting because the notice was too short and all the officials of the Applicant and their said advocate had pre arranged engagements which the advocate did. However, the Respondent dismissed the request for another dated and instead went ahead to appoint a committee comprising of that all the Interested Parties herein and mandated them to run the affairs of the Applicant and organize for an election within 60 days a decision which is contended was made based on emotions, whims and in temper and which decision was unreasonable as it effectively appointed the members and officials of a rival society to manage the affairs of the Applicant. .
10. It is contended that none of the Officials of the Applicant was present at the meeting and therefore a decision having far reaching consequences on the affairs and management of the Applicant was made without its officials being given an opportunity to be heard contrary to all the known rules of natural justice and further that the committee was appointed in utter breach of the Constitution of the applicant and the decision was therefore draconian, dictatorial and autocratic. According to the applicants the said decision made on the 2nd September, 2013 was unconstitutional as it violated the Applicant's legitimate expectation to fair administrative action. To them, the Respondent herein, and particularly **Mr. Joseph Onyango**, is a Public Servant and must exercise the discretion of his office fairly, legally and in accordance with the rules of natural justice and since the Applicant is a registered society with a constitution, all decisions on its management and appointment of officials must comply with he said Constitution and should not be based on the whims an fiat of a bureaucrat. Further, land being an emotive issue, any decision touching on the management of squatters must not just be fair but must be seen to be fair. The applicants aver that the said decision has caused a lot of confusion in the management of the Applicant and could, like previously, degenerate into violence and chaos.

RESPONDENT'S CASE

11. In response to the application the Respondent filed a replying affidavit sworn by **Joseph L. Onyango**, the Deputy Registrar General and a senior principal State Counsel in charge of Societies.
12. According to him, the entire Application is a gross abuse of the process of this Honourable Court brought in bad faith as the ex parte applicants lack the requisite Locus Standi to institute these proceedings as they are not property officials and have no proof to the contrary. To him, the Applicants were only placed on an interim basis owing to the numerous wrangles and disputes in the society and as such they cannot purport to carry themselves as proper officials. He further avers that applicants have no capacity, legal or otherwise, to bring this suit and the letter relied on in which they allege that they were confirmed as officials, has since been overtaken by events as a subsequent letter was duly issued by the Respondent on 2nd September 2013. To him, the letter dated 2nd September 2013 was meant to stabilize the society by calling all wrangling members for a joint consultative meeting at which the legitimate members of the society attended a joint committee was composed to deal with issues of the society until such a time that an all-inclusive election would be convened and properly conducted. However, in an attempt to frustrate the efforts of the Respondent, the Applicants herein, who are mere busy bodies, neglected and/or deliberately refused to attend the said meeting and that that the elections at which the purported office bearers were allegedly put into office, were a sham and in an attempt to maintain order in the society, the Respondent duly carried out his administrative duty and confirmed the Applicants herein on an interim capacity pending a proper meeting.
13. According to the Respondent, there has been no proper office since the term of the properly elected officials expired in 2011 whereafter the Respondent was sued in Judicial Review cause number 145 of 2011 and the Respondent was thus barred from intervening in the issues of the society by virtue of the aforesaid suit which suit has since been withdrawn against the Respondent, which consequently gave the Respondent authority to invite the wrangling members of the society for a joint meeting in an attempt to put the society in order and end the wrangles as

there was no valid office in place. As the interested parties are still faithful and legitimate members of the applicant society, nothing bars them from being eligible for nomination, election and appointment in any capacity in the Applicant society. To the deponent, to allege that the Respondent's decision was based on emotions, whims and temper is baseless and totally misguided since the Respondent has always acted diligently, in good faith and within his statutory mandate in dealing with the issues of this society and all procedures were adhered to. In his view, the Applicants have failed to establish a prima facie case or to show any prejudice if at all, caused by the Respondent that would warrant the award of the prerogative orders prayed for as the Applicants herein have always prevented the ends of justice from being met and are therefore not entitled to the exercise of this Court's discretion in their favour as this is a delay tactic meant to paralyze the operations of the society as the issues brought in this matter should have been raised in Judicial Review Cause number 309 of 2013 and therefore the applicants herein are mere busy bodies whose intentions are to waste the court's time as the Respondent has always acted within the law in the discharge of his duties.

14. It is the Respondent's position that the application is therefore baseless, incompetent, misconceived and devoid of any merit and the orders sought ought to be refused because if granted, there is likely to be a breach of peace and order which is not the intended goal rather than the promotion of public good.

APPLICANTS' SUBMISSIONS

15. On behalf of the applicants it was submitted that the decision of the Registrar dated 2nd September, 2013 in as far as it purports to appoint a committee to manage the affairs of a society with a constitution and duly elected officials was made without jurisdiction and is therefore ultra vires as there is no provision under the **Societies Act** which allows the Registrar to appoint officials, either on an interim or permanent basis, for society with duly elected officials. It is therefore submitted that the Registrar's decision was illegal and amounted to administrative coup. In support of this submission the applicants relied on **Republic vs. Attorney General ex parte Biwott [2002] KLR 685.**
16. It is further submitted that the Respondent knew from the returns filed with it who were the officials of the applicant and for how long they were to be in the office hence there was no dispute to warrant his intervention and reliance is placed on **Transworth Conveyors Limited & Another vs. Kenya Revenue Authority & 3 Others [2008] KLR 718.**
17. It is submitted that the Respondent's decision does not meet the clear constitutional threshold contained in Article 47(1) of the Constitution and should therefore be reviewed by being quashed.

RESPONDENT'S SUBMISSIONS

18. On behalf of the respondent it was submitted that the Applicants have not established any prima facie case or any arguable case that would warrant the prerogative orders sought. According to the respondent the request for a joint committee of the members with the mandate to make arrangements to call for an inclusive elections was upon request of the society's members owing to long standing leadership dispute that had persisted in the society which meeting the applicants conveniently refused to attend. To the Respondent the said wrangles can only be brought to an end through elections.

INTERESTED PARTY'S SUBMISSIONS

19. The interested parties on the other hand largely echoed the sentiments made by the respondents.

DETERMINATION

20. I have considered the application, the affidavits both in support of and in opposition to the application as well as the rivaling submissions and this is the view I form of the matter.
21. When this matter came up before **Korir, J** on 6th September 2013, the learned Judge as he was properly entitled to do under Order 53 rule 1 of the **Civil Procedure Rules** directed that the

- application is ordinarily heard ex parte be heard inter partes.
22. First and foremost it is clear that the application was not properly intitled. As was held by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563**, an application for leave ought to be intitled as hereunder:

In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition And In the Matter of Kenya Ports Authority Act And In the Matter of the National Environmental Management and Co-ordination Act 1999.

23. This was in line with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal Civil Appeal No. 63 of 1959 [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intitled:

“In the matter of an application by (applicants) for leave to apply for an order of Certiorari and In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal.”

24. It follows therefore that the intitlement of the present application is not entirely correct. Nevertheless, 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** 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”.

25. I, however, must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs. It must be remembered by the parties that proper intitlement of applications both for leave and the substantive Motion helps in minimizing confusion at the appellate level hence the need to properly intitle the proceedings.
26. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, **Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. **See also Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**
27. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is

designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

28. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
29. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.”

30. In R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.
31. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay.

Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

32. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.
33. In these proceedings, it is contended that the powers of the Registrar do not include the power to appoint a committee to manage the affairs of a society. To this contention the Respondent has kept a studious silence. It has not attempted to pinpoint which provision in the **Societies Act** empowers him to appoint a management committee to conduct elections for a registered society. Apart from that it is alleged that the Respondent appointed members of a rival society to manage affairs of the applicant society. That move if it turns out to be correct may well be irrational.
34. It is therefore my view based on the foregoing that the applicants have established a *prima facie* case to warrant the grant of leave sought. In the premises leave is hereby granted in terms of prayers 3 and 4 of the Chamber Summons dated 5th September 2013. The substantive Notice of Motion to be filed and served within 21 days.
35. With respect to the decision whether or not the grant of the said leave ought to operate as a stay, Order 53 Rule 1(4) of the **Civil Procedure Rules** provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

36. It must always be remembered that the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court's discretion being judicial and must therefore be exercised on the basis of evidence and sound legal principles.
37. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction and some of them are that the decision sought to be quashed has been implemented leave ought not to operate as a stay; that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review; that the objective of granting stay is to ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application; that the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken; that it is however not appropriate to compel a public body to act and that a stay order framed in such a way as to compel the Respondents to reinstate

the applicant before hearing the Respondent cannot be granted. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005; Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995; Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.

38.As I held in Miscellaneous Application No. 363 of 2013 In Re: Meridian Medical Centre;

“...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.....It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

39.According to the letter dated 8th January 2013, the Respondent indicated that the applicants were among others the society’s office bearers. In their notice of withdrawal, the plaintiffs in HCCC No. 133 of 2012 who filed the said suit as officials of the society seems to have made a hasty retreat as they clearly disowned their claim to be officials of the society. However these same people found themselves in the so called joint committee which was supposed to carry out the elections. The effect of the decision made by the Respondent and reflected in the letter dated 2nd September 2013 is that the said joint committee was given 60 days to call for an Extra Ordinary General Meeting at which the elections would be conducted. If at the determination of this application the Court finds that the Respondent had no powers to take the action it took it would mean that elections would have been called and presided over by people who had no authority to do so.

40.In the foregoing premises it is my view and I so hold that the grant of the leave herein ought to operate as a stay of the decision made by the Respondent and reflected in the letter dated 2nd September 2013. The effect of that is that the people who were acknowledged as the office bearers by the Respondent vide his letter dated 8th January, 2013 shall remain in the office pending the hearing and determination of these proceedings or further orders.

41.The costs of this application will be in the cause

Dated at Nairobi this day 18th of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kenyatta for applicant

Mr Okemwa for 1st to 11th interested parties