**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**MISCELLANEOUS CIVIL APPLICATION 36 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF UNPROCEDURAL DE-GAZETTEMENT OF THE APPOINTMENT OF JULIUS NYAROTHO FORMER CHAIRMAN AND MEMBER OF BOARD OF NZOIA SUGAR COMPANY LIMITED**

**IN THE MATTER OF THE STATE CORPORATION ACT (CAP 446) LAWS OF KENYA**

**JULIUS NYAROTHO.........................................................................APPLICANT**

**AND**

1. **THE ATTORNEY GENERAL**
2. **MINISTER FOR AGRICULTURE**
3. **NZOIA SUGAR COMPANY LIMITED**
4. **LAWRENCE SIMIYU SIFUNA...........................................RESPONDENTS**

**RULING**

The Applicant's case is that by Gazette Notice no.5555 of 2010 he was appointed by the President to be the Chairman of Nzoia Sugar Company Limited (3rd Respondent) for a term of three years from 12/5/2010. The appointment was under the provisions of the State Corporations Act (Cap.446). Under section 6 (2) of the Act the appointment could only be revoked if he had resigned, he was absent at three Consecutive Board meetings or he was convicted of a criminal offence. On 8/7/2011 the President purported to revoke the appointment with effect from 21/1/2011. He indicated he was exercising the powers conferred by section 8 (1) (a) of the Kenya Roads Act, 2007. On the same day, by Gazette Notice No.8003, he appointed Lawrence Simiyu Sifuna (4th Respondent) to be the Chairman for three years in place of the Applicant. He indicated to be acting under section 6 (1) (a) of the State Corporations Act. The Applicant was not guilty of any of the matters under section 6 (2). He was not given the reason(s) for the revocation of the appointment. He was not heard before the revocation and he had served diligently. He had not served the full term of three years. Following leave, he filed the present motion for an order of *Certiorari* to quash the revocation of appointment and an order of *Mandamus* to compel the Respondents to reinstate him as the Chairman of the 3rd Respondent. He, lastly, sought an order to restrain the 4th

Respondent from assuming or transacting any business as the Chairman of the 3rd Respondent.

The 1st Respondent entered appearance for the Minister for Agriculture (2nd Respondent) and filed grounds of opposition to say that the questioned Gazette Notice was issued by the President who had not been made a party to the proceedings, but instead the 2nd Respondent who had not made any decision had been sued. In any case, it was argued, judicial review orders could not be issued against the person of the President since they are orders issued in his name.

Subsequently, the 3rd and 4th Respondents, through Kiarie & Co. Advocates, filed a notice of preliminary objection seeking that the motion be struck out for being incompetent on the ground:

*"That the failure to enjoin as Republic and the applicant in the judicial review application makes the same fatally defective since the orders sought cannot be issued in the name of an individual person."*

The parties agreed to file written submissions on the objection and to have it disposed before the substantive motion. Submissions were filed and authorities annexed.

From the various decisions that were cited by the Respondents it is clear to me that judicial review orders are issued in the name of the Republic at the instance of the applicant and are directed to the person or persons who are to comply with them **(**See **Farmers Bus Service and Others v. The Transport Licensing Appeal Tribunal [1959] EA 779 and Mohamed Ahmed v. R. [1957] EA 523).** In the instant case the *"Republic"* ought to have been the applicant and *"Julius Nyarotho"* ought to have been the *"ex-parte Applicant". "Lawrence Simiyu Sifuna"* ought to have been *"the Interested Party."* It is important that judicial review applications should be correctly instituted and headed.

What is the consequence of the muddle and defect? Should the motion be found to be fatally defective? The many decisions cited to me appear to support the position that once a judicial review application is improperly titled it should be struck out for being fatally defective; that leave to amend cannot be granted to cure the defect as the application is not an ordinary one like that in a civil suit. It is a special application under sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. It should be noted, however, that in both **Farmers Bus Service case** and in **Mohamed Ahmed case** the then Court of Appeal took the liberal view that the defects could be cured to allow for the determination of the issues at hand on merits. In my view, Justice Ringera (as he then was) took a similar position in **Welamondi v. The Electoral Commission of Kenya, Misc. Application no.81 of 2002** at Bungoma when he stated that the failure to make the application in the name of the Republic was a mere want of form which was excusable.

The court should also be mindful of the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 which command that:

*"justice shall be administered without undue regard to procedural technicalities"*.

The substantial question which the court is being asked to decide is whether the President could revoke the applicant's appointment before the end of the three years, and without any reason or notice, and when he had performed his duties diligently. The parties know that this is the complaint, and the defects in the form of the motion have not been said to have prejudiced any of them. It is for these reasons that I find that defects in form are not fatal and do not oust the jurisdiction of the court to hear and determine the dispute. I dismiss the preliminary objection but ask the Applicant to pay costs of the same.

Dated, signed and delivered at Bungoma this 19th day of September, 2012.

**A. O. MUCHELULE**
**JUDGE**