REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL MISC. APPLICATION NO. 1133 OF 2007

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY: THE EX-PARTE APPLICANTS TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT

BETWEEN

REPUBLIC .....APPLICANT

VERSUS
THE COMMSSIONER FOR CO-OPERATIVE DEVELOPMENt.....1ST RESPONDENT
AND
NEW MITABONI FARMERS CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

EX-PARTE

ANTHONY MUOKA…….....……...…1ST APPLICANT

LUCIA MUOKA …….....…….2ND APPLICANT

TIMOTHY NDAVI …….....……..…….3RD APPLICANT

RULING

This ruling is in respect of the notice of motion dated 25th February, 2010 and filed in court on 26th February, 2010 by New Mitaboni Farmers Co-operative Society Ltd (the 2nd Respondent).

The application is said to be brought under Order XVI Rule 5 and Order L of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. In the application

the 2nd respondent seeks that " the judicial review suit by the exparte applicants be dismissed with costs".

The application was supported by an affidavit sworn on 25th February, 2010 by Patrick Mutua Kiteta who identifies himself as the Chairman of the 2nd respondent. On 1st December, 2011 counsel for the 2nd respondent informed the court that the application was also supported by the Commissioner for Co-operative Development (the 1st Respondent).

The 2nd respondent's application was opposed by Anthony Muoka and two others (the ex-parte applicants) by way of "grounds of objection" dated 13th May, 2011 and filed in court on 14th May, 2011. Four of the five grounds of objection are in the following words:-

1. The application is misconceived and an abuse of the court process. The orders sought are not obtainable under Order XVI rule 5 as judicial review proceedings are special in their nature.

2. The application is made in bad faith and only aimed at defeating the cause of justice.

3. The proceedings are pending ruling as all parties have filed submissions, which are already on record. It would be more expeditious and in the interest of justice the matter given a ruling date based on materials on record.

4. The matter was last removed out of daily cause list at the instance of the court and the mistake cannot be visited to an innocent party.

The 2nd respondent filed written submissions and authorities on 8th November, 2011 as directed by the court on 31st October, 2011. The ex-parte applicants did not file any written submissions or authorities.

Let me start by briefly looking at the history of this matter. This matter first came to court on 19th October, 2007 and the ex-parte applicants were granted leave to institute judicial review proceedings. On 15th June, 2009 the matter came up before Dulu, J and he fixed the same for hearing on 1st October, 2009. From the court file there is no evidence of any proceedings on 1st October, 2009. The next entry is on an unknown date when B N Mbuthia the advocate for the 2nd respondent fixed the matter for hearing on 28th April, 2010. When the

matter came up for hearing on 28th April, 2010 Mr. Mbuthia for the 2nd respondent indicated to the court that the matter was coming up for hearing of his client's notice of motion dated 25th February, 2010.

On 9th September, 2011 J M Mutua the advocate for the ex-parte applicants fixed the case for hearing on 31st October, 2011 before Gacheche, J. On 31st October, 2011 the file landed on my desk because Gacheche, J had already been transferred to another station. On that day counsel for the ex-parte applicants was not in court. I directed the parties to file and exchange submissions and listed the matter for hearing on 1st December, 2011.

There is no evidence on record that counsel for 2nd respondent notified counsel for the ex-parte applicants about the hearing on 1st December, 2011. There is also no evidence to show that counsel for the ex-parte applicants was served with the written submissions and list of authorities.

Failure to serve the advocate for the ex-parte applicants is a fundamental mistake that should result in the 2nd respondent being asked to serve the ex-parte applicants afresh.

I will however consider the 2nd respondent's application because I believe that the material already placed before the court will enable me reach a just decision in respect of the application.

Counsel for the 2nd respondent has argued that the ex-parte applicants' grounds of objection should be struck out in that the Civil Procedure Rules do not know an animal called grounds of objection. He cited the ruling of **Okwengu, J in ISAAC NJIRU VS. KAGAARI SOUTH FARMERS CO-OPERATIVE LIMITED , Civil Appeal No. 337 of 2007** in which she struck out the respondent's "grounds of affirmation" stating that:-

"In any case Order L Rule 16(1) of the Civil Procedure Rules provides for any respondent who wishes to oppose any motion or other application to file a replying affidavit or a statement of grounds of opposition. There is no provision for the filing of ground of affirmation the respondent "grounds of affirmation" is therefore incompetent and is accordingly struck out."

In the ex-parte applicants grounds of objection they argue that the orders sought are not obtainable under Order XVI Rule 5 as judicial review proceedings are special in their nature.

Judicial review proceedings are special in nature. They are neither civil or cirminal. As such the other orders of the Civil Procedure Rules are not applicable to judicial review proceedings. For this reason one can say the 2nd respondent's application is incompetent as submitted by the ex-parte applicants. The same argument can be extended to the 2nd respondent's claim that the Civil Procedure Rules are not alive to something known as "grounds of objection."

To me however the arguments by the advocates on both sides are mere technicalities. Let me state that the other provisions of Civil Procedure Rules cannot be cited in judicial review proceedings. If one removes the part which shows under which rules and law the 2nd respondent application is brought, one would still remain with a solid application which appeals to the inherent jurisdiction of the court.

On the other hand, whatever title the ex-parte applicants give to their grounds of opposition, one would clearly understand by reading the "grounds of objection" that the 2nd respondent's application is being opposed.

The objection raised by both sides should be overlooked so that the substance of the application can be considered. In saying so, I take refuge in the provision of Article 159(2)(d) of the Constitution which provides that :-

"justice shall be administrered without undue regard to proceedural technicalities."

I will now move to consider the application itself. The ex-parte applicants' main application was listed for hearing on 1st October, 2009. There is no evidence of proceedings on that day which clearly means that the file was not placed before a judge. The ex-parte applicants cannot be blamed for that mistake. Almost five months down the line the 2nd respondent brought this applciation. The file clearly shows that submissions had been filed in respect of the ex-parte applicants' main notice of motion dated 23rd October, 2007. That means what only remained was the highlighting of the submissions and taking of judgment date. Courts should not be quick to dismiss cases. Justice would be served better if a case is heard and a decision made on merits. Looking at the case before me I find that justice would better be served if the main notice of motion is heard and determined. As such, I dismiss the 2nd respondent's notice of motion dated 25th February, 2010. The costs will be in the cause. In order to speed up the finalization of this matter, I direct the Deputy Registrar to issue a mention notice for fixing of a hearing date for the substantive notice of motion dated 23rd October, 2007.

Dated and signed at Nairobi this 20th day of December, 2011.

W K KORIR
JUDGE