



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISC APPLI 371 OF 2007**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS FOR  
MANDAMUS, CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF SECTION 61 OF THE CO-OPERATIVE SOCIETIES ACT CAP.490  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF MURUKA FARMERS CO-OPERATIVE SOCIETY LIMITED**

**AND**

**IN THE MATTER OF CRIMINAL COURT PROCEEDINGS IN DMCC'S COURT CR. CASE  
NO. 195/2007 (KANDARA)**

**BETWEEN**

**JULIUS MWANIKI KIHAMBA..... 1<sup>ST</sup> APPLICANT**

**GEORGE ITONGU KIRAGU..... 2<sup>ND</sup> APPLICANT**

**(MURUKA FARMERS CO-OPERATIVE SOCIETY LIMITED)**

**APPLYING FOR AND ON BEHALF OF ABOUT 3,000 MEMBERS OF**

**VERSUS**

**COMMISSIONER OF CO-OPERATIVE DEVELOPMENT..1<sup>ST</sup> RESPONDENT**

**MANAGEMENT COMMITTEE, MURUKA FARMERS**

**CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> RESPONDENT**

**DISTRICT MAGISTRATE, KANDARA LAW COURT.....3<sup>RD</sup> RESPONDENT**

## JUDGMENT

What had come up for hearing before me was the Chamber Summons dated 12.4.07 filed by the Applicant, Julius Mwaniki Kihamba and George Itongu Kiragu who claimed to be applying on behalf of 3000 members of Muruka Farmers Co-operative Society Ltd. They sought leave of the court to commence Judicial Review Proceedings against the Commissioner of Co-operative Development, Management Committee, Muruka Farmers Co-operative Society Ltd and the District Magistrate Kandara Law Courts – 1<sup>st</sup> to 3<sup>rd</sup> Respondents. The Applicant sought leave to seek the following orders:-

- (1) Leave to apply for an order of mandamus directed against the 1<sup>st</sup> Respondent to compel him to order an inquiry into the management of Muruka Farmers Co-operative Society.
- (2) Leave to apply for an order of mandamus directed at the 1<sup>st</sup> Respondent to compel him to convene a special general meeting of Muruka Farmers Co-operative Society and keenly address the members grievances against its management committee.
- (3) Leave to apply for an order of certiorari to remove and bring to the High Court for purposes of quashing the meeting of Muruka Farmers Co-operative Society held on 8/3/07 at the Society's head office.
- (4) Leave to apply for an order of prohibition directed at the current management committee of the Co-operative Society prohibiting them from further conducting the business or adopting the implementation, the resolutions passed on the purported Annual General Meeting of the Co-operative Society held on 8/3/07 at the Society's Local Office.
- (5) Leave to apply for an order of prohibition to prohibit the 3<sup>rd</sup> Respondent from proceeding with Criminal Case 165/07 investigated by agents of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- (6) Leave granted, to operate as stay of the implementation of the resolutions passed at the purported Annual General Meeting of 8.3.07.
- (7) Costs be provided for.

When the Applicants came to court ex parte as is required by order 53 Civil Procedure Rules, the court directed that the Chamber Summons be served and heard inter partes: For one reason or the other, the application for leave has never been heard and when it came up for hearing inter partes on 16/7/09, the 1<sup>st</sup> Applicant who addressed the court told the court that the meeting had been convened, they had been acquitted of the offence that they faced in Kandara court, and all the prayers sought had been overtaken by events. What was left for determination was the issue of costs which they contend they should not be condemned to pay because they are not the cause of the delay. Counsel for the 1<sup>st</sup> Respondent insists that they be paid costs because the application was an abuse of the court process and they have come to court severally.

Mr. Nyakundi counsel for the 2<sup>nd</sup> Respondent also added his voice to the prayer for costs arguing that the Muruka Co-operative Society has over 3,000 members and there is no evidence that the Applicants acted for the members when they filed the Notice of Motion and that their capacity is questionable. That the application was malicious and it was an abuse of the court process. That the Applicants were aware that the Commissioner had conducted an enquiry and concluded in May 2007 and the application was made when the two cases were ongoing and that this application should have been terminated earlier in 2007. Mr. Meso counsel for the 3<sup>rd</sup> Respondent did not insist on getting the costs arguing that the Applicants acted in person, the prayers sought were overtaken by events and they were even acquitted of the charges they sought to prohibit due to the delay.

I have considered the prayer for costs. It is worth noting that this application was filed by the two applicants acting in their personal capacity. It is the court that directed that the matter be heard inter

partes. It is also not in dispute that the matter was not heard on merit but due to the delay, the prayers have been overtaken by events including the prayer that the Applicants sought to prohibit the Kandara court for trying them. They have been acquitted of the charges. They were acquitted under S.215 their case may have as well had some merit. The Applicants have generally attended this court without fail. However sometime due to non service or absence of the defence counsel, the matter has been adjourned. The delay in hearing of the matter that rendered the prayers spent is not entirely on the Applicants.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents claim that the proceedings were mischevious and have taken long but the application was not considered on merit nor can the delay be wholly attributed to the Applicants.

Ordinarily costs would follow the event. In this case, the prayers having been overtaken by events, it is not even clear what the event would have been and in exercise of this court's discretion and taking into account all the circumstances of this case, I order that each party bears their own costs.

It is so ordered.

Dated and Delivered this 24<sup>th</sup> day of July 2009

**R.P.V. WENDOH**

**JUDGE**

**Present**

Applicants in person - present

Mr. Mutai holding brief for Mr. Nyamichaba for 1<sup>st</sup> Respondent

Mr. Maina C.K. holding brief for Mr. Meso for 3<sup>rd</sup> Respondent and Mr. Meso

Muturi court clerk