



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION 115 OF 2005**

**IN THE MATTER OF AN APPLICATION BY NYAIGWA FARMERS CO-OPERATIVE SOCIETY LTD. TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

**AND**

**IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT (ACT NO.12 of 1997)**

**AND**

**IN THE MATTER OF CO-OPERATIVE SOCIETIES RULES 1998**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF ELECTION OF REPRESENTATIVES OF NYAIGWA FARMERS CO-OPERATIVE SOCIETY LTD.**

**BETWEEN**

**REPUBLIC .....**

**APPLICANT**

**AND**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT .....**

**... RESPONDENT**

**1. JAMES OMARIBA**

**OPANDE )**

**2. SAMWEL NTABO**

**)**

**3. YUVINALIS OBINO**

**)**

**4. SAMSON GESORA**

**)**

5. JAMES M. MOGAKA ) .....  
INTERESTED PARTY

)  
6. JEREMIAH MATARA

)  
7. SAMWEL MAKANA

)  
8. IBRAHIM NYAMBARE

)  
9. MAINA ONGERA

### RULING

By an application brought by way of notice of motion under **Order XVI rule 5(a) (c) and (d), Order LIII rule 1(4), 3(3)** of the **Civil Procedure Rules**, Section 76 of the **Co-operative Societies Act, 1997**, Sections 3, 3A and 63(e) of the **Civil Procedure Act**, the interested parties sought the following orders:

- (i) That the order of 12<sup>th</sup> July, 2005 that leave to apply for Judicial Review do operate as stay be lifted pending hearing determination of this application.
- (ii) That the orders of stay against the interested party herein be lifted unconditionally.
- (iii) That the suit be dismissed for want of prosecution.
- (iv) That costs be provided for.

When the said application came up for hearing on 12<sup>th</sup> March, 2008, Mr. Bosire for the applicant raised a preliminary objection as hereunder:

- (a) The application is incompetent and bad in law.
- (b) Judicial review follows special procedures and the only reliefs that can be granted are those set out under Order LIII, that is, certiorari, Prohibition and Mandamus.

He cited the case of **WELAMONDI VS THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA** [2002] 1 KLR 486.

In that judicial review matter, an objection was taken by one of the parties that the application was incompetent and that it invoked irrelevant provisions of the Civil Procedure Act and Rules. The court held that judicial review proceedings under Order LIII of the Civil Procedure Rules are special procedure and that it was incompetent to invoke the provisions of Section 3A and Order 1 rule 8 of the Civil Procedure Act and Rules and various Sections of the Constitution of Kenya.

Mr. Nyatundo for the interested parties responded by saying that the preliminary objection was totally unfounded.

He submitted that Order LIII was part of the Civil Procedure Rules and the application was therefore competent.

He added that under the provisions of **Order LIII rule 1(4)**, the court was empowered to vacate an order of stay if it became oppressive to any of the parties in the matter upon a suitable application being made. In his view, the case cited by Mr. Bosire was not relevant herein.

The genesis of Order LIII and the rules thereunder is **Section 9** of the **Law Reform Act** Cap 26 Laws of Kenya. The rules were first gazetted in legal notice No.299 at 1957 and in other subsequent legal notices as are shown in the marginal columns under the marginal notes of the various rules in that Order.

The Rules Committee created under Section 81 of the Civil Procedure Act has power to make rules to provide for any matters relating to the procedure of Civil Courts. My view is that the High Court, in dealing with matters of Certiorari, Prohibition and mandamus in the Civil Jurisdiction, follows Order LIII and other rules of procedure as may be applicable in the circumstances of the application before it. That, in my view, was the only reason why the Committee formulated the Rules under Order LIII together with all the other Civil Procedure Rules.

There are instances in which the court's inherent jurisdiction under Section 3A of the Civil Procedure Act can be invoked in Judicial review proceedings. For example, Order LIII rule 4(2) says that the court, on the hearing of the motion, may allow the statement to be amended and may allow further affidavits to be used. It does not talk about the notice of motion neither does it expressly state that the notice of motion cannot be amended. In **COASTAL AQUACULTURE LTD VS THE COMMISSIONER OF LANDS & ANOTHER** Mombasa High Court Misc. Civil Application No.55 of 1994, the court allowed amendment of a notice of motion. Later, the matter went before the Court of Appeal in **COMMISSIONER OF LANDS VS COASTAL AQUACULTURE LTD**, Civil Appeal No.252 of 1996. The court saw no fault with that procedure and upheld the orders made by Ringera J. (as he then was). The application to amend the notice of motion had been made pursuant to Section 3A of the Civil Procedure Act. If an issue arises in judicial review proceedings that is not expressly provided for under Order LIII, relevant provisions of the Civil Procedure Act or Rules may be called into aid.

If for instance, an applicant in judicial review proceedings wanted to effect service of court process upon a respondent outside the jurisdiction of the court, he will have to make an appropriate application under the relevant Civil Procedure Rules for leave to do so.

I do not therefore think that a general proposition can be made that only the provisions of Order LIII are applicable in interlocutory applications in matters commenced by way of judicial review. The nature of the application and the prayers sought must be considered, as they are the ones that will guide the court.

Consequently, I overrule the Preliminary Objection and award costs thereof to the interested parties.

**DATED, SIGNED and DELIVERED** at **KISII** this 16<sup>th</sup> Day of April 2008.

**D. MUSINGA**

**JUDGE.**

Delivered in open court in the presence of:

Mr. Bosire for the Respondent.

Mr. Otiso HB for Mr. Nyatundo for the Applicant.

**D. MUSINGA**

**JUDGE**