



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**

**MISC CIV APPLI 260 OF 2007**

**STEPHEN MWANGI MAINA.....APPLICANT**

**Versus**

**REGISTRAR OF SOCIETIES.....1<sup>ST</sup> RESPONDENT**

**TIMONTY OMATO.....2<sup>ND</sup> RESPONDENT**

**JUSTICE STEWART MADZAYO.....3<sup>RD</sup> RESPONDENT**

**ALICE C. KALYA.....4<sup>TH</sup> RESPONDENT**

**EARNEST KARAGANIA MATHIU.....5<sup>TH</sup> RESPONDENT**

**S.A. OORO.....6<sup>TH</sup> RESPONDENT**

**BATRAM MUTHOKA.....7<sup>TH</sup> RESPONDENT**

**RULING**

The ex parte Applicant, Stephen Mwangi Maina filed the Chamber Summons dated 19<sup>th</sup> March 2007 under Certificate of Urgency seeking the leave of the court to bring Judicial Review proceedings as follows:

- 2) That leave be and is hereby granted to the Applicants to file and serve on the Respondents an Application for Judicial Review for Orders of Mandamus and Prohibition as set out in the statement of facts and grounds accompanying this Application;
- 3) That the leave so granted do operate as stay of;
  - (i) Any action by Registrar of Societies to register the persons named as National Officials of the Society and in any way dealing or transacting with them as such,
    - (a) Mrs. Alice Kalya from Eldoret as Deputy Chairman
    - (b) Mr. Ernest Karagania Mathiu from Meru as Deputy Chairman;
    - (c) Hon. Justice Stewart Madzayol from Nairobi as chairman;

(d) Mr. S. A. Ooro from Kisumu as Deputy Chairman

Pending the hearing and determination of the substantive Application;

(ii) Any action by Registrar of Societies of registering the said purported amended Constitution of the Society as forwarded to her for registration on 22<sup>nd</sup> January 2007 pending the hearing and determination of the substantive Application;

(iii) Holding of the proposed Annual General Meeting of the Society scheduled for 23<sup>rd</sup> March 2007 pending the hearing and determination of the substantive Application;

(iv) Assumption into office of the named persons as the new officers of the Society pending determination of the substantive Application;

(v) Costs of the Application be provided for.

The Application was premised on the supporting affidavit of Stephen Mwangi Maina dated 19<sup>th</sup> March 2002, an affidavit verifying the facts dated 15<sup>th</sup> March 2007 and a statement of facts dated 15<sup>th</sup> March 2007. The Applicant also swore a supplementary affidavit on 21<sup>st</sup> March 2007 and Mr. Titus Njonjo swore another confirming the averments by the Applicant to be correct.

On 19<sup>th</sup> March 2007 when the Applicant's Counsel came to court, the court noted that there was no ex parte Applicant on the Application and asked the Applicant to amend the Chamber Summons to have the Applicant included. It is what is before the court for consideration. When Mr. Gatundu, Counsel for the Applicant appeared before the court, Mr. Kithi and the other Counsels also appeared on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents.

Since they had appeared the court allowed the matter to be argued inter parties though ordinarily such an application is heard ex parte.

The Applicant describes himself as an interested party/member of the Society. He challenges the election of officials of the Agricultural Society of Kenya (ASK), which took place on 23<sup>rd</sup> February 2007 whose election is supposed to be ratified by the Annual General Meeting which is scheduled to take place on 23<sup>rd</sup> March 2007 and which the Applicant wants stopped to pave way for the hearing of this Application.

It is also the contention of the Applicant that the agenda of the Annual General Meeting is to approve the election and put the officials into office yet the elections were conducted fraudulently, and were based on a purported amended Constitution that has not been ratified by the General meeting. He contends that the alleged amendment breached Article 36 of the Societies Constitution which provides that  $\frac{3}{4}$  majority of those at the General meeting ratify it.

Another contention by the Applicant is that since the ASK is a Society exempt from registration, because of the acrimony amongst the officials and members, the Registrar may waive that status of exemption.

Miss Mitema appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whereas the 4<sup>th</sup> to 7<sup>th</sup> Respondent were represented by Mr. Kithi. One Batram Muthoka, the Chief Executive Officer of the ASK swore an Affidavit in reply, opposing the Application and the Respondents also filed Notices of Preliminary Objections both dated 21<sup>st</sup> March 2007. Basically, the Respondents have challenged the competence of the Chamber Summons. The objections raised by Miss Mitema for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are as follows;

- 1) That the jurisdiction of the court is wrongly invoked.
- 2) The Applicant has failed to comply with the mandatory provisions of Order 53 R 1 (2) of the Civil

Procedure Rules that,

- (a) the statement should contain nothing more than the names and description of the Applicant, the relief sought and the grounds on which it is sought.
- (b) Evidence at leave stage ought to be by way of a verifying affidavit.
- 3) The pleadings laid before the court are incompetent and incredibly defective and should be struck out;
- 4) The Applicant has miserably failed to establish a prima facie case to warrant the orders sought;
- 5) The Application for Judicial Review for cancellation or suspension of the certificate of exemption issued in 1965 is statute barred;
- 6) The Agricultural Society of Kenya is not a public body and hence not amenable to the supervisory jurisdiction of the High Court.

In addition to the above Mr. Kithi filed other submissions and I refer to those not raised in the Notice of objection filed by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents namely –

- 2) That the Respondents are not public officers, against whom judicial review orders can issue;
- 4) That the Applicant has not shown sufficient interest in the matter or locus standi.

Even though the Applicant's Counsel did not bring this out in his submissions, the test as to whether leave will be granted is whether there is an arguable case made by the Applicant, that the relief might be granted after the hearing of the substantive Notice of Motion. This was the holding in the case of **NJUGUNA V MINISTER OF AGRICULTURE (2000) 1 EA 1284** where the Court of Appeal held:

“The test as to whether leave should be granted to an Applicant for Judicial Review is whether, without examining the matter in depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive Application.”

I do appreciate that the Applicant's Counsel did not go into too much detail in attempting to demonstrate that the Applicant has an arguable case though the Respondents tended to do just that. The Respondent's Counsel only needed to demonstrate that there is no arguable case or point out the defects in the Application.

I will first deal with the points of objection raised. It was Mr. Kithi's contention that the Chamber Summons Application is incompetent because the proper Applicant should have been the Republic. That was an erroneous contention. In Judicial Review the 1<sup>st</sup> Application for leave will normally be by way of Chamber Summons and Order 53 R 1 (2) Civil Procedure Rules clearly stipulates this. At that stage, it is the ex parte Applicant who is named as the Applicant. It is not until the Notice of Motion that the Republic comes in as the Applicant. The reasoning being that the prerogative orders were issued in the name of the crown and when Kenya became a Republic in 1964, they were then issued in the name of the Republic. This is established practice and set out in case law the most celebrated one being **FARMERS BUS SERVICE & OTHERS V THE TRANSPORT LICENSING APPEALS TRIBUNAL 1959 EA 779**. In that case the court set out the format of both the Chamber Summons Application for leave and the Notice of Motion filed after leave is granted. It is the Notice of Motion which is brought in the name of the Republic.

In the case of **JOTHAM MULATI WELAMONDI V THE CHAIRMAN ELECTORAL COMMISSION OF KENYA HMISC APPLICATION 81/02**, Justice Ringera adopted the holding in **FARMERS BUS** and also set out the format of Judicial Review Applications by Chamber Summons at leave stage and substantive Motion stage when it is brought in the name of the Republic.

In the case of **HENRY AMWAYI NDETE V CHAIRMAN LAND DISPUTES TRIBUNAL CIVIL MISC APPLICATION 79/02**, Justice Ringera was dealing with the Notice of Motion which was alleged to be defective for failure to have been brought in the name of the Republic. The respondents submissions on who should be the Applicant in this Application are misleading and erroneous. That objection cannot be sustained.

It was Mr. Kithi's submission that the Applicant had failed to serve a notice to the Registrar as per provisions of Order 53 Rule 1 (3) Civil Procedure Rules. It is couched in mandatory terms unless the court extends time for serving the notice. Again that submission was not correct because on record is a Notice to the Registrar filed in court on 15<sup>th</sup> March 2007. What is not clear is whether it was served on the Registrar as there is no stamp of the Registrar or an affidavit confirming service. However, the fact is that the same was lodged before the filing of this Application.

Miss Mitema submitted that the Application is defective because the decision that is challenged has not been lodged. I find that submission to be premature because under Order 53 Rule 7 (1) Civil Procedure Rules, the decision or order that is subject to be quashed by an order of certiorari can be lodged at any time before the hearing of the Motion and it has to be verified by Affidavit. If for one reason or another the decision cannot be lodged, the Applicant must give a satisfactory explanation to the court as to why it cannot be lodged. It should also be made clear that the decision or order under challenge need to be lodged only when it is sought to be quashed by an order of certiorari it need not be lodged when one only seeks mandamus and prohibition. There is no prayer for certiorari in this Application.

Objection was raised on the statement of facts and the verifying affidavit filed by the Applicant. Miss Mitema submitted that the statement of facts offends Order 53 Rule 1 (2) Civil Procedure Rules. That the Applicant has set out the facts in the Statement whereas the above rules provide what should be contained therein. Rule 1 (2) provides that the statement will set out the name and description of the Applicant, the relief sought, and grounds on which it is sought. In this case the Applicant has set out lengthy facts in the statement and Mr. Gatundu maintained that the use of the very name "statement of facts" means facts should be contained therein. That is not the correct position.

The case of **COMMISSIONER OF KENYA REVENUE AUTHORITY V SILVANO ONEMA OWAKI CA 45/2001** confirmed the position that it is the affidavit which is of evidential value but not the statement. The statement is indeed defective, but again that Application is made prematurely. This is because under Order 53 Rule 4(2) Civil Procedure Rules, the Applicant can apply to amend the Statement at any time before the hearing of the mention after he gives notice of his intention to do so. That defect would not be a ground for the court to strike out the statement. Besides, the facts set out in the statement are reproduced in the supporting affidavit and the defect in the statement would not be a ground to strike out the whole Application.

The Applicant filed a verifying affidavit of about 3 paragraphs. It is true that it is of no evidential value but that is not the only affidavit that the Applicant has filed. There is another affidavit filed in support of the Application dated 19<sup>th</sup> March 2007 filed with the Chamber Summons.

Order 53 Rule 1 (2) allows an Applicant to file Affidavits verifying the facts. He is not restricted to filing one affidavit. The verifying Affidavit and supporting affidavit are properly on record and both form the facts upon which the Application is predicted.

No doubt the ASK is a Society governed by the Societies Act. The question is whether it can be subject to Judicial Review. Judicial Review is a public law remedy and will normally issue against public officers performing statutory duties or against tribunals. It was the Respondents contention that Judicial Review orders cannot lie against the Respondents. Mr. Gatundu submitted that that is not an issue to be canvassed at this stage as a preliminary point. I do agree that that is a substantive issue to be canvassed at Notice of Motion stage and the court to decide whether or not ASK performs public duties. Sometimes courts have extended Application of Judicial Review jurisdiction to private bodies which perform public law functions or bodies whose functions have public law consequences.

In the case of **R V PANEL ON TAKE OVERS AND MERGERS ex parte DATAFIN PLC (1987) QB 815** Lloyd CJ held;

**I do not agree that the source of power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually be decisive. If the source of power is statute, or subordinate legislation under a statute then clearly the body in question will be subject to Judicial Review. If, at the other end of the scale – the source of power is contractual, as in the case of private arbitration then clearly the arbitrator is not subject to judicial review. See R V NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS (DISPUTES COMMITTEE) ex parte NEATE (1953) 1 QB 704. But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions or if the exercise of its functions have public law consequences, then that may as Counsel for the Applicants submitted, be sufficient to bring the body within the reach of Judicial Review.”**

It is at the hearing of the Notice of Motion that it can be established whether the ASK exercises public law functions which have public law consequences in order to be subject to Judicial Review or not. That objection is made prematurely.

I have looked at the prayers sought both in the Chamber Summons and the Statement. In the Chamber Summons, the Applicant mashed the 2 prayers of prohibition and mandamus in one prayer yet each has to be specifically prayed for because it is sought on different and specific grounds and for different functions. Coming to the statement, the reliefs sought are at paragraphs 25 to 34. I need to set them out specifically;

Para(27) – That this Honourable court be pleased to appoint or cause to be appointed by the Registrar of Societies a caretaker committee or persons to conduct the affairs of the company with further orders of this court;

Para 28) – That the 4<sup>th</sup> Respondent Hon. Justice Stewart Madzayo, be restrained from running for any National or branch seat as an elected official of the Society while sitting as a judge;

Para 29) – That the Hon. Court do restrain the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents and the entire Council from approving and effecting any amendments to the current registered Constitution of the Society otherwise than as per the said Constitution that is, through and at the Annual General Meeting by the members of the Society;

Para 30) – That this Honourable court be pleased to issue such or further orders in relation to the Annual General Meeting scheduled for 23<sup>rd</sup> March 2007 and the proposed amended Constitution presented to the Registrar of the Society for registration on 22<sup>nd</sup> January 2007;

Para 31) – That the holding of the proposed Annual General Meeting scheduled for 23<sup>rd</sup> March 2007 be stopped forthwith;

32) – That the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents be restrained from conducting the affairs of the Society and taking charge of and managing the properties of the Society and this Honourable court be pleased to appoint or cause to be appointed in place thereof by the Registrar of Societies a caretaker committee or such other qualified person(s) to take charge of the properties and conduct the affairs of the Society;

Para 33) – That the said caretaker committee to manage the affairs of the Society for at least one year or other period as the Hon. court may be pleased to order during which period proper elections in the branches and nation should be held;

Para 34)- That the court orders the Registrar of Societies to review and suspend or cancel the

certificate of exemption issued to the Society in 1965 and thus require it to comply to all provisions of the Act.

All the prayers 27 to 34 do not fall under the purview of Judicial Review. Under S. 8 of the Law Reform Act, which donates jurisdiction to the court to grant Judicial Review orders, only the order of mandamus, prohibition and certiorari can be granted in Judicial Review. The court cannot make injunctive or declaratory orders or give directions as prayed by the Applicants. Those are prayers to be sought in the ordinary Civil Courts. The Prayer at paragraph 34 seems to be seeking the quashing of the certificate of exemption that was issued in 1965 but there is no specific prayer for an order of certiorari that has been made. In any event leave can only be granted to apply for certiorari to quash such order if the Application is made within 6 months of the making of the decision as per provision of Order 53 Rule 2 Civil Procedure Rules.

That leaves the court with only two prayers at Paragraph 25 and 26 where orders of prohibition are sought. As regards the prayer at paragraph 26 of the statement, an order of prohibition may not serve any purpose if granted because the officials whom the Registrar is being prohibited from registering have already been elected. Without an order of certiorari quashing the elections, such an order would have been made in vain.

In my view, it is only the prayer at paragraph 26 of the statement that leave may have granted if indeed the Society's Constitution has been amended without following the right procedure and that raises an arguable case.

Would the Applicants be entitled to an order of stay and on what basis? The Applicant seems to be alone ranger amongst 6000 members of the ASK. What is coming up on 23<sup>rd</sup> March 2007 is an Annual General Meeting which is an event that brings all the membership together. Public interest would dictate that the wishes of the majority prevail over the interests of the lone Applicant and no stay would be granted in the circumstances even if stay was deserved.

Is the Chamber Summons seeking leave competent? I have considered the authorities presented to the court and it seems there is no provision for amendment of a Chamber Summons seeking leave. The option that the Applicant had was to withdraw the defective Application, the court having noted it to have been defective, and file a proper application. The amended Chamber Summons is incompetent and cannot be a basis for granting leave to commence Judicial Review proceedings.

For the many observations made above, this Application cannot be sustained, it is hereby struck out with each party bearing its own costs.

**Dated and delivered this 23<sup>rd</sup> day of March, 2007.**

**R.P.V. WENDOH**

**JUDGE**

**Present**

Mr. Gatundu – Applicant

Mr. Kithi – 4-7<sup>th</sup> Respondents

Ms Mitema – 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Daniel: Court Clerk