



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPL 102 OF 2006**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE REGISTRAR GENERAL MRS. B.W. GACHEGU .....RESPONDENT**

**AND**

- 1. JOSEPH NGETICH**
- 2. CHRIS BICHAGE**
- 3. E.M. SABWA**
- 4. BEN MUREITHI**
- 5. JOHN GARDNER**
- 6. JACINTA MAGANDA**
- 7. JUSTIN NJIRU**
- 8. P.J. SHAH ..... INTERESTED PARTIES**

**EX-PARTE APPLICANTS:-**

- 1. PETER MAMBEMBE**
- 2. VALENTINE MWAKAMBA**
- 3. VINCENT MWACHIRO**

**R U L I N G**

The exparte applicants herein, Peter Mambembe, Valentine Mwakamba and Vincent Mwachiro took out a Motion dated 3<sup>rd</sup> February 2006, the subject matter of this ruling. The Motion was filed pursuant to the leave granted by this court on the 1<sup>st</sup> day of February 2006 and is premised on the Provisions of order LIII rule 3(1), 3(2) and 4(1) of the Civil Procedure Rules.

In that motion, the exparte applicants sought for the following orders:

(i) *An order of Mandamus to compel the Registrar of Societies, Mrs. B.W. Gachegu, to register the officials of KIFWA as per the decision made by F.S.M. Ng'ang'a, Deputy Registrar General of Societies, on the 11<sup>th</sup> day of January, 2006 i.e.*

(a) *Joseph Ngetich - Chairman*

(b) *Peter Mambembe - Nat. V/Chairman*

(c) *E.M. Sabwa - Nat. Secretary*

(d) *John Gardner - Treasurer*

(e) *Valentine Mkamba - Exec. Member*

(f) *Vincent Mwachiro - Exec. Member*

(ii) *An order of Certiorari to bring into this court the decision of the Respondent dated 19<sup>th</sup> January 2006 and to have them quashed.*

The background of this matter can easily be found in the supporting

Affidavit sworn by Peter Mambembe and the statement of facts. The whole saga started when the Commissioner of Customs and Excise wrote to the executive Chairman, Association of Clearing, Warehousing and Freight Forwarders of Kenya (A.C.W.F.F.K) in a letter dated 25<sup>th</sup> June 2004 in which he expressed the view that A.C.W.F.F.K and other clearing and forwarding Associations should merge to make it easy for Kenya Revenue Authority to deal with one body in clearing and Forwarding Industry in the anticipated computerization programme.

Pursuant to the Kenya Revenue authority's suggestion, ACWFFK and Kenya International Freight Warehousing Association (KIFWA) entered into a memorandum of agreement dated 15<sup>th</sup> July 2004 to merge on the following terms inter alia:

*“ (i) KIFWA shall be the umbrella body which will be constituted of officials from both KIFWA and ACWFFK drawn from both associations.*

*(ii) That at the National level National Vice-Chairman and two National Committee members shall come from ACWFFK.*

*(iii) That at the branch level, membership in the*

*management committee will be decided by the*

*respective committees of the branch.*

*(iv) For all meetings with KRA, K.P.A and anybody,*

*KIFWA shall hold a briefing meeting prior, to report*

*representation to chart the way forward.*

*(v) .....*

*(vi) .....*

*(vii) .....*

(viii) .....

(ix) .....

(x) *That after its members have joined KIFWA, the ACWFFK may dispose of its assets and liabilities as provided in ACWFFK's constitution."*

Before the terms of the agreement were actualized the original KIFWA secretly and without informing ACWFFK proceeded to hold elections amongst themselves and purported to present names to the Respondent as elected officials of the new KIFWA. The exparte applicants together with the members of ACWFFK felt cheated and filed an action in this court i.e. Mombasa H.C.C.C. NO. 117 of 2005 and successfully obtained an order of injunction barring the respondent from registering the pretended list as the officials of KIFWA pending the hearing and determination of the suit. The order however did not bar the respondent from considering an interim list presented.

On the 11<sup>th</sup> day of January 2006, the Deputy Registrar General of Societies, F.S.M. Ng'ang'a summoned the combatants and after hearing the representation from both sides i.e. from KIFWA and ACWFFK came to the conclusion that the interim officials agreed on 23<sup>rd</sup> February 2005 namely:

Joseph Ngetich - Ag. Chairman

Peter Mambembe - Ag. V/chairman

E.M. Sabwa - Ag. National Secretary

John Gardner - Ag. Treasurer

Valentine Mwakamba - Executive Member

Vincent Mwachiro - Executive Member

be registered as interim officials of the new KIFWA with effect from 20<sup>th</sup> January 2006 at 2.30 p.m. unless the Registrar was served with other orders.

In a letter dated 19<sup>th</sup> January 2006, Mrs. B. W. Gachegu, the Registrar General of Societies, the Respondent herein, purported to overrule the decision of F.S.M. Ng'ang'a on the basis of an objection filed by Mr. Gakuo advocate acting for KIFWA on the instructions of Gakuo & Co. Advocates. In that letter the Respondent expressed her decision in the last two paragraphs as follows:-

*"I would wish to suggest that all the officials from both Associations recognized by this office, i.e. those officials on records before the merger process began, work together towards commencing the general meeting wherein fresh elections will be held.*

*In the meantime, the **status quo** shall remain and I shall pend the registration of the interim officials."*

Being aggrieved by the respondent's decision the exparte applicants have urged this court to review the Respondent's decision on the ground that the Respondent had no jurisdiction to overturn the decision of

her deputy and or that even if she had the jurisdiction to do so she did not hear the exparte applicants hence she breached the rules of natural justice. It was also argued that the decision was irrational and unreasonable. This court was further urged to make an order to compel the Respondent by an order of Mandamus in line with the ruling of the Honourable Mr. Justice Mwera.

Mr. Onyango Learned State Counsel for the Respondent opted to stand on the mid-ground in this dispute. He was of the view that the letter dated 19.1.2006 written by the Respondent gave the way forward in the dispute and that the feuding parties should discuss the matter and settle it out of court. Mr. Onyango was of the view that the Respondent should be given time to have the matter amicably sorted out administratively.

At the end of the arguments the following issues arose for determination.

- (i) Whether or not the Respondent had jurisdiction to overturn the decision of her deputy.
- (ii) Whether or not the Respondent acted reasonably in the circumstances of this matter
- (iii) Whether or not the Respondent breached the rules of natural justice
- (iv) Whether or not the exparte applicants are entitled to an order of Mandamus in the matter.

Let me now address the above issues in their order.

On the first issue i.e. as to whether or not the Respondent had jurisdiction to overturn the decision of her deputy. Let me sound repetitive over the facts in this regard. On the 11<sup>th</sup> day of January 2006, F.S.M Ng'ang'a a deputy Registrar General of Societies decided upon hearing both representatives of KIFWA and ACWFFK that the following person namely:

Joseph Ng'etich, Peter Mambembe, E.W. Sabwa, John Gardner, Valentine Mwakamba and Vincent Mwachiro be registered as interim officials of the new KIFWA with effect from 20<sup>th</sup> January 2006 unless the Registrar was served with an order before then. It is not denied that Mrs. B.W. Gachegu, the Registrar General made another decision in which she urged all the officials who were serving in KIFWA and ACWFFK before the merger to work together until that time elections were held. She further halted the registration of the interim officials proposed by the Deputy Registrar General. It is the submission of Mr. Gikandi advocate for the exparte applicants that the Registrar General (Respondent) acted without jurisdiction in the matter. The definition of the 'registrar' is given under S.2(1) of the Societies Act as follows:

*“The ‘registrar’ means the registrar of*

*societies appointed under section 8 of this*

*Act, and includes a person appointed under that Section to be a Deputy*

*or Assistant Registrar.”*

The import of the definition is that the registrar general, the deputy

Registrar general and or the assistant registrar general of societies are officers of concurrent jurisdiction. In other words no one of the holders of any of the three offices can overturn the decision of the other. In this case the registrar general (Respondent) purported to overrule the decision of a deputy registrar. The dispute, which was before the registrar, clearly falls within the provisions of Section 18(1) of the Societies Act and therefore the Registrar had the statutory duty to hear and determine the dispute. It is trite law that only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with. In this matter I hold the view that the Respondent acted without jurisdiction when she

purported to overturn the decision of the deputy registrar.

The second issue is whether or not the Respondent acted reasonably in

the circumstances of this case. A decision of a person or body exercising a statutory discretion will be quashed for irrationality or for being unreasonable. The exercise of discretionary powers like that exercised by the Registrar of Societies under Section 18(1) of the Societies Act Chapter 108 Laws of Kenya involving a large element of policy will only be quashed on the basis of manifest unreasonableness in exceptional cases. It is incumbent upon such bodies exercising administrative authority to give reasons for administrative actions and it is mandatory that such reasons be reasonable in the circumstances of the case. The standard of unreasonableness is described by Lord Greene M.R. in **Associated Picture Houses Ltd. -vs- Wednesbury Corporation [1947] 2 ALL E.R. P 680 – 683** as:

*“It is that which is so absurd that no sensible person could ever dream that it lay within the powers of the authority”.*

Lord Denning said in the case of the **Secretary of State for Education and Science -vs- Tameside Metropolitan Borough Council [1977] A.C 1014**

*“It is that which is so wrong that no reasonable person could take that view”.*

Applying the definition and scope of reasonableness vis a vis the decision by the respondent, it is clear that the Respondent acted reasonably though without jurisdiction. The respondent gave very sound reasons to support her decision but she unfortunately failed to appreciate that the matter had been decided by her deputy hence she was sort of rendered *functus officio*.

The third issue is in respect of whether or not the Respondent breached the rules of natural justice while making her decision of 19<sup>th</sup> January 2006. Again, Section 18(1) of the Societies Act requires the registrar to hear the warring parties before making a decision. It is evident from the letter of the Respondent dated 19<sup>th</sup> January 2006 that the Respondent acted on the basis of an objection dated 13<sup>th</sup> January 2006 by the firm of Muturi Gakuo & Co. Advocates.

The letter of the respondent of 19<sup>th</sup> January 2006 indicates that the respondent acted on the basis of an objection dated 13<sup>th</sup> January 2006 lodged by the firm of Muturi Gakuo & Co. Advocates on behalf of KIFWA. The objection is expressed in paragraphs 1 and 2 of the aforesaid letter as follows:

*“I have received an objection letter dated 13<sup>th</sup> January 2006 from Muturi Gakuo & Co. Advocates, acting for K.I.F.W.A.*

*Mr. Gakuo has raised an objection against the decision made by Deputy Registrar General, Mr. F.S.M. Ng’ang’a on 11<sup>th</sup> January 2006, wherein he stated that registration of the interim officials agreed on 23<sup>rd</sup> February 2005 will be done on 20<sup>th</sup> January 2006 at 2 .30 p.m. unless the Registrar is served with orders.”*

The Respondent therefore acted on an objection filed by representatives of K.I.F.W.A without according a similar treatment to the representatives of A.C.W.F.F.K. I am satisfied that the representatives of ACWFFK were not heard by the Respondent before the decision of 19<sup>th</sup> January 2006 was made. She therefore failed to meet the simplest tenets of natural justice. It is important to note that what is required of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. The result of a failure to comply with the rules of natural justice is that such a decision is subject to review and will obviously be quashed by an order of certiorari.

The final issue brought to the attention of this court is whether or not an order of mandamus should issue. This court has been urged to issue an order of mandamus to compel the Respondent to register the officials of new K.I.F.W.A as per the decision of Mr. F.S.M. Ng'ang'a dated 11<sup>th</sup> January 2006. The scope and efficacy of an order of mandamus was extensively dealt with by the Court of Appeal in the case of **Kenya National Examination Council =vs= Republic exparte Geoffrey Gathenji Njoroge and 8 others (Unreported) C.A. No. 266 of 1996.** The Court of Appeal said:

*“What do these principles mean? They mean that an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.*

.....

*To conclude this aspect of the matter, an order of Mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.”*

Applying these principles to the current proceeding can mandamus issue in the circumstances of this matter? The relevant part of the decision of F.S.M. Ng'ang'a, Deputy Registrar General is reproduced as follows:

*“I therefore feel inclined to give effect to the spirit of the ruling as issued by Justice Mwera on 12<sup>th</sup> October 2005 and come to the conclusion that the interim officials agreed on 23<sup>rd</sup> February 2005 be registered as interim officials. These officials are:-*

1. Joseph Ngetich .....Ag. Chairman
2. Peter Mambembe .....Ag. V/Chairman
3. E.M. Sabwa .....Ag. National Sec.
4. John Gardener .....Ag. Treasurer
5. Valentine Mwakamba .....Executive Member
6. Vincent Mwachiro.....Executive Member

*This registration should be done on the 20<sup>th</sup> January*

*2006 unless the Registrar is served with other orders.”*

The record is very clear that the decision of the deputy Registrar would be given effect unless there was an order served upon the registrar to the contrary. There is no evidence that such an order was served. Instead of the Respondent giving effect to the decision of 11<sup>th</sup> January 2006 she engaged herself in reconsidering the dispute afresh. I have already stated that she had no jurisdiction to do so. Having reached at a decision, it was the duty of the Respondent to perform her duty by registering the interim officials as required by Sections 17,18 and 25 of the Societies Act. The respondent has plainly and intentionally refused to perform her duty to give effect to her decision hence mandamus will issue.

The upshot of the whole matter is that the motion dated 3<sup>rd</sup> February 2006 is allowed in terms of prayers 2 and 3. The exparte applicants shall have costs of the motion paid by the Respondent.

Dated and delivered this 17th day of February 2006.

J.K. SERGON

J U D G E

Read in the presence of :

Mr. Gikandi for the exparte applicants and

No Appearance for Onyango for the Respondent.