



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**MISCELLANEOUS APPLICATION 32 OF 2004**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**COMMISSIONER OF CO-OPERATIVE DEVELOPMENT & ANOTHER ..... RESPONDENT**

**EX- PARTE GUSII FARMERS RURAL SACCO LTD**

**RULING**

During the Easter vacation when this Court was not sitting this file criscrossed from Kisii to Nakuru High Court, then to Nairobi High Court and then back to Kisii. The saga revolves around the management of Gusii Farmers Rural Sacco the applicant. Apparently the Commissioner of Cooperatives who is the first respondent had instituted an inquiry into the affairs of the society. After receiving the report, he on 25th March 2004 wrote to the Provincial Co-operative Officer Nyanza province asking him to call a meeting of all members to deliberate the report. This letter triggered the present suit.

On 1/4/04 the applicant appeared before my brother Justice D K Musinga in Nakuru under High Court vacation rules and applied for leave to institute proceedings for judicial review in the nature of *certiorari* to quash the 1<sup>st</sup> respondent's decision vide letter of 25th March 2004. The Court granted the leave and further ordered the leave to operate as a stay. The effect was that the Commissioner of Co-operatives could not call a meeting of all the members of the society as he had instructed the 2nd respondent to do.

Apparently the 2nd respondent had already called for a meeting on 21st of April 2004. If the order of stay remained in force it meant that the said meeting could not take place.

On 15/4/04 Clement Moreka, Peter Nyangena and Dickson Okindo filed a notice of motion seeking to be allowed to participate in the proceedings as interested parties and further seeking the setting aside of the order of stay granted when leave was given. The file was placed before my brother Justice Kamau in Nairobi who granted the two orders after hearing the counsel of the interested parties and counsel for the intended respondent. The meeting of 21/4/04 therefore took place and a date of 27th April set for election. The applicant thereafter brought this application seeking the Court to review the orders of Justice Kamau and restore the order of stay granted by Hon Justice Musinga. It too sought to stay the elections scheduled for 27th April. The application for review could not go back to Hon Justice Kamau as by the time it was filed this Court had resumed.

Mr Oguttu canvassed the case of the applicants at length. He submitted that there was an apparent error on record on the order given on 16th April 2004. It was submitted that the Hon Judge proceeded to hear the respondent in the absence of the applicant and gave substantive orders.

Applicants were condemned unheard, which is against the Rules of Natural Justice.

Secondly it was submitted that the judge was wrong to give a hearing to the alleged interested parties at that stage. Judicial review starts when the substantive motion had been filed. It is only then the other parties should be heard. The so called interested parties were strangers it was submitted.

The court was further told that the judge disturbed an order issued by a co-ordinate court. The judge who issued the stay order should be the one to hear the order to lift it.

Mr Orina appeared for the 1st and 2nd respondents while Mr Kerosi appeared for the interested parties. Both urged the Court to dismiss the application and submitted that the order of 16th April 2004 was properly given, as the applicants had not disclosed material facts when they applied for stay before Justice Musinga. The order was therefore given on merit after disclosure of all material facts.

The Court was told that rule 25(4) of the Co-operative Societies Rules gives the Registrar of Societies power to call a general meeting of a society at any time. He does not need to give any notice. Thus the 1st and 2<sup>nd</sup> respondents had powers to call for the meeting complained of without giving 15 days notice.

Further it was submitted that the interested parties had a right to proceed *ex parte* since the applicants too had proceeded *ex parte* in obtaining the leave and stay.

Lastly the Court was told that the application had been overtaken by events as the meeting proceeded on as scheduled on 21/4/04.

As pointed out earlier the issue was compounded by the fact that it came up during vacation when this Court was not sitting. That is why the file was first handled in Nakuru and then in Nairobi.

I first deal with the issue whether the interested 3rd parties should have been heard at that stage. Indeed in *Rep -v- Communication Commission of Kenya* 2001 EA 1999 the Court of Appeal held that judicial review proceedings under order 53 CPR starts when the substantive motion had been filed. In High Court Misc Applic No1110 of 2002 referred to the parties made their application after the substantive motion had been filed.

In this case the substantive motion had not been filed. However I believe that though the parties would not be heard on the issue of judicial review *per se* they still can be heard on the issue of stay if it is granted simultaneously with leave to institute judicial review. Granting of leave to institute judicial review is one thing and granting stay is another thing altogether. Whereas issues relating to the former should be dealt with after the substantive motion had been filed parties interested in the matter can canvass the issue of stay even before the substantive motion had been filed. This is only logical since if a party feels that he will be affected by the order of stay he may not have to wait for 21 days if he feels that by so doing his rights will be infringed. I therefore find that there was nothing wrong for Hon Justice Kamau to rule that the 3 interested parties could be heard.

The other issue is the issue of proceeding in the absence of the applicant. First I find it cheeky for the respondent to submit that since the applicant obtained leave and stay *ex parte*, they too were entitled to proceed *ex parte* – “tit for tat” as it is. Order 53 rule 1(2) is very candid. An application for leave “shall be made *ex-parte* to a judge in chambers .....”. That requirement is mandatory as the word “shall” is used. The applicant was therefore following the law.

Sub section 4 of the same rule provides that the Court can order the leave to operate as a stay. The applicant therefore did not obtain the orders secretly and he could not serve the respondent even if he wanted to. The Court would not have given the respondents or the interested parties an audience even if they appeared on that day.

On the other hand the interested parties’ application was under order 1 rule 10 and order 53 rules 4 & 6 CPR and s 3A CPA. Ordinarily such application should be served and heard *inter partes*. However when

a matter is extremely urgent a matter can proceed *ex parte*. The application dated 15/4/04 was certified urgent by the Deputy Registrar. However as submitted it is obvious that the interested parties could have served the applicants. Between 15th April and 21st April 2004 when the meeting was to be held was six clear days. The applicant had already nominated a counsel to appear for him. That counsel is domiciled in Kisii where the counsel for the 3rd party too is domiciled. It would not have been difficult to serve him. However what I find even more strange is that the application did not proceed *ex parte perse*. The application was brought by the interested parties and not by the 1st or 2nd respondents – the Commissioner of Co-operative and the Provincial Co-operative Officer respectively. The application shows that it was to be served upon the 1st and 2<sup>nd</sup> respondent and the applicant. By 15th April 2004 the 1st and 2nd respondent had not entered appearance. They did so on 16/4/04. Strangely the interested party were able to serve them in Nairobi and Mr Orina duly appeared for the respondent and promptly concurred with the submissions of the interested parties. The Court was not told why the applicants chose to serve the respondent and fail to serve the applicants. Rules of fair play must be followed. There was ample time to serve the applicant but this was not done.

The Court went ahead and gave substantive orders. One notes that there was no date ever fixed for *inter partes* hearing. As held in the case of *Mutiso –vs Mutiso* it is a fundamental principle of justice that before an order or a decision is made parties should be heard. This principle was floated. As I said it is clear that there was enough time to hear all the parties. The meeting was not going to be held the next day. The interested parties chose not to serve the applicants and I do concur with the submissions that this was an error on the face of record. This was more important in that the applicants had already been given stay by a court of co-ordinate jurisdiction. It was important that before what the Court gave them was taken away they should have been heard. On this point alone the application will succeed.

There was the other issue, that the Registrar of Co-operative Societies have the right to call a meeting at any time. There is no dispute to that fact. Rule 25(4) is very clear on that issue. The Registrar has powers even now to call for a meeting. However the complaint in this matter is different. It is complained that it is the Commissioner of Co-operatives who called the meeting and not the Registrar. The Commissioner of Co-operative is quite different from the Registrar though both offices are created by the same Act. The letter which led to the meeting of 21/4/04 is dated 25<sup>th</sup> March 2004 signed by Amb P K Mathanjuki, Commissioner of Cooperative Development. It is therefore clear that the meeting was not prompted and called by the Registrar. The Commissioner has no powers under the Act or the rules to call for a meeting of a society. This is the role of the Registrar of the Societies. The commissioner may be higher in rank but Parliament did not see it fit to bestow him with such powers. They were donated to his junior – the Registrar. He cannot usurp those powers.

The applicants' complaint is therefore genuine. That there is an inquiry report touching a committee member is not an issue in this application. The Registrar should know what steps to take within his powers. The Commissioner cannot float the law just because there is an inquiry report. The old adage that two wrongs don't make a right still stands.

The last submission was that the applicants had not exhausted their rights under the Co-operatives Act. In the case referred above of *Rep –vs- CCK* the Court held that provisions of s 8 & 9 of the Law Reform Act which vest powers to High Court to issue orders under order 53 CPR are not subject to Acts of Parliament. It is therefore not tenable to submit that the applicants should have exhausted the machinery provided for in the Act before seeking for judicial review.

The upshot of the above is that I find the application by the applicants has merit and the same is allowed. The order made on 16th April 2004 by my brother Justice Kamau is set aside and the order of stay granted by Justice Musinga on 1st April 2004 is reinstated until the substantive motion is heard. What that means is that status quo will revert back as it were on 1/ 4/04 when that order was granted. Of course this order does not bar the Registrar or the committee from proceeding under rule 25 if they deem so fit.

Costs will be in the cause.

**Dated and Delivered at Kisii this 6th day of May 2004.**

**KABURU BAUNI**

**JUDGE**