



Githongo Coffee Factory through Nelson Njuguna Njoroge & 4 others v Commissioner for Cooperative Development & another (Judicial Review Miscellaneous Application E014 of 2022) [2023] KEHC 17632 (KLR) (Judicial Review) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17632 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E014 OF 2022
JM CHIGITI, J
MAY 19, 2023

BETWEEN

GITHONGO COFFEE FACTORY THROUGH NELSON NJUGUNA NJOROGE, ALEX WANYOIKE NGUGI, SAMUEL NDUNGU NGANGA, STEPHEN BORO KERE & CATHERINE NUTA WAWERU APPLICANT

AND

THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT 1ST RESPONDENT

KOMOTHAI COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED 2ND RESPONDENT

RULING

1. The applicants' moved this court by way of the substantive notice of motion application dated February 24, 2022 seeking the following orders:
 - i. An order of certiorari for purposes of quashing the administrative action of the 1st Respondent, whether by itself, its servants, agents, officers, successors and/or assigns to quash the administrative action of February/March 2021 being the inquiry itself and the Inquiry report of February/March 2021 as contained in the said Inquiry Report with regards to the Applicants and any decision/resolution made pursuant thereto.
 - ii. An order of prohibition directed to the 1st respondent prohibiting him from implementing the inquiry report with regards to the applicants.



- iii. An order of mandamus directed to the 1st respondent compelling them to call for the final special general meeting as regards the spilt by the applicants from the 2nd respondent failing which an order of mandamus does issue compelling the 1st respondent to issue the certificate of registration to the applicants as recommended vide a letter dated May 23, 2019.
 - iv. An order for costs and such further and other relief be granted to the applicant as court deems fit.
2. The 2nd respondent herein filed a preliminary objection dated March 14, 2022 opposing the applicants notice of motion dated February 24, 2022.
3. The preliminary objection was raised on the ground that the notice of motion dated February 24, 2022 was in violation of the mandatory rules of section 9(3) of the Law Reform Act and order 53, rule 2 of the Civil Procedure Rules 2010 in that the impugned decision was made in March, 2021 which dictate an application for an order of certiorari must be brought within six (6) months of the impugned decision.
4. The 2nd respondent prays that this judicial review application be dismissed with cost.
5. In response to the preliminary objection the applicants herein filed written submissions dated December 15, 2022.
6. The applicant submitted that the inquiry report deals with an Inquiry that was conducted physically at the 2nd respondent's premises on or about February/March 2021 as per the date on the report but the decisions affecting the applicants were obviously and clearly not made on February/March 2021 as that was the date the Inquiry was conducted by the 1st Respondent physically at the 2nd respondent's premises to the clear exclusion of the applicants as they were never called to participate in the said inquiry.
7. The applicants further contend that the inquiry report came out much later after the actual physical inquiry that was at the 2nd respondent's premises in February/March 2021.
8. The applicants submitted that the inquiry report was actually put into effect on November 26, 2021 vide the Special General Meeting of the 2nd respondent when the same was adopted at the AGM.
9. The applicant further submitted that the inquiry report and the decisions made pursuant thereto sought to be challenged was clearly and as a fact uncontroverted, conducted behind the applicants backs and was intentionally withheld from the applicants by the respondents.
10. The applicants in their affidavit in support of the application dated February 24, 2022 state that the same was only availed unofficially to them in January 2022 having followed up on it since December 2021 as they only became aware of the inquiry report when the letter dated November 29, 2021 (annexure NNN2) was written to the Applicants coffee marketer Ms Sasini PLC who forwarded the letter to the Applicant.
11. The applicants avers that the 1st respondent did conduct an inquiry and made decisions affecting the applicants without informing them to participate in the inquiry report.
12. The applicants further contended that they were thus denied the sacrosanct right to a fair hearing and to fair administrative action.
13. The applicants submitted that the decision to close the applicants accounts was reached vide a Special General Meeting of November 26, 2021 according to annexure NN2.



14. It was their contention that the administrative action that clearly affected the applicants and for which the order of certiorari is sought is a decision that is within the timelines of Judicial Review and the decision made to close the accounts is based on the actions of the Respondents and further, is a decision of a continuing nature otherwise why hold a special AGM in November 26, 2021 if in deed the Inquiry Report was made in February/March 2021 as alleged.
15. It was for the respondents to disclose candidly the date the report was actually ready and rendered. They further contended that based on what was before court especially the letter from the 1st respondent of November 29, 2021, it is clear that the report was adopted by the 2nd respondent in the Special General Meeting of November 26, 2021 which is when it became effective and that is the date of the administrative action that is also sought to be quashed.
16. The 2nd respondent submitted that the preliminary objection herein invokes the provisions of section 9(3) of the Law Reform Act and order 53, rule 2 of the Civil Procedure Rules 2010.
17. The 2nd respondent avers that the applicants filed the instant application one year after the decision has been made and that this court lacks power to entertain an application for orders of certiorari which is time barred citing the case of Maitumitu Kamau v. District Land Adjudication & settlement officer & 2 others [2021] eKLR and AKK v Children's Court Milimani [2019] eKLR.

Analysis and determination

18. I have considered the notice of preliminary objection raised by the 2nd respondent, the response by the applicant as well as the law, their respective submissions.
19. The issue for determination is whether the application dated February 24, 2022 is time barred.
20. The court notes that the 1st respondent has not filed any response to the preliminary objection.
21. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, had the following to say on circumstances when a preliminary objection may be raised.

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
22. The applicants sought to quash the administrative action of February/March 2021 being the inquiry itself and the Inquiry report of February/March 2021 as contained in the said Inquiry Report with regards to the Applicants and any decision/ resolution made pursuant thereto.
23. This section 9 (3) of the Law Reform Act provides as follows: -

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”



24. The above provision is replicated in order 53 rule 2 of the [Civil Procedure Rules](#), 2010 in the following words: -

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

25. This court in [Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 \(JV\) & another \(Interested Parties\); Exparte Magal Security Systems Ltd/Firefox Kenya Limited \(JV\) \[2019\] eKLR](#) held that the word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.

26. The letter dated November 29, 2021 and marked as NNN2 from the 1st respondent which is addressed to sasini plc shows that the inquiry report done by 1st respondent was adopted by the 2nd respondent in the Special General Meeting held on June 5, 2021.

27. In the case of [Ako vs Special District Commissioner, Kisumu & another](#) Civil Appeal No. 27 of 1989 the Court of Appeal was emphatic that “it is plain that under sub-section (3) of section 9 of the [Law Reform Act](#) leave shall not be granted unless application for leave is made inside six months after the date of the judgment.”

28. Time starts running after an occurrence or the happening of an ascertainable event. From the proceedings the following facts are undisputed:

29. At paragraphs 4 and 5 of the applicants submit as follows:

4. “Further the Inquiry Report and the decisions made pursuant thereto sought to be challenged was clearly and as a fact that was uncontroverted, conducted behind the applicants backs and was intentionally withheld from the applicants by the 1st and 2nd respondents and in their affidavit in support of the application the applicants have clearly explained as much stating that the same was only availed unofficially to the applicants in January 2022 having followed up on it from December 2021 as they only became aware of the Inquiry Report when the letter dated 29 November 2021 (annexure NN2) was written to the applicants' coffee marketer Ms Sasini PLC who forwarded the letter to them and thus the applicants were then vide that letter made aware of the unlawful and illegal hidden actions of both Respondents as regards the rights of the applicants.”

5. “Clearly the 1st Respondent did conduct an Inquiry and made decisions affecting the applicants without having called them to participate in the Inquiry Report. The applicants were thus denied the sacrosanct right to a fair hearing and to fair administrative action. The applicants were kept in the dark so that the 1st respondent could then, in case of such a challenge, as is



before this court proceed to plead that the decision sought to be challenged vide certiorari could not be so challenged as time had lapsed.”

30. This court has gone deeper into what the intention of the legislator was when inserting the words “....after the date of that judgment, order, decree, conviction or other proceeding...” in order 53.
31. The six months’ period as set out under order 53 of the *Civil Procedure Rules* must be counted from the date a certain event occurs. This is in keeping with order 50 of the *Civil Procedure Act*.
32. The respondents have not made any attempt to inform the court whether or not they informed or notified the applicants of the report in issue if at all. This omission leaves the court with no option than to believe the uncontroverted evidence of the applicants.
33. The 2nd respondent cannot then wake up one day at its convenience to blame the applicant for failing to move the court within six months of the happening of an event that they are unaware of.
34. To allow the preliminary objection would offend article 50 of *the Constitution* which guarantees all to the right to fair hearing.
35. Section 5 (1) (i) of the *Fair Administration Act* provides that:

“In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall give reasons for the decision of administrative action as taken...”
36. The reasons for a decision imply that in the first place there was a hearing that was followed by a decision. The reasons can either be within the body of the decision or in exceptional cases they can be furnished to the person who is affected by the decision separately.
37. Either way, of importance is the fact that the decision or the finding must be communicated and or shared with all the parties who participated in the hearing that led to the decision.
38. The reason behind this fundamental rule of law provision is obvious. It helps the parties achieve closure or decide whether to seek for a review or to challenge the decision in the next appellate platform.
39. It is no wonder, in this case, the disgruntled applicants have moved this court seeking to quash the offending finding of the 1st respondent in exercise of their right to access to justice. They moved the court when they learnt of the existence of the 1st respondents finding as earlier set out in the ruling.
40. The 2nd respondent cannot at this point turn around and blame the applicants for filing this suit after they learnt of the 2nd respondent’s decision through a letter dated November 29, 2021 that was addressed to the applicants’ coffee marketer known as Ms Sasini PLC.
41. It is this court’s finding that the preliminary objection is a red herring.

Orders

42. The 2nd respondent’s preliminary objection dated March 14, 2022 is dismissed with costs.
The notice of motion shall proceed for hearing and determination on merit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023

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J. CHIGITI (SC)



JUDGE

