Mbugua & another v Registrar of Companies & another (Application E14 of 2023) [2024] KEHC 14436 (KLR) (Judicial Review) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E14 OF 2023

J NGAAH, J

NOVEMBER 21, 2024

BETWEEN

BENARD NDUNGU MBUGUA ..... 1ST APPLICANT

PATRICK KAMAU GICHUHI ..... 2ND APPLICANT

AND

REGISTRAR OF COMPANIES ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. The applicants' application is a chamber summons dated 6 November 2023 expressed to be brought under section 8(2) of the *Law Reform Act*, cap. 26 and Order 53 (1) of the Civil Procedure Rules. Their primary prayer is for leave to file a substantive motion for the judicial review relief of mandamus; it is couched as follows:

> " 3. That, the Honourable Court be pleased to grant leave to the applicants herein to apply for an order of mandamus:
>
> i) To compel 1st respondent to forthwith to call for and conduct elections for Gatatha Farmers Co. Ltd.
>
> ii) To order an audit of the Financial Affairs of the Company."

2. The application is based on a statutory statement dated 6 November 2023 and an affidavit verifying the facts relied upon sworn on even date by Mr. Benard Ndungu Mbugua. He has sworn the affidavit on his own behalf and on behalf of the 2nd applicant.

3. According to Mr. Mbugua, the 1st to 7th interested parties are the current directors of Gathatha Farmers Company Limited. They have allegedly failed to conduct company elections and conduct transparent financial and asset audits of the company. The applicants, therefore, want the court to issue an order of mandamus compelling the 1st respondent "to perform his/her statutory functions in accordance with the law".

4. According to the applicants, the 1st to 7th interested party's failure to conduct elections is a recipe for chaos in the company. Besides accusing the 1st to 7th interested parties of failing to conduct elections, the applicants have also sworn that "the 1st respondent's decision not to call for and manage elections for the company is therefore unreasonable."

5. The application has been opposed by the interested parties and a replying affidavit sworn to that effect. The affidavit has been sworn by Mr. Peter Mburu Gakwa who has sworn that he is a director of Gathatha Farmers Company Limited. According to Mr. Gakwa, a dispute between members and directors of the company or amongst members of the company ought to be resolved through an ordinary suit and not through a judicial review application.

6. The application is also opposed on the ground that the applicants have not stated the obligation the 1st respondent owes the public or the applicants in particular. As far as the allegations of failure to hold annual general meetings are concerned, Mr. Gakwa has sworn that the meetings have been held consistently over the years and, in proof of this fact, he has exhibited to his affidavit what he has described as "Annual General Meeting Booklet" for the years 2020, 2021 and 2022 together with the agenda for the annual meetings, which has included appointment of directors in accordance with the Articles of Association of the Company. The next annual general meeting was due on March 2024.

7. While the application was pending for hearing, the applicants filed a motion dated 4 March 2024 mainly seeking an interim order to stop an annual general meeting called by the interested parties. The prayer for this order has been couched as follows:

> " 2. That the Honourable Court be pleased to issue a conservatory orders against the 1-7th interested parties, their agents and/or appointed persons from convening a stage managed Annual General Meeting scheduled on 23rd March, 2024 of the sanctioning of the sale and disposal of prime land of Gathatha Farmers' Company Limited."

8. According to the applicants, "the intention of the 1st -7th interested party is to circumvent the possible outcome of the present proceedings." In an affidavit sworn in support of the application, the applicants exhibited an advert placed in the Daily Newspaper of 2 March 2024 calling for the Annual General Meeting.

9. The interested parties filed a replying affidavit sworn on 24 April 2024 by Mr. Peter Mburu Gakwa. In the affidavit, Mr. Gakwa swore that the annual general meeting was held as scheduled on 23 March 2024 and that elections, apparently of directors, were held on the material date. It has also been sworn that the applicants have filed another suit over the same dispute in the Civil Division of this Honourable Court, being HCCC/E056/2024.

10. Since this is an application for leave to file a judicial review motion, the court would not be concerned about the merits of the applicant's application at this stage. In order to guard against delving into the

merits of the case, Lord Diplock, in IRC V National Federation of Self-Employed and Small Businesses Ltd (1982) 617, (1981) 2 ALL ER 93) suggested the following approach in such applications:

> " If, on a quick perusal of the material then available, the court thinks the application discloses what might on further consideration turn out to be an arguable case in favor of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

11. Thus, on this basis, the applicants only have to show not that their case is arguable, but that it might turn out to be, an arguable case.

12. My quick perusal of the application reveals that what the applicants have presented in the statutory statement as grounds upon which the relief of the order of mandamus would be sought, if leave is granted, are the depositions made in the affidavit verifying the facts relied upon. To understand my point, it is necessary that I reproduce the "grounds" here; they have been couched as follows:

> " 1. That the 1st Respondent has neglected to exercise his/her powers to have elections held for the subject company for elections were last held on 18th February 2002.
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> 2. That, there is massive waste and looting at the company under the close supervision of the 1st to 7th interested parties.
>
> 3. That, the element of gender balance has never been practiced for men have continued to exert their dominance at the expense of women. who are also shareholders.
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> 4. That, decisions are being made and arrived at by a cabal of officials at the expense of the Society membership.
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> 5. That, no audit has ever been undertaken de-spite merited complaints from the applicants in particular the procurement of loans using company Assets.
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> 6. That the company perspectives are illegal being disposed without members approval particularly parcels situate at Kilimambogo Machakos County, Endebbes, Transzoia, Pangani and Eastleigh Nairobi, just to mention a few.
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> 7. That, the decision of the Interested Parties persistent refusal and neglect to call for elections has entrenched corruption to the extent that women have been left out in crucial decision making.
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> 8. That, the 1st Respondent has neglected to call for elections despite the mandate conferred by statute.
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> 9. That the 1st respondent has neglected the supervisory powers bestowed upon the said Office hence the Applicant's plea that the Honourable Court do (sic) issue an order of Mandamus to call for and conduct the said elections.
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> 10. That, the Applicant's case is that the 1st Respondent has neglected to perform his/her public duty hence the plea for the Honourable Court's intervention in exercise of its supervisory jurisdiction.
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> 11. That the interest of justice tilts in favour of allowing the Applicant's Application herein.

12. That, the 1st to the 7th interested parties actions are otherwise unlawful, irregular and unwarranted and are likely to trample on the applicant's rights as members of Gathatha Farmers Company Limited and amounts to unfair administrative action on the part of the 1st respondent."

13. As I have previously stated in several applications of this nature which have come before me, it is the grounds on which judicial review reliefs are sought that are of immediate interest to the court. The grounds constitute the first hurdle which an applicant must surmount because without them, an application for judicial review would be baseless and fatally defective. As it were, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to supervisory jurisdiction of this Honourable Court is the grounds upon which the application is made.

14. This is obvious from Order 53 Rule 1(2) which states in rather peremptory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

15. And Order 53 Rule 4(1) states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

16. These grounds have not been left to speculation or conjecture. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

17. The grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

18. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

19. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

20. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010.

21. Thus, courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a

practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

22. Turning back to the applicants' application, what they have presented as "grounds" are no more than their depositions in the affidavit verifying the facts relied upon. They are not grounds as defined by Lord Diplock in Council of Civil Service Unions versus Minister for the Civil Service (supra). What the applicants have effectively done is to present the facts and left it to court to speculate if those facts fall under all or any of the grounds of judicial review. This, the court cannot do because the obligation is upon the applicants "to identify and express accurately the possible grounds for judicial review" not just for the sake of the court but also to put the respondent or respondents on notice of the case they are confronted with.

23. The Court would not be able to tell the case before it and the respondents will certainly be at a loss on what to respond to if the grounds of judicial review are not clearly identified and accurately stated. The applicants have not discharged this obligation to my satisfaction and, for this reason, I find their application untenable.

24. The second reason why I am not inclined to exercise my discretion in favour of the applicants is that the substantive motion would be based on disputed facts. I say so because leave is sought on the ground that the company has not held any annual general meetings since 2002 yet the interested parties have come up with the evidence of their own showing that the company has held annual general meetings in the years 2020, 2021 and 2022. The court cannot rely on affidavit evidence to establish which of the two versions represents the truth.

25. A judicial review court is ordinarily not ideally placed to interrogate conflicting affidavit evidence. It was so held in R versus Secretary of State for the Home Department, ex p Khawaja (1984) AC 74 where the court noted as follows:

> " The migration officer, whether at this stage of entry or at that of removal, as to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents was genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated. It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

26. Though this case related to immigration and the questions are pertinent to the immigration issues that had been raised, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues is applicable in this case. It relies on the affidavit before it and, for this very reason, it is not in a position to tell the truth between conflicting depositions.

27. Lord Woolf was more apt in R versus Derbyshire County Council, ex p Noble (1990) ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

28. On the same point, Lord Diplock at p.316G in Hoffmann-La-Roche (F) & Co AG versus Secretary of State for Trade and Industry (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction.

29. And in a judgment delivered by the Supreme Court of England on 16 October 2024, In the matter of an application by Noeleen McAleenon for Judicial Review Appellant) (Northern Ireland) [2024] UKSC 31, the court revisited this issue and held as follows:

> " 41. Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.
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> 42. Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting. (This is not to say that such procedures are not available in judicial review: cross examination is available and will be allowed "whenever the justice of the particular case so requires": O'Reilly v Mackman [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it)". (Emphasis added).

30. Our very own Supreme Court has also addressed this question in Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment). In that case the court noted as follows:

> " (76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence

> in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis added).

31. It follows that the applicants' application is bound to fail to the extent that if leave was granted, the applicants would demand of this Honourable Court to inquire into disputed facts.

32. Finally, it is not in dispute that the annual general meeting of the company which the applicants are bidding for was eventually held. This is clear from the applicants' own application for 'conservatory orders' and the interested parties' response to the application. In the absence of any contrary evidence, it will not serve any purpose to order the 1st respondent to call for an annual general meeting that has been held. It is assumed that the question of audit of the company's accounts and assets would be addressed in such a meeting and therefore, there is no reason to seek an order for mandamus for this purpose. In any event, based on the material before court, I have not found any factual or legal basis for such an order.

33. For the foregoing reasons, I am hesitant to grant the applicants leave to file a substantive motion for judicial review. The application is dismissed. As the application is dismissed at the leave stage, I make no order on costs. Orders accordingly.

SIGNED, DATED AND POSTED ON CTS ON 21 NOVEMBER 2024

NGAAH JAIRUS

JUDGE