



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 263 OF 2019

IN THE MATTER OF AN APPLICATION FOR DECLARATIONS, AND ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY,

MINISTRY OF TRADE AND INDUSTRY.....1ST RESPONDENT

THE COMMISSIONER OF CO-OPERATIVES.....2ND RESPONDENT

MR. STEPHEN KAMAU NJOROGE.....3RD RESPONDENT

MISS DORIS WANGUI GITHUA.....4TH RESPONDENT

MR. ANTHONY MAINA WAITHAKA.....5TH RESPONDENT

MISS JOYCE NKIROTE KINUU.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

EX PARTE:

- 1. JOSPHAT KIMANI GACUGU**
- 2. SOLOMON NDUU MBOE**
- 3. PETER KAREGA NGUGI**
- 4. PETER WANGENGI NGANGARI**
- 5. KARANJA GATHURI**

JUDGMENT

The Application

1. The 1st to 6th *ex parte* Applicants herein (hereinafter “the Applicants”) are coffee farmers, and claim to be shareholders of Kenya Planters Co-operative Union, which is a farmer’s cooperative that trades in coffee. They have sued the Respondents in relation to the liquidation of the said Kenya Planters Co-operative Union. The 1st Respondent is the Cabinet Secretary who was at the relevant time responsible for the Ministry in charge of matters relating to trade, industry and co-operatives (hereinafter referred to as “the Cabinet Secretary”). The 2nd Respondent is the Commissioner of Co-operatives, an office set up under the Co-operative Societies Act and responsible for the management of the Cooperatives. The 3rd to 6th Respondents are the persons appointed as liquidators of Kenya Planters Co-operative Union, pursuant to Gazette Notice No. 7963 issued by the 2nd Respondent and published on 23rd August 2019. Lastly, the 7th Respondent is the Attorney

General, a constitutional office responsible for advising the national Government.

2. Pursuant to leave granted by this Court, the Applicants filed an application by way of a Notice of Motion dated 25th September 2019, seeking the following orders:

a) A declaration that the 1st to 6th Respondents are under a duty to follow the Constitution and all applicable law at all times;

b) A declaration that the placing under liquidation of the Kenya Planter's Cooperative Union Limited under liquidation vide Gazette Notice No. 7963 published on the 23rd August, 2019 is unconstitutional, illegal, irrational and procedurally unfair and is therefore null and void;

c) An Order of Certiorari bringing into the Court and quashing Gazette Notice No. 7963 of the 23rd of August, 2019 placing Kenya Planter's Cooperative Union Limited under liquidation;

d) An Order of Prohibition preventing the Respondents herein from implementing the decisions and consequential actions resulting from Gazette Notice No. 7963 of the 23rd of August, 2019; and

e) That the costs of this Application be provided and awarded to the Applicants.

3. The Application is supported by a Statutory Statement dated 10th September 2019, and the Verifying Affidavit and supplementary affidavit of Josphat Kimani Gacucu, the 1st Applicant herein, sworn on 10th September 2019 and 25th September 2019 respectively, on his behalf and that of the other Applicants. The other applicants also swore verifying affidavits confirming that they had given the 1st Applicant such authority.

4. The 1st and 2nd Respondents filed a replying affidavit sworn on 2nd October 2019 by Geoffrey Wang'ombe, the Acting Commissioner for Co-operative Development under the Ministry of Industry, Trade and Co-operatives, in response to the application. The 3rd to 6th Respondents relied on a replying affidavit sworn on 11th October 2019 by Stephen Kamau Njoroge, who is the 3rd Respondent herein. A summary of the parties' respective cases is as follows.

The Applicants' case

5. The Applicants averred that out of their faith in the Kenya Planters Co-operative Union (hereinafter referred to as "KPCU"), they bought shares therein and are therefore shareholders. They contend that they last supplied coffee to KPCU in February 2019, and thereafter awaited payment. However, that on or about 2nd August 2019, when they went to the KPCU headquarters to check on the progress of the payment, they encountered a contingent of armed police officers. That upon explaining the reason of their visit, the said police officers directed them to the office of the Managing Director of KPCU, and that they learnt from someone in the said office that KPCU had been placed under liquidation by order of the Cabinet Secretary, Ministry of Trade and Industry (CS) as well as the Commissioner of Co-operatives. Further, that a group of persons had been appointed to liquidate the said company.

6. The Applicants state that on seeking information on the 2nd Respondents actions, which they claim was an interference in the affairs of a private company and liquidation of a solvent entity, they were directed to leave the premises or risk arrest for obstruction. Further, that upon inquiry about the payment of their dues, they were advised to await for communication on the same. They averred that on the next day, being 3rd August 2019, the 1st Respondent in disregard to the law and the Constitution, released a press statement explaining the actions that he had directed to be done, and that the 2nd Respondent subsequently followed the said directives by issuing the impugned orders, which were gazetted on 23rd August 2019.

7. The Applicants contended that they resorted to seeking legal redress as the actions of the Respondents herein are illegal, unlawful, and amount to deprivation of their personal property, and an illegal governmental takeover of a solvent institution. Further, it is contended that the said actions are unlawful, illegal, unconstitutional, irrational, procedurally unfair and amounts to deprivation of personal property. The Applicants cited Article 3(1) which provides for the duty to respect and uphold the Constitution; Article 10 on national values and principles of governance, Article 40 on the right to acquire, own, use and quietly enjoy property, and Article 47 on the right to fair administrative action.

8. The Applicants acknowledged the judgment rendered in **High Court Judicial Review Number 312 of 2014**, and averred that an appeal from the said judgment is still pending determination by the Court of Appeal, hence the Respondents acted in abuse of the law and court process. It is averred that in any case, even if the 1st and 2nd Respondent have the mandate to act as they have, there is a laid down procedure in the Co-operative Societies Act, in sections 58 to 61 which they have bypassed. Lastly, that, whereas there is an alternative procedure and remedy under section 62 of the Co-operatives Societies Act, the same isn't applicable in light of the bias and actions of the 1st Respondent. That therefore, the Applicants' only recourse is judicial review through the courts.

9. The Applicants in conclusion therefore contend that the Respondents have cancelled the registration of KPCU and proceeded to appoint liquidators without following the due process of the law, and that the orders sought herein are meant to ensure the Respondents' compliance with the law. Further, that if the Court does not intervene at the earliest opportunity, irreparable loss and harm will be visited upon KPCU's and the Applicants' shares, as the 3rd to 6th Respondents, by instruction from the 1st and 2nd Respondents, have control of KPCU's premises and the records.

The 1st and 2nd Respondents' Case

10. The 1st and 2nd Respondent averred that the KPCU was registered in 1937 as a co-operative society under the Co-operatives Societies Act, and incorporated as a company in 1945 under the Companies Act. It is averred that the said co-operative has a membership of over 700,000 small scale farmers drawn from 400 coffee marketing co-operative societies, and approximately 3000 large scale estate farmers. According to the said Respondents, KPCU, which was once vibrant and the centre of the coffee sub-sector, has since had dwindled fortunes, to near collapse occasioned by systematic management, corruption and plunder in its successive management. That, its assets have been mismanaged, stripped and sold contrary to the law and stakeholders' interests, and it has failed to meet its objectives.

11. It is further averred that before KPCU was liquidated, it was run by persons who were irregularly in office, having not pursued the due process of formal elections, which also amounted to abuse of court process. The 2nd Respondent gave an account of the leadership disputes in the co-operative, leading to the filing of **Republic v Commissioner for Co-operative Development & 17 Others Ex-Parte Kenya Planters Co-operative Union Limited, Judicial Review Application No. 312 of 2014** which challenged the mandate of the Commissioner of Co-operatives to call for the elections, and the outcome of the elections. It is averred that the Court ruled that KPCU is a co-operative society and not a company, hence the Commissioner for Co-operative Development is mandated to call for elections; and that the Co-operatives Societies Act provides for the dissolution or winding up of a co-operative society.

12. However, that the Interim Board of KPCU were dissatisfied with the decision and moved to the Court of Appeal in **Civil Appeal Case No. 367 of 2014** which has remained unprosecuted for five years as at the time of lodging the instant application. According to the 1st and 2nd Respondents, the said Interim Board purported to convene an Annual General Meeting of KPCU under the Companies Act in disregard of the Court's judgment. It is averred that the registration of KPCU was thereupon cancelled in accordance with section 62(1) (b) and (c) of the Co-operative Societies Act, and it was consequently placed under liquidation pursuant to the Cancellation/Liquidation Order dated 2nd August 2019 published in the Kenya Gazette Notice No. 7963 on 23rd August 2019.

13. The 1st and 2nd Respondents contend that due process was followed in the cancellation of the KPCU's registration, as it has not filed returns for 3 years and failed in its objectives. Further, that the liquidators were appointed pursuant to section 65 of the Co-operative Societies Act and are discharging their duties in accordance with the law. Lastly, that the instant application is aimed at reverting KPCU to the prevailing *status quo* of illegal management, disregard of the shareholders' interests, breach of its objectives and plunder of the its assets for a few individuals' benefit.

The 3rd to 6th Respondents' Case

14. In a manner more or less similar to the 1st and 2nd Respondents, the 3rd to 6th Respondents outlined the vibrant history of KPCU, and also decried its current deteriorated status and failure to achieve its objectives and deliver value to stakeholders. They averred that the 2nd Respondent acted in accordance with the law in placing KPCU under liquidation, since, immediately an entity is registered as a co-operative society/union, it comes into the exclusive jurisdiction of the Commissioner in respect of management and administration.

15. The 3rd to 6th Respondents averred that the Applicants have not exhibited documents to demonstrate their ownership or shareholding of KPCU as alleged, and are thus busy-bodies with no *locus-standi* to institute the instant Application in such capacity or otherwise. According to the deponent, the 'Grower's Code' provided as evidence by the Applicants is a number issued to any coffee farmer licensed by the then Coffee Board of Kenya and now the Coffee Directorate Kenya, and is therefore not proof of shareholding in KPCU. Further, that the 'out-turn numbers' in the Applicants' annexures are not membership numbers but coffee delivery entries. That, the out-turn number enables the farmer to monitor his/her coffee from the miller, and is not linked to the issue of shareholding or dividends. It is averred that the Applicants like any other coffee farmer in the country have the right to take their coffee to KPCU, which is purely a question of business.

16. According to the 3rd to 6th Respondents, that the Applicants are hired by a cartel of former disgruntled directors who have held KPCU at ransom for many years, frustrating legitimate government effort to liberate the coffee industry. They cited various reports including a Report on the Inquiry into the Receivership at the Kenya Planters Co-operative Union (KPCU) Ltd, prepared by the National Assembly Departmental Committee on Agriculture, Livestock and Co-operatives in September 2011; a Report by the Directorate Criminal Investigations; and a Presidential National Task Force on Coffee Sub-Sector set up to investigate and make recommendations on how to stimulate growth in the coffee sub-sector in 2016.

17. It is averred that the liquidation follows a directive issued by the President, wherein he ordered the Ministry to intervene and take over the operations of KPCU with a view of restructuring it. It is further averred that KPCU is in an extreme financial crisis, with unserviceable debts and obligations, and the true position is that the company has zero liquidity due to mismanagement and plunder over time. The 3rd to 6th Respondents gave a detailed account as to the financial status of at KPCU and its inability to meet its objects including milling, marketing and warehousing of coffee, as well as of the mismanagement by its previous Directors.

18. Regarding the allegations that the 2nd Respondent did not follow the law in placing KPCU under liquidation, the 3rd to 6th Respondents averred that the Cancellation/Liquidation Order clearly states that it was made pursuant to Section 62(1)(b) and (c) of the Co-operative Societies Act, as KPCU had failed to file returns with the Commissioner for more than three years and had failed to achieve its objects. Further, that the order conformed to Article 47 and was expeditious, efficient, lawful, reasonable and procedurally fair in the circumstances.

19. They contended that none of the Applicants, outgoing Directors, or any other individual shareholder or member of KPCU has written to the 2nd Respondent claiming that their right or fundamental freedom has or is likely to be adversely affected by his action, hence seeking reasons for the said actions pursuant to Article 47 of the Constitution. That, the 2nd Respondent would have gladly provided the reasons, which in any case are set out under Section 62(1) (b) and (c) of the Co-operative Societies Act. In the circumstances, it is averred that the Applicant's allegations against the process of investigation and appointment of liquidators is biased and unfounded, as the same was done above board.

20. Lastly, the 3rd to 6th Respondents averred that if aggrieved by the 2nd Respondent's decision under section 62(2), the Applicants ought to have appealed to the Cabinet Secretary but failed to do so. Further, that the Applicants have not demonstrated any exceptional circumstances to justify an exemption from exhausting that route, other than the claim of bias on the part of the 1st Respondent which is unsubstantiated.

The Determination

21. The Applicants urged the application through written submissions dated 20th March 2019 filed by Guandaru Thuita & Company Advocates, their Advocates on record. Munene Wanjohi, a State Counsel in the Office of the Attorney General, filed submissions dated 24th October 2019 on behalf of the 1st and 2nd Respondents', while Gitonga Muriuki & Company Advocates, the 3rd to 6th Respondents' Advocates on record, filed submissions dated 16th October 2019.

Preliminary Issues

22. The Respondent have raised two preliminary issues in their pleadings and submissions, that need to be determined at the outset, as their outcome will affect the feasibility of the other issues raised by the application. These are firstly, whether the Applicants have locus to bring the present judicial review proceedings, and secondly, whether this application is properly before this Court for want of exhaustion of alternative dispute resolution mechanisms.

On the Applicants' Locus

23. On the first preliminary issue, the 1st and 2nd Respondents submit that the Applicants have no *locus standi* to institute the instant proceedings, as they have not demonstrated that they are members of KPCU, and/or coffee farmers, and that the orders sought will affect them in any way. The 3rd to 6th Respondents submitted in like manner that the Applicants have not demonstrated that they are shareholders of KPCU, and that the growers' codes and outturn numbers which they have exhibited cannot be regarded as evidence of shareholding. Hence, that the Applicants have not established any sufficient interest in the liquidation, and further, majority of the shareholders have not challenged the liquidation, which demonstrates their support for the same. The 3rd to 6th Respondents cited the case of **Majimbo Georgiadis v Law Society of Kenya, Nairobi Branch & 11 Others [2018] e KLR** in support of their submissions.

24. The Applicants on the other hand reiterate that they are coffee farmers and are members of KPCU, and further, that the rigid rules of *locus standi* in **Wangari Maathai v Kenya Times Media Trust [1989] e KLR** have been bypassed by the Constitution. Particularly, that Article 22 of the Constitution leaves it open for any person to institute proceedings claiming that a fundamental right is being violated, as well as Article 258. In this regard, it is submitted that the Applicants have raised allegations of violation of Article 47 of the Constitution. Therefore, it is submitted that they have the legal basis to lodge the instant proceedings.

25. I note in this regard that the general approach to the issue whether a claimant has standing in judicial review application, is that the claimant must have sufficient interest in respect of the action or decision under challenge, which is a mixed question of fact and law. Therefore, the Court will consider the issue of standing by reference to a number of factors, and is generally liberal in its approach to the issue of standing.

26. Relevant factors that are considered by the Court include the nature of the claimant's interest, and whether the claimant has a clear private interest in the action or decision under challenge. A private interest may arise because the decision was specifically targeting, or taken in relation to the claimant, or because it has an impact upon him or her. Other factors are where a claimant is seeking to represent the public interest, and demonstrate that they have a real or genuine interest in the decision under challenge; where a clear stake in the issue before the court is demonstrated; and where the claimant seeks to vindicate the rule of law, or address an important issue of the law.

27. J. Odunga in explaining how such sufficient interest is demonstrated referred to the direct effect that judicial review proceedings will have on a party in **Republic v Office of the Director of Public Prosecution & 2 others Ex-Parte Sylvia Wairimu Njuguna also Known as Sylvia Wairimu Muli ,[2018] eKLR** as follows:

“25. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

28. The impugned decision in the present judicial review proceedings is the cancellation of the registration of, and subsequent liquidation of KPCU. The Applicants have brought evidence to show that they have been delivering coffee to KPCU and are owed for the said delivery. In this regard, they annexed Return to Grower Statements authored by Kenya Planters Co-operative Union and a Milling Statement dated 11th February 2019 in their favour to their Supplementary Affidavit. They therefore have a private interest that is being directly affected by the said decision, and therefore have sufficient interest to bring the instant judicial review proceedings. In addition, as the Applicants' application herein is not brought against the Kenya Planters Co-operative Union, evidence of their shareholding is immaterial.

29. It is also notable in this regard that the decision in **Majimbo Georgiadis v Law Society of Kenya, Nairobi Branch & 11 Others (supra)** which was relied on by the 3rd to 6th Respondents was on leave to commence judicial review proceedings, and was decided on the basis of the availability of alternative dispute resolution mechanisms. It is therefore not relevant to the issue of the Applicants' standing.

On Availability of Alternative Dispute Resolution Mechanisms.

30. The second preliminary issue raised by the Respondents is that there is an internal appeals mechanism that the Applicants ought to exhaust; hence this application is an abuse of the Court process. The 1st and 2nd Respondents submit that the instant application offends section 62 (2) of the Co-operative Societies Act and section 9(2) of the Fair Administrative Action Act, to the extent that the Applicants did not exhaust the available internal mechanism of an appeal to the Minister. Therefore, this application is prematurely before this Court and ought to fail. Accordingly, reference was made to the case of **Republic v Firearms Licensing Board & Another Ex-Parte Stephen Vincent Jobling [2019] e KLR**.

31. It was also submitted that the Applicants have not demonstrated any exceptional circumstances to warrant exemption as provided for in section 9 (4) of Fair Administrative Action Act, and reliance was placed on the decisions in **Speaker of National Assembly vs Karume [1992] KLR** and **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry (2015) eKLR**, where the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

32. The above arguments were reiterated by the 3rd to 6th Respondents, who cited section 9 of the Fair Administrative Action Act, and the cases of **Godfrey Osotsi v Amani National Congress Party [2019] eKLR**, **Starways Express Limited v National Transport & Safety Authority & 2 Others [2017] eKLR** and **Thande and Others v Montgomery & Others 2008 1 KLR (EP)**, for the submission that a party seeking judicial review must first exhaust available statutory remedies before moving to Court, and should they wish to be exempted; such party must file a formal application to that effect.

33. The Applicants' submissions on the issue are that they are unlikely to get justice by way of exhausting the remedy under section 62 (2) of the Co-operatives Societies Act as averred by the Respondents. It is submitted that the Applicants have sued both the Commissioner of Cooperatives as 2nd Respondent and the Minister as 1st Respondent, hence it is illogical to appeal to the Minister while he is one of the parties the Applicants are aggrieved about. It is also submitted that the instant circumstances are exceptional, as the Respondents have admitted that it is the Cabinet Secretary himself who directed the 2nd Respondent to undertake the liquidation. Hence, an appeal would have been futile.

34. As regards moving the Cooperative Tribunal, the Applicants submit that the instant dispute does not fall under the definition of disputes under section 76 of the Co-operatives Societies Act, which provides for the types of disputes that fall under the Tribunal. According to the Applicants, these are disputes between members of a co-operative, members and a co-operative, and between two co-operatives. That, the definition does not include a dispute between the Commissioner of Co-operatives and the Cabinet Secretary on one hand and members of a co-operative society and members of a limited company on the other hand.

35. It is not in dispute that an internal dispute resolution mechanism is provided for by section 62 (2) of the Co-operatives Societies Act, for any person aggrieved by decisions of the 2nd Respondent to cancel registration of a co-operative society as in the present case. Section 62(2) provides for an appeal against such order to the Minister within thirty days of the order. In addition, sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

36. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (supra)** in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

37. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

38. The Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. Section 9(4) of the Fair Administrative Action Act however suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy.

39. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows:

“.. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

40. The Applicant in this regards contends that the alternative remedy of an appeal to the Cabinet Secretary is not effective on account of the said Cabinet Secretary’s bias, as evidenced by the press statement he issued on the subject matter of this application, before the impugned decision was made. It is my view in this respect that the absence or otherwise of bias is a legitimate concern when considering the question whether an alternative remedy is accessible and effective, as the Constitution in Article 50(1) on the right to a fair hearing expressly provides that a dispute is required to be resolved by an independent and impartial tribunal or body.

41. A likelihood or apprehension of bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she will be biased. The test to be applied in determining whether there is a likelihood of bias was stated in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge**, [1995-1998] 1 EA 134 by Lakha, JA as follows: -

“In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; “The judge was biased.”

42. The test for apprehension of partiality or bias for decision makers was also set out in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others** [2013] eKLR, where the Supreme Court stated that disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias, if a reasonable man would reasonably suspect bias. M.K.Ibrahim JSC expressed himself as follows:

“The court has to address its mind to the question is whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible”

43. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the Applicant was made, and having considered the facts, would conclude that there was a possibility that the Cabinet Secretary may be biased. I find the answer to be in the positive in light of the averments made by the Cabinet Secretary in the said press statement, which showed that he had already formed an opinion on the subject matter of the impugned decision.

44. The subject press statement issued by the Cabinet Secretary was annexed as an exhibit to the 3rd to 6th Respondents’ replying affidavit. The issuance of the said press conference by the Cabinet Secretary is also not disputed by the Respondents. In particular, the Cabinet Secretary stated as follows in the press statement:

“...2.12 In view of the above, KPCU has contravened the provisions of the Co-operative Societies Act by failing to file returns with the Commissioners hold elections and totally failed to achieve the objects for which it was established.

Way Forward in K.P.C.U

In view of the foregoing, I had earlier today, directed the Commissioner for Co-operative Development to take appropriate legal action. He has already reported back to me that he has cancelled the registration of KPCU and immediately appointed liquidators by invoking Sections 63, 63 and 65 of the Co-operative Societies Act. “

45. It is evident from the said statements that the Cabinet Secretary had already made a decision as regards the cancellation of KPCU’s registration and its liquidation. While the Cabinet Secretary may have the power to give such directions, it would be contrary to the requirements of a fair hearing and principles of natural justice for the Cabinet Secretary to sit in judgment over disputes arising from the subject matter of the same directions. It is thus my finding that for this reason that the alternative mechanism of an appeal to the same Cabinet Secretary is not an effective and fair remedy for the Applicant, and the exception in section 9(4) of the Fair Administrative Action Act therefore applies.

46. In this respect, I find that while a formal application to be exempt from the provisions of section 9(2) to (4) of the Fair Administrative Action Act is advisable, it will in the circumstances of this application not only cause unnecessary and undue delay to these proceedings, but

will also not add any substantive value, as the relevant factors have already been canvassed by the parties, and considered by this Court. This Court also has discretion under Article 159 of the Constitution and section 3A of the Civil Procedure Act to make such orders as are necessary to achieve substantive justice, and not to give undue regard to procedural technicalities in the process. This application is thus found to be properly before this Court.

The Substantive Issues

47. This Court will therefore proceed to consider the three substantive issues raised in this application. In this regard, the Applicants do not dispute that the 2nd Respondent has powers under section 62 (1) of the Co-operative Societies Act to cancel the registration of a co-operative society. The said section provides as follows:

“(1) Where a co-operative society has—

(a) less than the prescribed number of members; or

(b) failed to file returns with the Commissioner for a period of three years; or

(c) failed to achieve its objects, the Commissioner may, in writing, order the cancellation of its registration and dissolution of the society and the order shall take effect immediately”.

48. In addition, under section 65 of the Act, the 2nd Respondent also has powers to appoint liquidators of a co-operative society when the registration of that co-operative society is cancelled. What the Applicant is challenging is the lawfulness of the 2nd Respondent’s decision on account of improper exercise of its powers, which they claim were exercised for improper motives and unfairly.

49. The three substantive issues to be determined therefore are firstly, whether the 2nd Respondent’s decision to cancel the registration of KPCU was made with improper and ulterior motives; secondly whether the said decision was procedurally unfair, and lastly whether the remedies sought are merited.

50. Before embarking on a consideration of these issues, it is necessary to reiterate the grounds for judicial review as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others**, (2008) 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

51. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

52. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator or make the orders stipulated in Section 11 of the Act.

On Whether the 2nd Respondent's decision was made with Improper and Ulterior Motives

53. The Applicants submitted that contrary to what is alleged, the Respondents placed KPCU under liquidation for an ulterior motive, which is one of the grounds of review as provided under Section 7(2) (e) of the Fair Administrative Action Act. In this regard, it is submitted that whereas the 2nd Respondent purported to place KPCU under liquidation under Section 62 of the Co-operative Societies Act following its failure to file returns for more than three years, the Respondents explain in detail therein how KPCU has been brought down following mismanagement by the current directors and other players. The Applicants submit that the apparent intention was for the Ministry to take over the operations of KPCU and restructure it.

54. According to the Applicants, liquidation is ordinarily supposed to bring to an entity to an end especially for not achieving its purpose or for being insolvent. That however, in the instant case, the liquidation was for purposes of restructuring, which one more points to an ulterior motive, hence the decision was in bad faith. It is submitted that the fact that the decision was preceded by a presidential directive portrays the 2nd Respondent's failure to act independently, contrary to Section 7(2) (g) of the Fair Administrative Action Act.

55. The Applicant in this respect also submitted that it is not in contention that KPCU is registered both under the Companies Act and the Co-operative Societies Act. That, KPCU was registered as a company in 1945, hence cannot be said to be governed by a single law as contended by the Respondents. It is submitted that any measure to restructure, liquidate or place KPCU under receivership must apply both regimes as relying on one would be inadequate and lead to confusion. According to the Applicants, the decision by the Respondents to place KPCU under liquidation under the Co-operative Societies Act leaves unresolved the aspects that fall under the Companies Act.

56. It is thus submitted that the Respondents acted in bad faith, as there was no difficulty in involving the Registrar of Companies in the liquidation process, and this oversight is not only unlawful but also makes the fate of the Applicants shares acquired through the Companies Act rather than the Co-operative Societies Act unclear. Therefore, the Respondent's decision is illegal and in violation of the proprietary rights under Article 40 of the Constitution of the members of KPCU. It is submitted that under Section 7(2) (f) of the Fair Administrative Action Act, the High Court can review an administrative action if there was failure to consider a relevant factor, and there is nothing in the impugned decision and the replies to demonstrate that the dual registration was taken into consideration before the Gazette Notice was issued.

57. It is the Applicants' contention that Article 10 of the Constitution requires state officers to adhere to the national values and principles of governance. That, if the 2nd Respondent was keen on knowing the factual affairs of KPCU, it would have first ordered for an inquiry and inspection under Part XII of the Co-operative Societies Act. The Applicants in this respect submitted that none of the Reports availed by the 2nd Respondent were done at the instance of the 2nd Respondent. Hence, that the 2nd Respondent's allegations of mismanagement and insolvency are baseless, and the 2nd Respondent was instead acting capriciously and whimsically on the issue.

58. Lastly, the Applicants submitted that an inquiry would have involved participation of the stakeholders as constitutionally required, unlike in the instance case where the impugned decision is not in tandem with constitutional requirements, hence ought to be quashed.

59. The 1st and 2nd Respondents on the other hand submitted that the impugned decision is in accordance with section 62 of the Co-operative Societies Act, and the Court can only interfere with that discretion if it is exercised unreasonably, illegally, arbitrarily and without jurisdiction. It is submitted that the Applicants have not demonstrated that the Commissioner exercised his discretion wrongly. Further, that judicial review is intended to ensure a party receives fair treatment in the hands of public bodies, and is not intended to ensure that a public body arrives at a conclusion that is correct in the eyes of the Court. Hence, the Court is not empowered to delve into the merits of the decision.

60. It is submitted that a party seeking judicial review orders must satisfy the settled criteria for issuance of the orders, namely, illegality, impropriety of procedure and irrationality as held in **Re Bivac International SA (Bureau Veritas), (2005) 2 EA 43**). The case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** was also cited for this position. The 1st and 2nd Respondents also cited the cases of **Republic v Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] e KLR**, **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Metropolitan Development and Another [2014] e KLR**; and the Court of Appeal case of **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd** for the positions that the Court should not address the merits of the decision being challenged.

61. The 3rd-6th Respondents on their part cited section 62 (1) (b) and (c) of the Co-operative Societies Act to show that the law was followed in reaching the impugned decision, and for the reasons for the cancellation and liquidation of KPCU, being failure to file returns for three years and being unable to meet its objects as per its Memorandum and Articles of Association.

62. It was further submitted that the allegations on not filing returns have not been refuted, as well as the allegations on failure by the Society to meet its objects. Instead, it is submitted, the Respondents have furnished the Court with evidence highlighting the Union's sad state of affairs as outlined in the Replying Affidavit. It is submitted that since the Commissioner had issued the Cancellation/Liquidation Order and the same had not been challenged to the Minister within 30 days as per Section 62(2) of the Act, the liquidation has since taken effect and cannot be challenged.

63. The applicable law on unlawfulness of a decision on account of improper or ulterior motives and bad faith is in section 7(2)(e) and (h) of the Fair Administrative Action Act, which provides that a Court may review an administrative action or decision if it was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant or in bad faith. Therefore the ground of an improper or ulterior motives and bad faith arises when a public body exercise a statutory power for a purpose other than that for which the power was conferred. Acting in bad faith also connotes intentional wrongdoing, such as acting in a manner that is fraudulent, dishonest or malicious.

64. The Applicant alleged ulterior motives and bad faith on the part of the Respondents on account of two circumstances – that of the

intended restructuring of KPCU, and that of the pending litigation on the status of KPCU as a co-operative society. The Respondents on the other hand submit that there has been evidence of mismanagement of KPCU which they provided, and that this fact is not disputed by the Applicants, neither is the fact that KPCU has not filed its returns for three years. All the parties however do not dispute that there is pending appeal in the Court of Appeal as to the legal status of KPCU, namely **Civil Appeal Case No. 367 of 2014**, and in particular as to whether it is a co-operative Society or company, and which consequential legal regime should therefore apply to it.

65. It is my finding in this respect that I cannot address the merits of the arguments as to whether KPCU needs to be restructured or not, as this will require evidence and argument thereon by the parties, and this Court as a judicial review Court is not the proper forum for such a hearing and determination. I cannot also delve into the issue whether KPCU is a cooperative society or company, principally for the same reasons, and also for the further reason that this is an issue that is pending appeal in the Court of Appeal. Further, this Court having already pronounced itself on the issue in **Republic v Commissioner for Co-operative Development & 17 Others Ex-Parte Kenya Planters Co-operative Union Limited, Judicial Review Application No. 312 of 2014**, it is thereby *functus officio* and has no jurisdiction on the matter.

66. However, these findings notwithstanding, I am of the view that the decision of the 2nd Respondent to cancel the registration of KPCU and place it under liquidation using the provisions of the Co-operative Societies Act while **Civil Appeal Case No. 367 of 2014** is still pending, is not only in abuse of the court process, but also indicative of an ulterior and improper purpose to circumvent the decision of the Court of Appeal in this regard. I also find that for this reason, the said decision meets the threshold of being dishonest, as all parties were aware that the resolution of the pending appeal in the Court of Appeal would have had repercussions on the impugned decision made by the 2nd Respondent. It is also instructive that the 1st and 2nd Respondents in this respect averred that the impugned action was motivated by the actions of the Interim Board of KPCU to convene an Annual General Meeting of KPCU under the Companies Act.

67. Lastly, even though the 2nd Respondents have alleged that KPCU had not filed returns for three years, it would not cure the effects of other ulterior motives in the exercise of its powers. To this extent, it is my finding the exercise of powers by the 2nd Respondent in cancelling the registration of KPCU was also made with an ulterior motive of preempting the determination as regards the legal status of KPCU, and was to this extent unlawful.

On Whether the 2nd Respondent's decision was Procedurally Fair

68. The second limb urged as to the legality of the 2nd Respondent's decision is in relation to whether it was undertaken with procedural fairness. The Applicant urged that the 2nd Respondent was obliged to comply with Article 47 of the Constitution and the provisions of the Fair Administrative Action Act, while the Respondents contend that there was such compliance in light of previous reports on KPCU, and no specific requests were made by the Applicants to the 2nd Respondents as regards the reasons for the impugned decision.

69. I note in this regard that section 62(1) on cancellation of registration of a co-operative society does not provide for the procedure to be followed in such cancellation, unlike the provisions of section 58, 59 and 61 of the Act which apply to a dissolution of a co-operative society upon an inquiry as to its working and financial conditions, or upon inspection of its books. This however does not mean that there are no other laws that apply as regards the procedure that should be followed by the 2nd Respondent when undertaking such a cancellation. The 1st and 2nd Respondents are now required to act fairly, which is a constitutional imperative under Article 47 of the Constitution. Article 47 now imports and implies a duty to act fairly by any decision maker in any administrative action. Article 47 provides as follows in this regard:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

70. Section 2 of the Fair Administrative Action Act, which was enacted to implement Article 47, in this regard defines an administrative action to include—

- a) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or
- b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

In addition, under section 3, the said Act applies to all state and non-state agencies. Therefore, the provisions of the Act as regards fair action also bind the 2nd Respondent not only as an administrative authority, but also as a body whose decision is likely to affect the rights and interests of the Applicants.

71. In addition, section 4 (3) and (4) of the Fair Administrative Action Act, lays down the procedure to be adopted when taking an administrative action or decision as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

72. In the present application, the decision to cancel the registration of KPCU and place it under liquidation was made without any notice by the 2nd Respondent, and without giving any opportunity to persons who would be affected by the said decision to make representations. Apart from the previous reports on the status of KPCU, the 2nd Respondent in this regard did not provide any evidence of any notice given specifically on to its intention to cancel KPCU’s registration and to place it under liquidation, or opportunity for representations on the same.

73. The core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. It is also notable that the duty and obligation is upon the 1st and 2nd Respondents as administrators to respect and observe the requirements of Article 47 of the Constitution, and to apply the provisions of the Fair Administrative Act before the taking of an administrative action or making of a decision. The Applicants cannot therefore be faulted for not asking for reasons after a decision has been unfairly made.

74. It is thus my finding that in the present case, as the Applicants were not given an opportunity to state their case as regards the said cancellation of the registration of KPCU and its liquidation, the impugned decision was therefore made unfairly.

On Whether the Remedies sought are Merited

75. The Applicants have sought the remedies of certiorari, a declaration and prohibition. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances when the orders of certiorari and prohibition can issue as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

76. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body’s powers and duties, and the rights of individuals or the law on a particular issue.

77. I find that as the 2nd Respondent has been found to have acted with an ulterior and improper motive in cancelling the registration of KPCU, and unfairly by failing to give the Applicants notice and an opportunity to make representations on the said decision, the order sought of certiorari to quash the said decision is merited. Likewise, the Applicants are also entitled to the order of declarations sought, so as to clarify the legality of the 2nd Respondent’s actions and their rights in this respect. Lastly, the orders of prohibition are also merited to the extent that the effect of quashing the decision by the 2nd Respondent to cancel the registration of KPCU is that the *status quo* will revert to the state it was before such cancellation. The Respondents cannot therefore proceed with the implementation of the impugned decision.

78. In the premises this Court finds that the Applicant’s Notice of Motion dated 25th September 2019 is merited to the extent of the following orders:

I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing, and to quash the decision of the 2nd Respondent cancelling the registration of Kenya Planter's Cooperative Union Limited and placing the said Kenya Planter's Cooperative Union Limited under liquidation vide Gazette Notice No. 7963 published on the 23rd August, 2019.

II. An order of Prohibition be and is hereby granted prohibiting the Respondents herein from implementing the decisions and consequential actions resulting from Gazette Notice No. 7963 of the 23rd of August, 2019.

III. A Declaration that the decision of the 2nd Respondent cancelling the registration of Kenya Planter's Cooperative Union Limited and placing the Kenya Planter's Cooperative Union Limited under liquidation vide Gazette Notice No. 7963 published on the 23rd August, 2019 was made without compliance with the provisions of Article 47 of the Constitution and the provisions of the Fair Administration Act, 2015, and is thus procedurally unfair and unconstitutional.

IV. The 1st and 2nd Respondents shall meet the Applicants' costs of the Notice of Motion dated 25th September 2019.

79. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2020

P. NYAMWEYA

JUDGE