



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 459 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE JUDICATURE ACT**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND 9**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVL PROCEDURE RULES**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF SOCIETIES..... RESPONDENT**

**AND**

**ZIMMAN SETTLEMENT SCHEME THROUGH:**

**FRANCIS KIRIMA MÍKUNYUA**

**BENEDICT HONGO ODHIAMBO**

**JULIUS GIKONYO KANYWIA.....INTERESTED PARTY**

**EX-PARTE: ZIMMAN RESETTLEMENT SCHEME THROUGH:**

**HARRISON GITAU**

**JOSEPH GAKOTHA RUCIAKA**

**BENARD AJODE**

**RULING**

**Introduction**

1. Zimman Resettlement Scheme, hereinafter “the Applicant”, states that it is a registered society under the Societies Act. It has sued the Registrar of Societies, which is a statutory office established by the Societies Act, and who is the Respondent herein. Zimman Settlement Scheme which is another registered society, was also joined as an Interested Party in these proceedings by the Court, through its officials.

2. The Applicant filed an Amended Chamber Summons application dated 9<sup>th</sup> April 2019, seeking leave to institute judicial review proceedings for an order of mandamus against the Respondent, to compel him to cancel the certificate for Zimman Settlement Scheme, the Interested Party herein. The grounds for the application are stated in the said application, a statutory statement dated 9<sup>th</sup> March 2019, and verifying affidavits sworn on 9<sup>th</sup> April 2019 by Harrison Gitau, Joseph Gakotha Ruciaka, and Benard Ajode, the Applicant’s Chairman, acting Secretary and Treasurer respectively. The said Acting Secretary in addition filed a supplementary affidavit sworn on 15<sup>th</sup> April 2019.

3. The Applicant claims that it was registered on 2<sup>nd</sup> December 2003 and issued with a certificate of registration number 23044. However, that another society with the name Zimman Settlement Scheme was registered in 2008, and was issued with a certificate with the same serial number 23044. The Applicant averred that it had, through its officials, written to the Respondent to cancel the certificate for the Interested Party but in vain. The Applicant contends that the Respondent’s failure to perform his duty is irrational and without any reasonable cause.

4. The Applicant also alleges that the Respondent is colluding with the Interested Party, leading to some of their members being charged in court with forgery of certificates of the two societies. Further, that the officials of the Interested Party have been masquerading as officials of the Applicant, and did not have capacity to apply for the Applicant’s change of name. The Applicants denied that they had filed cases on leadership disputes, and were not aware of any judicial review applications filed in, nor were they party to **JR Misc. Application No. 318 of 2013**.

5. They admitted having knowledge of **Misc. Application No. 623 of 2017** and **JR Misc Application No.29 of 2018**, and stated that the file for **JR Misc. Application No. 623 of 2017** went missing, and they could take no further steps in the application, which prompted them to file **JR Misc Application No.29 of 2018** as the cause of action was still accruing. The Applicant attached copies of the two certificates issued to it and the Interested Party, a notice of intention to sue the Attorney General dated 7<sup>th</sup> August 2017 by its Advocates, and various correspondence with the Respondent.

6. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their respective pleadings in this regard. The Respondent filed Grounds of Opposition dated 21<sup>st</sup> January 2019, and a replying affidavit sworn on 25<sup>th</sup> October 2019 by Jacob Ikiara, the Ag. Registrar of Societies. The Respondent opposed the application on the ground that the same is an abuse of court process, as the Applicant had filed two similar applications, namely **JR Misc. Application No. 623 of 2017** on 12<sup>th</sup> October 2017, and **JR Misc Application No.29 of 2018** on 25<sup>th</sup> January 2018, which were both dismissed for non-attendance.

7. According to the Respondent, Zimman Resettlement Scheme was registered on 2<sup>nd</sup> December 2003 and changed its name to Zimman Settlement Scheme on 15<sup>th</sup> December 2008, and was issued with the same certificate registration number 23044. Further, that the society has had name leadership wrangles resulting in the judgment in **JR Misc. Application No. 318 of 2013**, where the Respondent was ordered to confirm the legal officials of Zimman Settlement Scheme.

8. Lastly, that the current officials of Zimman Settlement Scheme are Francis Kirima M’Ikunyua (Chairman), John Wainaina Ndungu (Vice-Chairman), Peter Ndungu Mutiga (Secretary), and George Oluoch Omondi (Treasurer). Therefore, that the Applicant herein are not known officials of Zimman Settlement Scheme and lack *locus standi* to institute this matter. The Respondent attached copies of the certificate issued to the Applicant and Interested Party, minutes of the Applicant on change of name, and a copy of the judgment in **JR Misc. Application No. 318 of 2013**.

9. These grounds were reiterated by Francis Kirima M’Ikunyua, the Interested Party’s Chairman, in an affidavit he swore on 2<sup>nd</sup> December 2019. He stated that Zimman Resettlement Scheme and Zimman Settlement Scheme are one and the same society, save for the change of name and some officials. He gave the current officials of the society as Francis Kirima M’Ikunyua (Chairman), Benedict Hongo Odhiambo (Secretary), and Julius Gikonyo Kanyiwa (Treasurer). He averred that the Applicants disregarded the orders by this Court given on 7<sup>th</sup> February 2018 that the dispute on change of name be resolved amicably by the Registrar of Societies, and proceeded to instead file the instant application.

### The Determination

10. The application was canvassed by way of written submissions. Mutisya & Company Advocates filed submissions dated 21<sup>st</sup> August 2019 for the Applicant, wherein they reiterated the averments made in their pleadings as summarized in the foregoing.

11. Janet K. Kabuchoru, a State Counsel in the office of the Attorney General, filed submissions dated 25<sup>th</sup> October 2019 for the Respondent, while Adera & Kenyatta Advocates filed submissions dated 2<sup>nd</sup> December 2019 on behalf of the Interested Party.

12. The Respondent’s submissions were that an order of mandamus is not tenable, as it has demonstrated that Zimman Resettlement Scheme and Zimman Settlement Scheme is one and the same society, and its registration cannot therefore be cancelled. Further, that the Respondent does not involve itself in internal matters of societies, and its role is restricted to registration and administration of societies. The decisions of the Court of Appeal in **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** and **Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji & Others, (1997) e KLR** on the nature of judicial review and the order of mandamus were cited in this regard.

13. The Interested Party on its part submitted that it had complied with section 20 of the Societies Act as regards change of its name, as the Respondent had permitted the change of the name, and it had submitted all the requirements for change of name. Further, that its name is not

in contravention of section 11 of the Act, under which a society may not be registered if its name is the same or similar to that of another society, as the Applicant and the Interested Party are one and the same society. The decision in **Republic vs Registrar of Societies & 5 Others ex parte Ndungu Nganga & 3 Others, (2018) e KLR** was cited for the submission that the Applicant has not demonstrated that the Respondent has the mandate to cancel the Interested Party's registration, as the change of name was effected as provided in the Societies Act.

14. The issue that arises for determination is whether the Applicant merits leave to commence proceedings for judicial review orders of mandamus against the Respondent. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court is sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

**“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.**

15. The criteria for granting leave is multifarious. The relevant factors to be considered can be summarized as the capacity and sufficient interest of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim, and the propriety of judicial review proceedings to resolve the claim. In the present application, the dispute between the Applicant, Respondent and Interested Party emanates from the statutory functions of the Respondent under the Societies Act, and is therefore one that would ordinarily fall under the jurisdiction of this Court as granted by Article 165(3) of the Constitution.

16. However, it is evident that the very legal existence of the Applicant is disputed, and the Respondent provided evidence of the history of the Applicant as regards the Applicant's change of name and litigation on its officials. The Applicant's legal capacity to bring the instant judicial review proceedings is therefore contested, and the dispute as to its capacity and *locus* therefore needs to be resolved first, before its claim can be heard.

17. This brings to for the factor whether this Court is the proper forum to hear and determine the dispute as regards the Applicant's capacity. The evidence by the Respondent and Interested Party has been disputed by the Applicant, who in turn also produced evidence of minutes on its officials. The evidence that has been adduced will require examination and analysis for resolution of the dispute, which is not possible in judicial review proceedings for two reasons.

18. Firstly, it is notable that the exercise of supervisory jurisdiction and grounds of judicial review pursuant to which this supervision is conducted, are premised on the application and interpretation of the law and applicable legal principles on uncontested facts and evidence. It is normally the case that the body whose decision is under challenge is the primary fact finder and decision maker, and the judicial review Court role is limited to a review of the facts and decisions already made, and is not envisaged as the initiator of the said facts or decisions.

19. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as regards the holding of trials involving contested evidence, as those that arise in the exercise of the judicial review jurisdiction. The Applicant therefore first needs to get a conclusive determination on its legal status in the appropriate fora, before it can move this Court for grant of leave to commence judicial review proceedings.

20. Further to the above findings, the nature of an applicant's claim is also relevant to the issue of leave, and in this respect delay by an applicant in bringing an application will be a factor that the Court may take into account in the exercise of its discretion whether or not to grant leave. This is not only because expeditious hearing of civil cases is an overriding objective under section 1A and 1B of the Civil Procedure Act, but also because specific timelines are set for judicial review proceedings.

21. In particular, it is notable that Order 53 Rule 2 of the Civil Procedure Rules provide that an application for leave to commence proceedings for orders of certiorari should be made not later than six months after the date of the proceeding sought to be quashed, while Order 53 Rule 3 requires an application to be made within twenty-one days once leave has been granted to apply for an order of mandamus, prohibition or certiorari.

22. I note in this respect that it is not contested that the subject matter of the instant application has also been the subject of other applications brought by the Applicant in this Court, namely **JR Misc. Application No. 623 of 2017** and **JR Misc Application No.29 of 2018**. A perusal of the court record in the two suit reveals as follows. In **JR Misc. Application No. 623 of 2017** the Applicant was on 30<sup>th</sup> October 2017, given a time limit of twenty one (21) days by this Court (Odunga J.) within which to file its substantive application after having been granted leave, which it failed to do. Its suit was consequently struck out on 20<sup>th</sup> November 2017.

23. The Applicant subsequently filed **JR Misc Application No.29 of 2018** on 25<sup>th</sup> January 2018, and this Court (Aburili J.) gave directions on 21<sup>st</sup> March 2018 on service of the pleadings on the Interested Party, which do not appear to have been complied with. Thereafter, there was several non-attendances by the Applicant, leading to dismissal of the suit on 20<sup>th</sup> November 2018. The Applicant then filed the instant application on 22<sup>nd</sup> November 2018. It is notable that the Applicant also failed to disclose the existence of the previous suits in the present

application, and has been represented by the same firm of advocates in all applications.

24. The Applicant is thus not only culpable of delay in prosecution of its claim, but is also clearly in abuse of the process of Court.

25. In the premises, I find that the Applicant's Amended Chamber Summons application dated 9<sup>th</sup> April 2019 is not merited, and is hereby dismissed with no order as to costs.

26. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF DECEMBER 2019**

**P. NYAMWEYA**

**JUDGE**