



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NO. 64 OF 2017**

**CHARLS RIOBA & 13 OTHERS.....APPLICANTS**

**VERSUS**

**THE CHAIRMAN CO-OPERATIVE**

**TRIBUNAL & 17 OTHERS.....RESPONDENTS**

**RULING ON REVIEW**

1. On 27<sup>th</sup> March, 2017 this court did stay these proceedings upon the agreement of all the parties' advocates on record that they wished to have the matter referred to the commissioner of Co-operative Development for mediation as the dispute revolved around leadership of the Umoja InnerCore Tena Matatu Owners (UTIMO) the 13<sup>th</sup> ex-parte applicant.
2. The court invoked Article 159 of the constitution on promoting Alternative Dispute Resolution mechanisms and stayed these proceedings and referred the dispute to the Commissioner for Co-operative Development for mediation and set a mention date for 17<sup>th</sup> July, 2017.
3. On 17<sup>th</sup> July, 2017 this court was on leave hence the parties fixed a date in the Registry for mention for 2<sup>nd</sup> October, 2017.
4. On the latter date, Mr. Orina advocate for the applicants, Mr. Moseti for 11- 18<sup>th</sup> interested parties, Mr. Munene for 1 – 5<sup>th</sup> Respondents and Mr. Juma holding brief for Mr. Ombwayo for 6<sup>th</sup> – 10<sup>th</sup> Respondents attended court. Mr. Orina informed the court that there was successful mediation and that elections for the Sacco were held and affairs of the Sacco were being conducted smoothly and that the report of the Commissioner was being filed to that effect. He urged the court to mark the matter as settled. Mr. Munene concurred with Mr. Moseti that indeed the advise by this court led to successful elections of 31/3/2017 and that the Sacco was being run smoothly.
5. Mr. Juma holding brief for Mr. Ombwayo stated that he had contrary instructions that no mediation took place and that the court should order for court assisted mediation. When Mr. Munene stated that an affidavit was being filed to show the participation of Mr. Ombwayo's clients in the elections and that the matter was related to another matter which was challenging the outcome of elections but which had been struck out by this court and that there was no dispute between the parties, Mr. Juma threw in the towel saying he had limited instructions and that Mr. Ombwayo was around the court.
6. The court then recalling that the matter related to JR.142/2017 which had been struck out on 17<sup>th</sup> May, 2017 found that in view of the submissions by Mr. Munene and Mr. Moseti, there was no other dispute and it marked the matter as settled with each party to bear their own costs of the proceedings and also closed the file.
7. In this matter, no leave has ever been granted to apply for Judicial Review Orders pursuant to the application dated 16<sup>th</sup> February, 2017.
8. It is the orders of 2<sup>nd</sup> October, 2017 which Mr. Ombwayo's clients are contesting on the grounds that they were issued pursuant to misrepresentation by Mr. Moseti and Mr. Munene that there was successful mediation contrary to the true position and that his clients are before the Tribunal challenging the outcome of elections of 31<sup>st</sup> March, 2017 after this court struck out the JR.142/2017 and directed them to file any dispute arising from elections to the Co-operatives Tribunal.
9. The applicants also claim that as the court had stayed these proceedings pending mediation, the Commissioner was duty bound to file into court an award or a report on progress or outcome of the mediation process before a settlement could be reached. Counsel claims that his clients are prejudiced by orders of 2<sup>nd</sup> October, 2017 as they were not heard before the order was made hence the need for review of the said

orders so that due process can be followed.

10. The 1 – 5<sup>th</sup> Respondents opposed the application by Mr. Ombwayo's clients urging that since elections were held on 31<sup>st</sup> March, 2017 litigation should come to an end and insisted that there was mediation leading to the successful elections which Mr. Ombwayo's clients participated in, lost and challenged before the court, the court vide JR.142/2017 struck out the JR and that that being the case, there is no dispute pending for this court to resolve. Further, that to review orders of this court is to re-open matters which are settled.

11. On the part of Mr. Moseti for the ex parte applicants and holding brief for Mr. Orina for the interested parties, it was contended through an affidavit sworn by Mr. Boniface Mwoni on 30<sup>th</sup> January, 2018 reiterating what Mr. Munene had submitted on as per his client's grounds of opposition filed this morning and adding that the issues of the Sacco were resolved following successful elections which were held on 31<sup>st</sup> March, 2017 in a Special General Meeting.

12. Further, that the applicants challenged those elections through JR.142/2017 which was dismissed and that that was a protest to mediation process yet they are alleging that no mediation took place. It was further contended that the Sacco affairs have returned to normalcy and that members accessed their savings, are happy and the applicants and other former members have no savings, no vehicle TLBs and no interest whatsoever, of the Sacco and that there have been many cases before the court and Tribunal.

13. It was contended in addition that, the order of 2<sup>nd</sup> October, 2017 was issued with blessings of all members of the Sacco hence the court should not allow re-litigation but allow members to operate their Sacco and invest smoothly.

14. This court agrees that litigation must come to an end. However, due process must be followed once parties invoke the jurisdiction of the court.

### **Determination**

15. The court did implore parties who agreed to go for mediation to attempt to resolve their differences before the Commissioner of Co-operative Development. The court also stayed these proceedings pending mediation. When parties appeared on 2<sup>nd</sup> October, 2017 the record shows that Mr. Ombwayo had not properly briefed Mr. Juma on the status of the mediation talks. Indeed, despite the promise then by Mr. Moseti advocate and Mr. Munene advocate that an affidavit of the Commissioner showing the outcome of mediation process was being filed, no such affidavit or minutes of the mediation process were filed in court to-date.

16. This court having stayed proceedings, only a consent or evidence of a settlement could confer jurisdiction on the court to settle the dispute.

17. I therefore find that the order of 2<sup>nd</sup> October, 2017 was issued per incuriam as no minutes of mediation were filed in court. It is for that reason that I find the application by Mr Ombwayo on behalf of his clients merited. I allow it and set aside the order of 2<sup>nd</sup> October, 2017 and substitute it with an order reinstating the proceedings until the Commissioner of Co-operative Development files in court a report of the mediation conducted between the parties if at all there was such mediation and in the absence of such mediation report being filed within (7) seven days from the date hereof, these proceedings shall remain as they were prior to the referral to the mediation process.

18. Nonetheless if the ex-parte applicants and other Respondents and interested parties believe that there is no dispute, then the ex-parte applicants shall be at liberty to terminate the proceedings in the usual manner set out in the law and practice of the court.

19. Each party to bear their own costs of the application for review.

Dated, Signed and Delivered in open court at Nairobi this 6<sup>th</sup> day of March, 2018.

**R.E. ABURILI**

**JUDGE**

### **In the Presence of:**

Mr Ombwayo for 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> Respondents/Applicants

Mr. Munene for 1 – 5<sup>th</sup> Respondents

N/A for ex parte applicants/Respondents

Mohamed Kombo – Court Assistant