



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 105 OF 2016

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE COMPANIES ACT, 2015

REPUBLICAPPLICANT

VERSUS

THE REGISTRAR OF COMPANIESRESPONDENT

EX PARTE INDEPENDENT ELECTORAL BOARD OF THE KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY (KNCCI)

JUDGEMENT

1. By a Notice of Motion dated 7th March, 2016, the *ex parte* applicant herein, **Independent Electoral Board of the Kenya National Chamber of Commerce and Industry**, seeks the following orders:
 1. **THAT the order of mandamus do issue compelling the Registrar of Companies to accept the list of the officials/directors of the Kenya ATIONAL Chamber of Commerce & Industry (KNNCI) based on the elections held on 4th December, 2015 as duly forwarded to the Companies Registry by the ex parte applicant together with the requisite payment/fees; and then register the newly elected officials/directors and issue Form CR. 12 on the said returns as stipulated by the Companies Act.**
 2. **THAT the order of Prohibition do issue prohibiting the Registrar of Companies from registering any officials/directors of the Kenya National Chamber of Commerce & Industry (KNNCI) other than the ones on the list based on the elections held on 4th December, 2015 d duly forwarded to the Companies Registry for registration by the applicant herein.**
 3. **THAT the costs of these proceedings be provided for.**
2. According to the applicant, pursuant to clause 74 of its Memorandum of Association with respect to the terms of the applicant’s officials’, it resolved to have an Extraordinary General Meeting and a National Governing Council Meeting on 4th December, 2015 for the purpose of electing new national officials and directors of the applicant as stipulated in clause 71 of the said Memorandum.
3. The said elections were duly elected on the said 4th December, 2015 and the new officials were

- duly elected whose names were forwarded to the Respondent and endorsed on Form CR6. However the cashiers at the Respondent's offices declined to accept payment citing orders from above which the applicant confirmed emanated from the office of the Respondent.
4. Accordingly, the new officials were not registered by the Respondent, an act which the applicant contended was in blatant contravention of the law. To the applicant no reasons were advanced for the refusal to register its new officials hence the Respondent was guilty of abusing its powers.
 5. According to the applicant the Respondent is a public office created by section 831 of the Companies Act (hereinafter referred to as "the Act") and is obliged to record the election returns of the applicant and register the new officials/directors once the same are received by its officers. The Respondent was however accused of not assigning any reason for declining to effect the said registration.
 6. According to the applicant, this amounted to arbitrary performance of statutory functions hence the orders sought herein.
 7. The application was not opposed by the Respondent.
 8. That the Respondent has the power to receive and register documents lodged by parties is not in doubt. The only question is whether the Respondent also has the power to reject such documents. The nearest provision dealing with this power seems to appear in section 847 of the Act whose side note is "*Registrar's notice to remedy defective lodgement*" which provides as follows:

(1) This section applies if a document lodged with the Registrar for registration —

(a) does not meet the requirements for proper lodgement; and

(b) is not corrected under section 844, or replaced under section 845.

(2) The Registrar may give notice —

(a) to the person by whom the document was lodged if the identity, and name and address of that person are known; or

(b) if notice cannot be given under paragraph (a) and the identity of that company is known —to the company to which the document relates.

(3) The Registrar shall, in a notice to be given under subsection (2)—

(a) state in what respects the document does not appear to meet the requirements for proper lodgement;

(b) state the date on which it is issued; and

(c) require a replacement document complying with the requirements for proper lodgement to be lodged with the Registrar within fourteen days after that date.

9. In my respectful view this provision could have been better drafted to expressly confer power on the Respondent to reject documents under specified circumstances. However section 47 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that:

Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

10. It is therefore my view that the Respondent has power to reject registration of documents where the same do not comply with the law. However in exercising the said discretion or power the Respondent is expected to comply with Article 47 of the Constitution which provides that:

(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.

54. The said Article was the subject of judicial interpretation in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

11. It follows that the Respondent was duty bound to consider the applicant’s application for registration of the documents lodged by the applicant and furnish the applicant with the reasons for not registering the same in the event that it made a decision not to do so.

12. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

13. This position was adopted in **R vs. Secretary of State for Home Department ex p Venebles [1998] AC 407** to the effect that:

“a person on whom power is conferred cannot fetter the future exercise of its discretion by committing himself now as to the way in which he will exercise his power... By the same token, the person on whom power has been conferred cannot fetter the way in which will use that power by ruling out of consideration on the future exercise of power factors which may be relevant to that exercise”

14. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. To deliberately set out not to exercise a power properly conferred by the law without legally recognised justification in my view is as much an abuse of power as to purport to exercise a power which is not conferred. According to **Prof Sir William Wade in his Book *Administrative Law***:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite

and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them..."

15. The parameters of judicial review were set out by the Court of Appeal in Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 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...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...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."

16. As I have found hereinabove, the Respondent has the power to decline to register a document presented to it which discretion must be exercised lawfully. This is so public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of

the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by Parliament in my view without proper reasons would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

17. In the instant case, the applicant's position is that the Respondent has declined to give any reason for the failure to register the documents presented to it. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view the Respondent is under an obligation to consider an application to register a document and the failure to do so amounts to abuse of discretion. However, this Court cannot by way of an order of *mandamus* compel the Respondent to register the said document. The Court can only compel the Respondent to consider the same and make a decision one way or the other. However the Respondent is obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant. Where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. This position is clearly legislated in section 6(4) of the ***Fair Administrative Action Act, 2015*** which provides that:

Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

18. This was the jurisprudence prevailing before the enactment of the above statute and enunciated in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, where the Court expressed itself as follows:

“In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons...It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void.”

19. With respect to the prayer for prohibition, it is clear that the said prayer cannot be granted since it is speculative in nature. Prohibition is only available where there is a threat of a particular action being undertaken. In this case there is no evidence that the Respondent intend to register any other person or persons in order to invite the issuance of an order of prohibition.

Order

20. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the Respondents to consider the applicant's application for registration the list of the officials/directors of the Kenya National Chamber of Commerce & Industry (KNNCI) based on the elections held on 4th December, 2015 as duly forwarded to the Companies Registry by the ex parte applicant together with the requisite payment/fees and furnish the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, the Respondent will be deemed not to have any reasons in which event an order of *mandamus* shall issue compelling the Respondents to register the said newly elected officials/directors and issue Form CR. 12 on the said returns as stipulated by the ***Companies Act***.
21. The applicant will have the costs of this application.

Dated at Nairobi this 6th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Mutisya