REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 41 OF 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECIETIES ACT CAP 108 OF THE LAWS OF KENYA

AND

IN THE MATTER OF A DECISION OF THE STAFF AND FINANCE COMMITTTEE OF THE AGRICULTURAL SOCIETY OF KENYA TO EXPEL MR. JOHN B. NTHUKU FROM MEMBERSHIP OF THE AGRICULTURAL SOCIETY OF KENYA AND THE SUBSEQUENT REFUSAL TO REVERSE THE SAID DECISION BY THE COUNCIL OF THE AGRICULTURAL SOCIETY OF KENYA ON 21/8/2014

REPUBLIC …….....……...APPLICANT

-VERSUS-

THE COUNCIL OF THE AGRICULTURALSOCIETY OF KENYA.....RESPONDENT

JOHN B. NTHUKU…….....……EX-PARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 3rd July, 25, the *ex parte* Applicant herein, **John B. Nthuku**, seeks the following substantive orders:

> **(a) An order of certiorari to remove to the High Court for the purposes of being quashed the decision of the National Executive Committee on behalf of the Respondents to expel the applicant from the Agricultural Society of Kenya.**
>
> **(b) An order of prohibition prohibiting the 1st Respondent from interfering with the applicant's rights and privileges as a member of the Agricultural Society of Kenya.**
>
> **(c) An order of mandamus directing the 1st Respondent to reinstate he applicant to the**

membership of the Agricultural Society of Kenya with full rights and privileges.

Applicant's Case

2. According to the Applicant, he is a retired Deputy Commissioner of prisons and has served in the Agricultural Society of Kenya for other thirty years during which period he has contributed in the following areas:-

(i) Chairman of various sub committees such as arena and Gate, Deputy Chairman Nairobi branch and Chairman of Nairobi International Trade Fair.

(ii) The improvement of the financial position of the Nairobi Branch which in turn greatly improved the financial standing of the society tenfold in the period 2005 and 2010.

3. According to the Applicant, his efforts and contributions were recognized by the society and he was made a life governor of the society, was given 10 years, 20 years and 30 years' service award. He averred that they improved trade stands, tarmacked all roads on the trade fair grounds and that during his chairmanship of the trade fair they built more than 300M Security Masonry Wall and started a tree planting annual programme that continues to this day. The Applicant further deposed that he has been an active member of the society representing the Nairobi branch in the council of Agricultural Society of Kenya.

4. He however averred that on or about 23rd April, 2014 he received a letter from the executive officer of the Agricultural Society of Kenya dated 22nd April, 2014 inviting him to attend a meeting of the staff and finance committee scheduled for 25th April, 2014 at 12.20 pm the purpose of which was indicated as to share knowledge and views on an adverse media publication in the *Weekly Citizen Newspaper* of 7th April, 2014. According to the Applicant, at the time he received the invitation, he had not seen or read the said newspaper and was no aware of what had been said/written about the society in the said publication. He disclosed that at the meeting a member of the committee read some parts of the said article and asked him if he knew who had written the article and who had given the information to the newspaper to which he responded in the negative.

5. The Applicant averred that at the said meeting he was not informed that he was a subject of any disciplinary proceedings and asserted that he had no role in the publication of the adverse report. However, on 15th May, 2014 he received a letter informing him that he had been found culpable of violating Article 37(4) of the Society's Consultation and expelled from the society. Upon receipt of the same, he engaged his advocates on record who sought a rescission of the decision which they did in a letter dated 26th May, 2014. To this letter the respondent responded through their advocates letter dated 10th June, 2014 and forwarded what was alleged to be the rules governing the disciplinary process of the society. By a letter dated 18th July, 2014, the Applicant appealed the decision to expel him from the society and his appeal was summarily rejected in a letter dated 21st August, 2014.

6. It was the Applicant's case that the person who sent him the letter rejecting his appeal was part of the committee that expelled me and was therefore bound to be biased. It was the decision rejecting his appeal that triggered these proceedings since in his view, he expected to be granted an opportunity to be heard on the appeal but this was not done. According to him, he has been gravely wronged by the expulsion from the society without cause yet he had absolutely nothing to do with the publication in the said newspaper. He averred that he has faithfully served the society and expected to be at the very least treated fairly and with dignity by the respondent yet he was not granted a hearing and his removal was against the Rules of Natural Justice. He further averred that the decision taken by the staff and finance committee to expel him was *ultra vires* the society's constitution and that his right to a fair administrative action was violated.

Respondent's Case

7. In opposition to the application the Respondent filed a Notice of Preliminary Objection in which it

raised the following objection:

> **(a) That the Applicant has sued the Council of Agricultural Society of Kenya whereas the same is not a public body; and**
>
> **(b) That the Application was filed out of time as the decision to expel the Applicant from the Council was made in May 2014 and the Application was filed in April 2015, more than a six (6) months' time period, contrary to Order 53 Rule 1 of the Civil Procedure Rules 2010.**

8. The Respondent also filed a replying affidavit in which it averred that the the letter inviting the Applicant to attend the Disciplinary Committee meeting held on 24th April, 2014 sufficiently informed him of the purpose of the meeting. Further, before the Disciplinary proceedings begun, the Applicant was clearly reminded of the reasons why he was invited to attend the meeting and that he did not deny knowledge of the meeting as well as the charges leveled against him. Instead, he participated in the meeting and responded to the questions directed at him. With respect to the appeal it was contended that the same was denied because he did not comply with the Society's Appeals and disciplinary process rules.

9. The Respondent therefore contended that the Applicant was given a fair hearing and that the decision of the National Staff and Finance Committee that the Applicant was responsible for the Publication of the *Weekly Citizen Newspaper* was fair.

10. The Respondent therefore urged the Court to dismiss the Application with costs.

Applicant's Rejoinder

11. In a rejoinder, the Applicant averred that the errors pointed out by the Respondent are not fundamental and can be cured by way of amendment as the said errors do not go to the substance of the application and were as a result of an inadvertent mistake and not deliberate. To the Applicant, misjoinder of a defendant or a plaintiff is not fatal to the suit and where there is misjoinder, a name of plaintiff or a defendant who has been improperly joined may be struck out and the court may order that the name of any person who ought to have been joined be added. He therefore urged the Court to permit him substitute the council of the Agricultural Society of Kenya with the Agricultural Society of Kenya registered Trustees and proceed to determine the matter on the merits. He equally urged the court to allow him amend the prayer seeking leave of the court as leave had already been granted and the inclusion of that portion was made inadvertently without any intention to mislead since in his view, the respondent will not be prejudiced in any way by the proposed amendment and the hearing of the matter on the merits.

12. According to him, his removal and that of the entire Nairobi branch executive from the society was orchestrated for ulterior motives and to settle perceived personal scores since though a decision appears to have been made to investigate him and other persons, this decision was not communicated to him at all.

Determinations

13. I have considered the application, the affidavits in support of and in opposition to the application and the submissions filed.

14. The Respondent has raised two preliminary issues in opposition to the application. The first issue is that the Applicant has sued the Council of Agricultural Society of Kenya whereas the same is not a public body. In **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal expressed itself as follows:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or *a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment*...Is the form of title to the appeal as adopted by the Attorney General**

in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court". [Emphasis added].

15. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation.

16. Since the defect is curable by an amendment which is an exercise of judicial discretion, the Respondents first objection cannot succeed. This is in line with the holding in the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**. In that case **Newbold, P,** was of the view that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

17. Further it must be appreciated that the Article that specifically deals with judicial review of administrative action is, Article 47 of the Constitution. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015***. Section 2 thereof defines "administrative action" to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) 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;

18. The same section defines "administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. [Underlining Mine].

19. That the Respondents decision affected the legal rights or interests of the Applicant cannot be doubted. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the ***Fair Administrative Action Act, 2015***, judicial review orders may where appropriate issue against the decisions of the Respondent.

20. The second objection was that the Application was filed out of time as the decision to expel the Applicant from the Council was made in May 2014 and the Application was filed in April 2015, more than a six (6) months' time period, contrary to Order 53 Rule 1 of the ***Civil Procedure Rules 2010***.

21. Sections 9(2) and (3) of the ***Law Reform Act*** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that

judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

22. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else.

23. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

24. However, even if the six months' time bar was applicable, it is clear that where the remedy sought is not just limited to an order of certiorari, the whole application cannot be said to be incompetent by that mere fact. The 6 months limitation only applies to application for certiorari for the simple reason that in cases where an order for prohibition is sought it means that the action sought to be prohibited is still continuing while mandamus applies to situations where a public authority has declined to carry out a duty imposed on it. In the premises it is my view that the six months limitation period may not be invoked to bar the applicants from bringing the present proceedings hence the provisions relied upon by the Respondent are inapplicable to the circumstances of this case since the decision to expel the applicant does not fall within the genus of the actions contemplated by the said provisions.

25. However, it must be noted that the nature of judicial review requires parties to approach the Court expeditiously. Expedition in my view is the hallmark of judicial review proceedings and where the Court finds that an applicant has approached the Court after an inordinate delay the Court would still be entitled to decline to grant the orders sought time bar or otherwise notwithstanding. The rational for this is that judicial review deals with administrative actions and such actions ought not to be placed in a status of uncertainty as to whether they would be subject of challenge. I associate myself with the decision in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others [2006] 1 KLR 443** where it was held:

> **"As stated herein it is a requirement of the rule of law that law must be certain and predictable…Thus the advantages of upsetting these ingredients at the altar of individual claims no matter how meritorious are heavily outweighed by the advantages of certainty predictability and stability…I believe one of the pillars of the rule of law which the Court should always uphold is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law. On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate. Limitation in judicial review actions is that of a reasonable time (except as regards *certiorari* orders and proceedings set out in order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the Court away."**

26. In this case however the Respondent's objection is not based on the ground of inordinate delay but on limitation which as I have found is inapplicable.

27. The Applicant in this application contends that his right to be heard was violated as he was not notified of the action the Respondent intended to take against him. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."**

28. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The said Article provides:

> ***(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.***

29. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."**

30. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *"(c) responsive, prompt, effective, impartial and equitable provision of services"* and *"(f) transparency and provision to the public of timely, accurate information."***

28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."*

29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."*

31. Section 4(3) of the ***Fair Administrative Action Act, 2015*** provides 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) administrative action.***

32. In this case it is clear that the notice inviting the applicant for the meeting was not only inadequate in terms of its contents but was meant to mislead the applicant as to the actual object of the same. Apart from bare averments, there is no evidence that the Applicant was informed that he was under investigations. Accordingly, it is my view that the applicant was never afforded an opportunity of being heard as contemplated by the law. That being the position the decision made on appeal being based on proceedings which were themselves null and void cannot stand. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

33. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

'If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

34. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

35. Having considered the material placed before me it is my view that the applicant's case is merited.

Order

36. Consequently, the orders that commend themselves to me and which I hereby grant are:

(a) an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the decision of the National Executive Committee on behalf of the Respondents to expel the applicant from the Agricultural Society of Kenya and the same is hereby quashed.

(b) An order of prohibition prohibiting the Respondents from interfering with the applicant's rights and privileges as a member of the Agricultural Society of Kenya.

(c) An order of mandamus directing the Respondents to reinstate the applicant to the membership of the Agricultural Society of Kenya with full rights and privileges.

37. As the Applicant appreciated that there was misjoinder of parties there will be no order as to costs.

38. Orders accordingly.

Dated at Nairobi this 9th of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Kairaria for the Applicant

Miss Sogomo for the Respondent

Cc Mwangi