



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
H.C. MISC APPLICATION NO.84 OF 2015

WILSON WAKHUSAMA INGANGA APPLICANT

VERSUS

- 1. THE SUB-COUNTY CO-OPERATIVE OFFICER KAKAMEGA CENTRAL..... 1ST
RESPONDENT**
- 2. THE HON. ATTORNEY GENERAL 2ND
RESPONDENT**
- 3. THE COUNTY COMMIESIONER FOR CO-OPERATIVES 3RD
RESPONDENT**

AND

**JUMA MULIEVI & 8 OTHERS INTERESTED
PARTIES**

RULING

By a chamber summons dated 1st October, 2015 brought under *Order 53 rule 1(1)(2) and (4)* of the Civil Procedure Rules and *section 3A* of the Civil Procedure Act and *section 5(1)* of Cap 8 Laws of Kenya.

Wilson WaKhusama Inganga (the applicant) has sought leave of the court to commence Judicial Review proceedings against a number of named respondents. The applicant wants to commence proceedings to bring into this court for purposes of quashing the decision of the Kakamega Sub-county Co-operatives officer of covering a special general meeting on 30th July 2015 and the subsequent proceedings and resolutions arrived in that meeting. The applicant also prays that once leave is granted, it should operate as stay the resolutions made and the elections of a new management committee pending the hearing of the substantive motion.

The grounds upon which the application for leave is based are that the 1st respondent convened the special general meeting and set the agenda, one of them being election of a management committee which was contrary to the Co-operatives Societies Act and By Laws of the affected Co-operative Union, that the Notice was not served on the officials of the Co-operative Union and that non-members participated in the elections.

The applicant has filed a statement of facts and a verifying affidavit in support of the application for leave. In a nutshell, the applicant says he is the Chair of the Management Committee of Kakamega District Co-operative Union and that the 1st respondent, the Sub-county Co-operatives officer, convened a

special general meeting without reference to his committee and without serving relevant Notice as required. He further says that the agenda for the special general meeting was contrary to law namely *section 27* of the Co-operative Act and clauses 9, 10, 11, and 16 of the By-laws of the Co-operative Union. The applicant therefore says that the change orchestrated by the 1st respondent through his actions were *ultra vires* and unlawful.

The application came to court by way of urgency and was scheduled for hearing on 9th October 2015. On that day Mr Anziya learned counsel for the applicant was present in court and so was Mr Tarus, learned counsel for 1st, 2nd and 3rd respondents. The court reminded Mr Tarus that the application was *ex parte* and counsel had no difficulty conceding to that fact and left Mr Anziya to move the application.

Mr Anziya submitted that the 1st respondent sent out a letter dated 3rd July 2015 simply addressed to “All affiliate societies, Kakamega Co-operative Union Ltd” calling for a special general meeting for 30th July 2015. There were three agenda with agenda 2 being on election of the union’s officials. Counsel submitted that this was contrary to *section 27* of the Co-operatives Societies Act and By-law No.16 of the Co-operative Union. According to counsel, *section 27(5)* of the Act Provides when elections are to be held and that elections cannot be held during special general meeting. He said that the setting of the agenda and convening the meeting contravened both the Act and By-laws.

Counsel prayed for leave and sought that leave to operate as a stay of the resolutions reached on 30th July 2015 where a new Management Committee of the Co-operative Union was supposedly put in place thus handing over the activities of the Co-operative Union to strangers

I have considered this application, the statement of facts, verifying affidavit and the annexures to the application. I have also taken into account submissions by counsel.

This being an application for leave to commence Judicial Review proceedings, it calls for exercise of discretion, and in exercising that judicial discretion I have to be satisfied that there are sound grounds upon which to exercise it in favour of the applicant. In the case of *R vs Minister for Agriculture ex parte W. Njuguna & 6 others, Civil Appeal No.144 of 2000 KLR 82*, the Court of Appeal was of the view that leave to commence Judicial Review proceedings should be granted if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave.

The criteria for granting leave to commence judicial review was well stated in the case of *Murugi Kariuki vs Attorney General [1992] KLR 8* as follows:-

“The law relating to judicial review has now reached a stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. The controlling factor in determining whether the exercise of Prerogative Power is subject to Judicial Review power is not its source but its subject matter ... It is not the absoluteness of the discretion nor the authority of the person exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected ... It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant’s interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing there has been a failure of public duty, the court would be in error if it granted leave.

The curb represented by the need to show when he seeks leave to apply, that he has a case, is essential to prevent abuse of the legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief-makers ...”

The court in the above decision laid down clear parameters to consider when dealing with an application for leave to apply. The applicant must show that he has a prima facie case, that there has been failure of

public duty and that there are reasonable grounds upon which the court can act in granting leave. The need to apply for leave acts as a sieve to eliminate unmerited applications such as where there is an alternative remedy, or where the application has been caught up with limitation thus prevent abuse of the legal process. Only matters that have merit should be allowed to proceed to hearing.

The Court of Appeal in furtherance of the same view in the case of *Re Birac International SA (Bureau Veritas)*. 2005 EA, 42 stated:-

“Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the court to threshold issues namely whether the applicant has an arguable case and whether if leave is granted the same should apply as stay. Whereas judicial review remedies are at the end of the day discretionary that discretion is a judicial discretion and for that reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court’s discretion. There should be an arguable case which without delving into the details could succeed ... Ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontier of judicial review and perhaps give an applicant his day in court instead of denying him ... Judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure, and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against arbitrariness ... Although leave to apply for judicial review should not be granted as a matter of routine, where one is in doubt, one has to consider the wise words of Megarry, J. in the case of John vs Rees (1970) Ch 343 at 402, in the exercise of discretion on whether or not to grant stay, the court takes into account the need of good administration ...” (Emphasis)

What emerges from the principles of law contained in the above decisions is that an application for leave to apply should not be granted as a matter of course but on sound grounds in what is called a *prima facie* case. At the same time the court in exercising its discretion should not deny an applicant his day in court and that the court should act on the material before it and not delve into the subsistence of the case. Illegality, arbitrariness and impropriety of procedure when alleged, would lead the court to grant leave so that the applicant’s case can be heard on merit and on whether leave should operate as stay, the court should consider good administration and the legality of the administrative action as a basis.

The *ex parte* applicant herein has alleged that the 1st respondent violated the law governing the calling and holding of general meetings of the Co-operative Union. He is the Chairman of the Management Committee of the Union but his committee members and himself were not notified of the meeting. If this be true, that the law was violated, then that raises the issue of the *legality* of the meeting and the outcome thereof. It also raises the issue of impropriety of the procedure used in called for that meeting and also the issue of *arbitrariness* since it is said, the 1st respondent called the meeting on his own and fixed election as one of the agenda contrary to law. If those are the grounds upon which leave is sought, I am satisfied that they fall within the realm of Judicial Review and that the applicant who has an interest in the Union, his rights were affected and he has demonstrated that he has good reasons to apply for leave to apply for judicial review proceedings to question the legality and good administrative action by the 1st respondent

The applicant has pleaded that once leave is granted it should operate as stay of the decisions or resolutions that were reached on 30th July 2015. He has argued that the welfare of the Union has been placed in the hands of strangers which will affect the performance of the union to the detriment of its members. At this stage it is not known who attended the meeting and how the deliberations went. If it is true that the parent Act, The Co-operatives Societies Act was violated and if it is also true that the By-laws of the Union were equally violated, I think it would be proper to maintain the status quo prior to the impugned meeting of 30th July 2015 so that the affairs of the Union are not jeopardised while parties fight

in court. If in the end the court finds that the elections were legally conducted the new management officials will take office. Should on the other hand the court find that the elections were improper, the Union will still be in the hands of people who had had custody of its affairs and there will be less interruption. The welfare of the Union is paramount in all this.

For the above reasons, I exercise my discretion and allow the application dated 1st October, 2015 and make the following orders:-

- 1.) Leave is hereby granted to the *ex parte* applicant to commence judicial review proceedings to apply for an order of *certiorari* to bring into this court and quash the decision of the first respondent, the sub-county Co-operatives officers Kakamega Central to convene the a Special General Meeting on 30th July, 2015 and subsequent proceedings and resolutions therefrom.
- 2.) The leave so granted do operate as stay of the resolutions made and the election of a new Management Committee and any other decision emanating from meeting of 30th July, 2015 pending the hearing and determination of the substantive motion.
- 3.) The Notice of motion shall be filed and served within twenty one (21) days from the date hereof.
- 4.) The matter will be mentioned on 16th November, 2015 for further directions.

Dated and delivered at Kakamega this 14th day of October, 2015.

E. C. MWITA

JUDGE