



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
JUDICIAL REVIEW NO. 1 OF 2014
GIKANDA FARMERS COOPERATIVE

SOCIETY LTD & OTHERSAPPLICANTS

versus

THE COMMISSIONER OF COOPERATIVES & ANO.....RESPONDENTS

RULING

1. By an application dated 13th January 2014 filed under certificate of urgency the exparte applicants moved court for the following orders
 1. ***That the application be certified urgent.***
 2. ***That leave be granted to the exparte applicants to apply for an order of prohibition, prohibiting the respondents from convening or presiding over any general meetings of the exparte applicants societies with the following agenda.***
 - a. ***The subject of joint coffee Milling at Sagana Coffee Mills as per the circular Number 1 of 2013 of the County Government of Nyeri.***
 - b. ***Election of or replacement of officials of the exparte applicants cooperative societies.***
 3. ***That leave be granted to the exparte applicants to apply for an order of certiorari to remove and bring before this honourable court for quashing the said notices issued by the 1st Respondent herein his servants or agents calling for general meetings of the exparte applicants.***
 4. ***That leave so granted do operate as a stay of all the notices issued for general meetings of the exparte applicants by the first respondent.***
 5. ***That costs be provided for.***
1. The application was supported by grounds on the face of it and verifying affidavit sworn by CHARLES MURIUKI GAKUO GACHARI on 13th January 2014 in which he deponed that he is the chairman of Gikanda Farmers Cooperative Society Ltd with the authority of the chairmen of the other applicants to swear the affidavit and that the 2nd Respondent on 30th October 2013 issued circular number 1 of 2013 directing that all coffee from Nyeri County be milled through SAGANA COFFEE MILLS and marketed through a common agent appointed by the 2nd Respondent.

2. That each of the ex parte applicants have in force tripartite coffee marketing agency and milling agreements legally binding each of the ex parte applicants to exclusively market and mill the ex parte applicants coffee and that the said circular No. 1 of 2013 constitute a violation of the ex parte applicants fundamental rights and freedoms enshrined under Article 27(1), 32(4) 33(4) 8(20 47(1) and (2) of the constitution of Kenya 2010.
3. When the applicants' Advocate appeared before me ex parte Mr. Wahome also appeared and indicated that he had been instructed by the 2nd Respondent to appear for it.
4. Upon hearing Mr. Muthui I granted leave to the same to apply for judicial review but directed that the application be served for inter partes hearing as the issue as to whether the leave granted herein should operate as a stay.

SUBMISSIONS

5. It was submitted by Mr. Muthui on behalf of the ex parte applicants that the circular No. 1 of 2013 had been challenged in Judicial Review No. 14 of 2013 wherein the court had granted leave to operate as stay of the said circular which has made it mandatory that all coffee within Nyeri County be taken to Sagana Coffee Mill. It was further submitted that the ex parte applicants are the ones in possession of the coffee which is being directed to be taken to Sagana Coffee Mills while they each have milling agreements with individual millers which agreement are in force.
6. It was further submitted that under the Coffee Act the mandate of the county government is limited and that the 2nd Respondent is using the 1st Respondent to push the agenda of Sagana Coffee Mill and have now called for meetings wherein the Governor of the county wants to push his agenda which are the meetings sought to be stayed by the leave so granted.
7. Mr. Wahome for the 2nd Respondent filed a replying affidavit sworn by WAMBUI KIMATHI the 2nd Respondent County Secretary in which she deponed that if the meetings are stopped there will be nothing to be heard once the main motion is filed and that the meetings are not an administration matter capable of being resolved by the court by way of judicial review as it is not a decision capable of being implemented or being quashed.
8. Mr. Wahome submitted that for leave to operate as stay the applicants must show that the substantive notice will be rendered nugatory or that the outcome will render the outcome of judicial review nugatory. That the applicants must demonstrate to court that the judicial review has high degree of success and in support thereof relied on the decision of JUSTICE G.V. ODUNGA in MILIMANI HIGH COURT MISC. CIVIL APPLICATION NO. 302 OF 2013 REPORTED IN [2013] eKLR.
9. It was submitted that the matter is subjudice judicial review No. 14 of 2013 wherein leave has been granted and therefore goes against section 6 of Civil Procedure Act and that the meeting called are to enable the Governor address coffee farmers on development issues.
10. Upon hearing the Advocates herein I declined to grant stay at that stage and indicated that the substantive ruling will be delivered on notice which now I hereby do.

ISSUES.

11. For the purposes of this ruling I have identified only two fundamental issues for determination.

1. What are the principles upon which leave granted can operate as stay of order.

2. Has the ex parte applicants met the said principles.

12. The Principles that guide the grant of an order that the leave do operate as stay have been summarised by G.V. Odunga. J in HIGH COURT OF KENYA NAIROBI JUDICIAL REVIEW MISC. APPL. No. 420 OF 2013 REPORT IN [2013] eKLR as JAMES MBURU GITAU t/a JAMBO MERCHANTS OR SUB COUNTY PUBLIC HEAD OFFICE KIAMBU as follows.

“Some of them are that the decision sought to be quashed has been implemented leave ought not to operate as stay; that in considering whether the said leave ought to operate as stay of proceedings the court has to be careful in what it state lest it touches on the merits of the main application for judicial

review, that the objective of granting stay is to ensure that the ex parte applicants application is not rendered nugatory by the act of respondents during the pendency of the application, that the purpose of a stay order in judicial review proceeding is to prevent the decision maker from continuing with the decision making process if the decision has not been made and it is not limited to judicial or quasi judicial proceedings as it encompasses the administrative decision making process being undertaken by public bodies such as a local authority or ministers”

13. He further stated that it is

“It is only where the inherent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the court would stay the said proceedings. The strength or otherwise of the applicant's case notwithstanding. It must be shown that the probability of a determination being made in the challenged proceedings are high and cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

14. I wish to associate myself with the principles set out by Justice Odunga and add that stay will also not be granted if the court is of the view that to do so will amount to an abuse of the court process.

15. As regards the application before the court it is the applicants case that the Respondents have called meetings of members of the ex parte applicants to forcefully push the agenda of the respondents for the coffee milling at Sagana and it is clear that this court had addressed his mind on the said issue in judicial review No. 14 of 2013 wherein stay orders have been granted against the circular No. 1 of 2013 which is the subject matter of this proceedings and the proceedings in misc. application No. 14 of 2013.

16. It is therefore clear that this matter as regards stay of the said circular No. 1 of 2013 is subjudice and therefore an abuse of the court process.

17. It is also clear from the letter calling the said meetings that the agenda thereof which is stated as coffee development is not covered by the order sought by the ex parte applicants and therefore granting stay at this stage might not serve any purposes.

18. The ex parte applicants officials have also not demonstrated to this court reasons why the said meetings should not go on and further they have not shown to the satisfaction of the court why they do not want to attend the said meetings to raise their opposition to the agenda of the second respondent.

19. Should the respondents proceed to discuss issues which are before the court and make resolutions thereon the ex parte applicants still have the remedy of citing the same for contempt of court and further to convince the court to quash the circular upon which the same is based and therefore the said resolution would be rendered a nullity.

20. I therefore find no merit on the prayer for leave to operate as stay and thus dismiss the same with cost being in the cause.

21. For record purposes I must state that the stay order granted in JR Misc. Appl. No. 14 of 2014 is still in force and any party before the court who violates the same shall meet the full force of law as this court does not issue orders in vain.

Dated and delivered this 5th day of February 2014.

J. WAKIAGA

JUDGE

