



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Miscellaneous Application 235 of 2011**

**IN THE MATTER OF ORDER 53 RULE 1 & 4 OF THE CIVIL PROCEDURE RULES  
(CAP 21) LAWS OF KENYA**

**AND**

**IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT (CAP 490) LAWS OF KENYA**

**BETWEEN**

**MOSES KAMAU KAARA & 24 OTHERS ..... APPLICANTS**

**AND**

**1. KAMULU HOUSING CO-OPERATIVE SOCIETY  
LIMITED**

**2. COMMISSIONER OF CO-OPERATIVE SOCIETIES**

**3. BEAR AFRIC COMPANY LIMITED ..... RESPONDENTS**

**RULING**

On the 24<sup>th</sup> October 2011 the applicants led by Moses Kamau Kaara filed a Chamber Summons and named Kamulu Housing Co-operative Society Ltd, the Commissioner of Co-operative Societies and Bear Afric Company Ltd as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

It was an application brought under Order 53 Rules 1 (1), (2) & (4) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, and sections 8 and 9 of the Law Reform Act (Cap 26). The main prayer is for leave to be granted to apply for judicial review for orders of *certiorari* and prohibition.

When the application came up before me on 25<sup>th</sup> October 2011, I certified the same as urgent and ordered that it be served for *inter partes* hearing. This was in line with the new provisions under Order 53 Rule 1(4) of the Civil Procedure Rules which allows the court to order *inter partes* hearing of the summons for leave. The rule states:-

**1(4). The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if a judge so directs, operate as a stay of the proceedings in question until determination of the application, or until the judge orders otherwise.**

**Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the Judge may direct that the question of leave and whether grant of leave and whether the grant of leave shall operate as stay may be heard and determined separately within seven days.**

The application having been served, the 1<sup>st</sup> respondent Kamulu Housing Co-operative Society filed a notice of Preliminary Objection. The 2<sup>nd</sup> respondent filed grounds of opposition. The 3<sup>rd</sup> respondent filed a Notice of Preliminary Objection. Parties' counsel also made submissions in support of their respective clients' position.

In this matter, leave to file judicial review proceedings has not been granted yet. In my view, under the provisions of Order 53 of the Civil Procedure Rules, the court has powers either to grant leave to file judicial review proceedings, or to decline to grant such leave. That is the reason why leave must be sought and granted first before the Notice of Motion, which is the substantive pleading in judicial review proceedings, can be filed.

In considering whether or not to grant leave, the court must of the essence establish whether the intended proceedings fall within the limited parameters of the operation of the judicial review jurisdiction of the High Court provided under Order 53 of the Civil Procedure Rules, and the Law Reform Act. As was stated by Kuloba J in the case of **David Mugo t/a Mayatta Auctioneers –vs- The Court Brokers Licensing Board – Nbi H.C. Misc. Application No. 818 of 1998:-**

**“...this is an application for a judicial review; and as it is fairly well known, judicial review is undertaken where a judicial or quasi judicial decision making authority, whether it consists of one person or a plurality of persons:-**

**(i) exceeds its powers, or**

**(ii) commits an error of law, or**

**(iii) commits a breach of natural justice, or**

**(iv) reaches a decision which no reasonable tribunal could have reached, or**

**(v) abuses its powers or**

**(vi) does a combination of any of these things.”**

Therefore the court has to determine whether the intended proceedings fall within the confines of the above parameters.

It is also imperative to state that judicial review is a public law remedy. It is special jurisdiction of the court under public law and not private law. That is why the “**Republic**” is named in the Notice of Motion as the applicant. It only applies to the exercise of power by public institutions or public officers. It does not apply to the exercise of power, by private institutions or persons.

Having perused the documents herein, I am convinced that the complaints of the applicants, justified as they may be, relate to private transactions with private persons or institutions. The 2<sup>nd</sup> respondent who is a public officer has been joined as a party merely as an attempt, by remote control, to give legitimacy to the application. There is no complaint that attaches to the 2<sup>nd</sup> respondent, the Commissioner of Cooperative Societies. When he comes to exercise or purports to exercise his statutory powers then the issue of challenging his actions can arise. As at now, the Commissioner of Cooperative Societies is not exercising or purporting to exercise his statutory powers. He should therefore not have been joined as a party. The issues herein appear to be the purchase of land and the registration of the interests of purchasers by the Cooperative Society. Those are private engagements which cannot be the subject of

judicial review proceedings. There is therefore, in my view, no legal justification for granting leave to file judicial review proceedings for *certiorari* and prohibition herein. The applicants are of course at liberty to follow the other legal avenues open to them for protection or enforcement of their contractual rights. Their attempt to invoke the judicial review jurisdiction of the court is, in my view, misconceived. I find no merits in the application for leave to file judicial review proceedings.

For the above reasons, I uphold the objections, and decline to grant leave to the applicants to file judicial review proceedings. In effect the application for leave to file judicial review proceedings is dismissed. Costs to the respondents.

It is so ordered.

Dated and delivered at Machakos this 2<sup>nd</sup> day of **October** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Mr Kimani holding brief for Mr Gathii for applicant

Mr Orina for 1<sup>st</sup> respondent holding brief for 3<sup>rd</sup> respondent

N/a for 2<sup>nd</sup> respondent

Nyalo – Court clerk