



**Githongo Coffee Factory, Through Njoroge & 4 others v Commissioner for Co-operative Development & another (Judicial Review Miscellaneous Application E014 of 2022) [2024] KEHC 2683 (KLR) (Judicial Review) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E014 OF 2022**

**JM CHIGITI, J**

**MARCH 15, 2024**

**BETWEEN**

**GITHONGO COFFEE FACTORY, THROUGH NELSON NJUGUNA NJOROGE, ALEX WANYOIKE NGUGI, SAMUEL NDUNGU NGANGA, STEPHEN BORO KERE, AND CATHERINE NDUTA WAWERU ..... APPLICANT**

**AND**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT ... 1<sup>ST</sup> RESPONDENT  
KOMOTHAI COFFEE GROWERS CO-OPERATIVE SOCIETY  
LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to leave of court, the Applicants by a Notice of Motion Application dated 24<sup>th</sup> February, 2022 - brought under Order 53 Rule 3 (1) of the Civil Procedure Rules, Section 8 and 9 of the [Law Reform Act](#), Cap 26 – seeks for:
  1. An order of Certiorari for purposes of quashing the administrative action of the 1<sup>st</sup> Respondent, whether by itself, its servants, agents, officers, successors and/or assigns to quash the administrative action of February/March 2021 being the inquiry itself and the inquiry report of February/March 2021 as contained in the said inquiry report with regards to the Applicants and any decision/resolution made pursuant thereto.
  2. An order of Prohibition directed to the 1<sup>st</sup> Respondent prohibiting them from implementing the inquiry Report with regards to the Applicants.



3. An order of Mandamus directed to the 1<sup>st</sup> Respondent compelling them to call for the final special general meeting as regards the split by the Applicants from the 2<sup>nd</sup> Respondent failing which an order of Mandamus does issue compelling the 1<sup>st</sup> Respondent to issue the certificate of Registration to the applicants as recommended vide a letter dated 23<sup>rd</sup> May 2019.
  4. An order for costs and such further and other relief be granted to the Applicant as this court deems fit
2. The Application was supported by a Statutory Statement dated 2<sup>nd</sup> February, 2022; and an undated Verifying Affidavit deposed by Nelson Njuguna Njoroge.

### **Applicants' Case**

3. The Applicants' case is that the conduct of the 2<sup>nd</sup> Respondent amounts to clear violations of the right to fair administrative action, as set out in Sections 7, 8, 9, 10 and 11 of the *Fair Administrative Action Act*, a breach of the rules of natural justice, and a contravention of the Applicants' Rights under Articles 22, 23, 42, 47, 69, 70, 232 (1), 232(1) of *the Constitution* of Kenya.
4. As per the Applicants, the 1<sup>st</sup> Respondent was aware of the intended split of the 2<sup>nd</sup> Respondent [into two independent co-operative societies] yet, he (1<sup>st</sup> Respondent) purported to undertake an inquiry without involving the Applicants, and proceeded to make very adverse and punitive findings against the Applicants, whereas the intended split had been undertaken procedurally and lawfully.
5. Further, that the 1<sup>st</sup> Respondent has a public duty owed to the Applicants - in that it was mandated to facilitate the meeting that was to be called to finalize on the split of the 2<sup>nd</sup> Respondent [by calling for a special general meeting three (3) months after the first resolution was made]. Thus, the 1<sup>st</sup> Respondent wrongfully abdicated and abandoned his duties and powers in withholding the exercise of the aforementioned public duty.
6. According to the Applicant, in further proof of the abdication of the 1<sup>st</sup> Respondent statutory mandate, the fact that instead of calling for the 2<sup>nd</sup> meeting of the 2<sup>nd</sup> Respondent [as regards the split of the Applicants from the 2<sup>nd</sup> Respondent] within the statutory three (3) months even after request by the Applicants, it is alleged that the 1<sup>st</sup> Respondent started to shift the blame to the Applicants; yet, the process of the split had been commenced and acted upon, and in fact implemented in the presence of the 1<sup>st</sup> Respondent.
7. The Applicants states that due demand has been made, despite which the 1<sup>st</sup> Respondent has refused and/or neglected to carry out his statutory duties of calling for the special general meeting.
8. To the Applicant, no other remedy exists in law to compel the 1<sup>st</sup> Respondent to carry out the said public duty, and no other remedy is available to the Applicants to stop the implementation of the un-procedural, and illegal inquiry report made by the 1<sup>st</sup> Respondent.
9. That there is no other suit pending between the Applicant and the Respondents, apart from the two (2) disclosed matters between the 2<sup>nd</sup> Respondent and the Applicants: one at the Co-operative Tribunal, and the other at the Chief Magistrate's Court.

### **Respondent's Case**

10. The Application is responded to, and opposed by the 1<sup>st</sup> Respondent through the office of the Attorney General, by a Grounds of Opposition dated 8<sup>th</sup> March, 2022 based on the grounds:



1. That the application herein is unmerited, misconceived, vexatious, unmerited, bad in law and therefore an abuse of the processes of the court.
  2. That the application herein offends the Mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules which provides that an application for Certiorari must be brought within 6 months from the date of the decision.
  3. That the inquiry and the Inquiry Report being challenged was done and made in February/ March 2021 and the Application herein was filed on 24<sup>th</sup> February, 2022 past one year.
  4. That the division of the society did not comply with Section 30 of the Act.
  5. That the Applicant has not shown how the said decision by the Commissioner for Co-operative Development has been tainted by illegality and procedural impropriety.
  6. That in the circumstances and based on the foregoing reasons the Notice of Motion Application dated 24<sup>th</sup> February, 2022 is therefore devoid of any merit and the orders sought should not be granted.
  7. That the Applicant has not demonstrated sufficient cause for grounds upon which the court can grant the orders sought.
  8. That the application is an abuse of court process.
11. To buttress their cases, the parties filed their respective written submissions.

### **Applicants' Submissions**

12. The Applicants, in their written submissions dated 17<sup>th</sup> July, 2023 in the main submitted that they are entitled to the prerogative orders sought. That the 1<sup>st</sup> Respondent decision made in the inquiry report was unfair, illegal, unlawful, and had lots of procedural improprieties, for the following stated reasons.
13. That the 1<sup>st</sup> Respondent had purported to undertake an inquiry in February/March 2021, which inquiry did not and could not involve the Applicants: As the Applicants had already started the process of splitting from the 2<sup>nd</sup> Respondent; The split had lawfully been endorsed; The Applicants were in the process of awaiting for the necessary procedure to be undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; and, There was in existence orders in the tribunal case stopping interference by the 2<sup>nd</sup> Respondent with the affairs of the Applicants; court ordered that the Applicants and the member farmers of the Applicant could be paid directly as they had started the process of splitting from the 2<sup>nd</sup> Respondent with the consent and endorsement of the 1<sup>st</sup> Respondent.
14. The Applicants concedes that the inquiry report was conducted in February/March 2021; However, they [Applicants] maintain that the decisions which affect their [Applicants'] rights, were put into effect on 26<sup>th</sup> November, 2021 vide the Special Annual General Meeting (AGM) of the 2<sup>nd</sup> Respondent.
15. Further, that the impugned inquiry report and findings were conducted, by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in hiding and intentionally withheld from the Applicants. That, the said report was only availed unofficially to the Applicants in January, 2022 [in the form of a photocopy] having followed up on it from December, 2021.
16. Also, that the Applicants became aware of the inquiry report when the letter dated 29<sup>th</sup> November, 2021 was written to the Applicants' Coffee Marketer, Ms Sasini, who forwarded the same letter to



- the Applicants; and in that way, the Applicants were then, vide that letter, made aware of the hidden actions of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
17. To the Applicants, they were denied knowledge of the decision and actions [in good time] so that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could then in case of such a challenge in court, plead that the decision sought to be challenged vide Certiorari could not be so challenged as time had lapsed, which indeed is what they have done.
  18. Further, according the Applicants, the decision to close their [Applicants] Accounts was reached vide a Special General Meeting of 26<sup>th</sup> November, 2021 - as per the letter dated 29<sup>th</sup> November, 2021. Therefore, it is submitted, that part of the administrative action and breach by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was the decision to close their [Applicants] Accounts which was a decision of a continuing nature – hence the reason why the 1<sup>st</sup> and 2<sup>nd</sup> Respondents held a Special AGM in 26<sup>th</sup> November, 2021 - despite as claimed that the decision/inquiry report being made in February/March 2021.
  19. It is stated that it was the duty of the 1<sup>st</sup> Respondent to disclose candidly the date the report was actually ready and rendered. That going by what is before this court, especially the letter from the 1<sup>st</sup> Respondent of 29<sup>th</sup> November, 2021; it is clear that the report was adopted by the 2<sup>nd</sup> Respondent in the Special Annual General Meeting (AGM) of 26<sup>th</sup> November, 2021; and that is the date of the administrative action that is sought to be quashed.
  20. As such, that if it was not adopted on the said date, there would have been obviously no decision to challenge. Notably, that the adoption in the special AGM was made in the absence of the Applicants, yet it was a decision that clearly affected them.
  21. According to the Applicants, the parties adversely affected by the said report (the Applicants herein) were the only party not involved in its production; yet they (the Applicants) are now affected by the subject report based on the actions of the Respondents of 26<sup>th</sup> and 29<sup>th</sup> November, 2021.
  22. The inquiry report, it is alleged by Applicants, was never even availed to them [Applicants] in an attempt at making sure that the Applicants did not have a chance to see its contents, and if necessary challenge its implementation, as it clearly had made adverse findings against the Applicants, including: a determination that the Applicants could no longer hold office as members of a Co-operative Society, a decision meant to unlawfully and illegally ensure that the division/splitting away of the Applicant herein, Githongo Coffee Factory, is stifled and stopped.
  23. Its submitted that the 1<sup>st</sup> Respondent disregarded any input by the Applicants, yet they were very aware of the situation as regards the formal request of the split between the Applicants and the 2<sup>nd</sup> Respondent, but that 1<sup>st</sup> Respondent went ahead to make the inquiry report trying to force the re-merging of the two entities - yet they had both themselves agreed to allow that split, with an official letter on the same dated 23.5.2019.
  24. Therefore, that the decision reached by the 1<sup>st</sup> Respondent was actuated by either bias or bad faith thus it is clear there was illegality, irrationality, and procedural impropriety in arriving at the decision in the impugned inquiry report. So, the displayed bias and bad faith rendered the decision of the 1<sup>st</sup> Respondent a nullity as regards the Applicants. Relying on the case of Animistic-vs- Foreign Compensation Commission [1969] 1 AI]ER208, at page 213 and 214 in which Lord Rein stated that; "where a decision is made in bad faith, principles of natural justice not observed, and where there was failure to take into account what is required to be taken into account, such a decision will be a nullity."



25. The Applicants posited that they had legitimate expectation that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were to call a final Special AGM which meeting was to be held within 3 months as provided for in the said Cooperative [Societies Act](#). The Respondents intentionally failed to take action as is demanded of them by the said Act to facilitate the split, and have tried using several means including the impugned Inquiry Report to try and scuttle the Applicants resolve to split and form its own cooperative society.
26. The Applicants argue that they expected to be treated fairly, transparently, honestly, and in good faith - especially because all parties had mutually agreed and there was a preliminary resolution to the same. Reliance in support of this assertion is placed on the case of Civil Service Unions and Others -vs- Minister for the Civil Service [1984] 3 ALL ER 985, at page 949.
27. The Applicants submit that the Fair Administrative Act at Section 4, 5, 6, 7, 8, 9, 10, & 11 were breached by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents actions and based on that breach, it gave grounds to the Applicants to file this matter and that is why the Inquiry Report is being challenged, and also why its implementation is sought to be prohibited. That Article 47 of [the Constitution](#) has now been effectuated by the [Fair Administrative Action Act](#), 2015 particularly under section 4(3) of the Act.
28. Additionally, that Section 108 of the [Evidence Act](#) provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. The case of M'Bitu Ntiro v Mbae Mwirichia & another (2018) eKLR as relied upon.
29. Accordingly, that it is evident the Applicants have proven that when the said inquiry report was being rendered by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Applicants were not involved and neither were the member farmers, while carrying out the Inquiry.
30. The Applicants submit that therefore, as seen from the evidence adduced and submissions, there was illegality, irrationality, and procedural impropriety, bias, and bad faith on the part of the 1<sup>st</sup> Respondent - in arriving at and in rendering its decision. The decisions made by the 1<sup>st</sup> Respondent are based on the said inquiry report, and which decisions will continue to affect the Applicants and all the member farmers of the Applicants. Hence, the court ought to proceed to quash the same, and issue the orders sought herein by the Applicants.
31. The Applicants contends that judicial review remedy is concerned with reviewing not the merits of the decision in respect of which the Application for judicial review is made, but the decision-making process itself. Herein that it has been shown the impugned decision was made contrary to the law, and the rules of natural justice were violated. The Applicants submits that the orders and prayers in the Application dated 24<sup>th</sup> February, 2022 be deemed as merited and the same be awarded to the Applicants with Costs.
32. Conversely, the 1<sup>st</sup> Respondent in their filed Written Submissions dated 9<sup>th</sup> March, 2023 – opposing the Application – submitted that the Application is unmerited and a nullity. It is contended that the decision being challenged (by the Applicants) is an inquiry report of February/March, 2021; while this instant matter was filed on 3<sup>rd</sup> February, 2022 a period of one (1) year after the decision/resolution was made.
33. It is submitted by the 1<sup>st</sup> Respondent that judicial review proceedings are a special kind of proceeding governed only by the provisions of Order 53 of the Civil Procedure Rules, and sections 8 and 9 of the [Law Reform Act](#), Cap 26.
34. Therefore, the 1<sup>st</sup> Respondent maintains, that as Order 53 Rule 2 of the Civil Procedure Rules provides that an application for Certiorari must be brought within 6 months from the date of the decision



[as well as under Law Reforms Act], the same being couched in a mandatory manner, the instant Application cannot stand.

35. In particular, that the ex-parte Applicants have no locus standi because the leave granted to them on 8<sup>th</sup> February, 2022 is a nullity - as per Order 53 rule 2 of the Civil Procedure Rule. That this position was also held in the case of Republic V Kithale M'munoru & 2 Others [2005] eKLR; Kimanzi Ndoe & David Mulwa Muthusi Civil Appeal 233/96; and Joseph Njeru Kombo Versus District Commissioner Mbeere & 30 Others.
36. To the 1<sup>st</sup> Respondent, the leave so granted to institute judicial review proceedings and the substantive proceedings are a nullity, for leave having been granted by the court after expiry of six (6) months. Therefore, the 1<sup>st</sup> Respondent prays that the Applications be dismissed with cost him.

### **Issue for Determination**

37. After a careful consideration of the Application, the responses, the submissions and cited authorities by learned counsel; I find the following issue arises for determination: Whether the Application is merited to grant the orders sought.

### **Analysis and Determination**

38. Before determination of the issues before the Court, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

39. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and section 7 of the *Fair*



*Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

40. In addition, it was emphasized by the Court of Appeal in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.
41. Article 165(6) of *the Constitution* also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights. This court has jurisdiction and I so hold.
42. The consideration and determination of the substantive issues raised in the instant application now follows.
43. Notably, the Applicants alleged illegality of the inquiry report by the 1<sup>st</sup> Respondent; and also as to violation of the right to fair administrative action, and contravention of the Applicant's rights under Article 22, 23, 42, 47, 69, 70, and 232(1) of *the Constitution* of Kenya.
44. On the illegality of the inquiry report by the 1<sup>st</sup> Respondent, the Applicants argued that the 1<sup>st</sup> Respondent was aware of the intended split of the 2<sup>nd</sup> Respondent [into two independent co-operative societies] yet, he (1<sup>st</sup> Respondent) purported to undertake an inquiry without involving the Applicants, and proceeded to make very adverse and punitive findings against the Applicants, whereas the intended split had been undertaken procedurally and lawfully.
45. This claim has not been controverted by the 1<sup>st</sup> Respondent, in any of their responses. Instead, the Respondent asserted on the time/date when the impugned decision/inquiry was made, arguing it's an inquiry report of February/March, 2021; while this instant matter was filed on 3<sup>rd</sup> February, 2022 a period of one (1) year after the decision/resolution was made.
46. Natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard, and that justice should not only be done but seen as done are now embedded in procedural fairness. The duty to act fairly relates to procedural fairness in decision making, and not the fairness in a substantive sense of a decision.
47. There is also no fixed content to the duty to afford procedural fairness, and the answer to a question whether the threshold of fairness has been met will depend on the nature of the matters in issue, and whether there was a reasonable opportunity for parties to present their cases in the relevant circumstances.
48. Article 47 of *the Constitution* and the provisions of the Fair Administrative Act in thus respect now import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of *the Constitution* provides as follows in this regard:
  - (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.



49. In addition, section 4(3) and (4) of the *Fair Administrative Action Act* lays down the procedure to be adopted by decision makers 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) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

50. In the instant matter, the 1<sup>st</sup> Respondent made a decision/inquiry without involving or informing the Applicants, which decision/inquiry has the effect of adversely affecting them [Applicants]. Hence, it is clearly demonstrated that 1<sup>st</sup> Respondent was in contravention of section 4(3) and (4) of the *Fair Administrative Action Act*, and Article 47 of *the Constitution*. Therefore, to my mind, the ground of illegality is demonstrated and established in this case, which may lead to issuing of prerogative order, as allowed in law.

51. The Applicant has sought orders of certiorari, prohibition, and mandamus; which as observed in the Court of Appeal case of Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 inter alia as follows:

52. As regards the nature of the order of prohibition:

“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...”

53. As regards the requirements for an order of mandamus to issue, the Court proceeded to hold as follows:

“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 compel 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...”

54. Lastly, the Court of Appeal discussed the order of certiorari, and opined as follows:

“...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. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”

55. The Respondent has mainly opposed this instant Application on the grounds that the impugned decision was made, in February/March 2021, more than six (6) months before this Application was instituted, on 24<sup>th</sup> February, 2022 [a period of more than one-year].

56. On the other hand, the Applicants argued that the impugned decision was of a continuous nature; thus, informing the reason why the 1<sup>st</sup> and 2<sup>nd</sup> Respondents held a Special Annual General Meeting (AGM) in 26<sup>th</sup> November, 2021 - despite claims that the decision/Inquiry Report being made in February/March 2021.



57. The foregoing issue - of the application being made outside the mandatory required time of six (6) months - was decided on by this court while dealing with a Preliminary Objection dated 14<sup>th</sup> March, 2022 and raised by the Respondent. In a Ruling delivered on 19<sup>th</sup> May, 2023 by this court, in essence, the court decided that the judicial review proceedings seeking certiorari orders were commenced within time [six (6) months]. As such, the same issue that was competently decided on by court, cannot form again, herein. Resultantly, an order of certiorari can issue, where applicable.
58. On Mandamus, the Applicants seek to compel the 1<sup>st</sup> Respondent (Commissioner) to call for a final special general meeting on the division of the Applicants from the 2<sup>nd</sup> Respondent, in default, to compel the 1<sup>st</sup> Respondent to issue a certificate of Registration to them [Applicants.]
59. Divisions of co-operatives societies, which this present case revolves around, is provided for under section 30 of the [Co-operative Societies Act](#). In particular, Section 30(6) of the Act states that:
- “(6) After the expiry of three months after the date of the preliminary resolution, a further special general meeting of the existing society shall be held to consider the preliminary resolution and any notices received under this section.”
60. On general special meetings, section 24(1), 25, and 27(6) to (10) of the Act states that,
- “24. Board of Representatives
- (1) Every co-operative union and apex society shall have a Board of Representatives consisting of at least one delegate from each affiliated society elected at its annual general meeting.
25. Duties and powers of the Board
- The Board shall be empowered to give directions in regard to the business of a co-operative society to the extent that it shall have authority to convene a special general meeting of the society when in disagreement with its Committee.
27. General meetings
- (6) A special general meeting of a co-operative society may be convened—
- (a) by the Committee for the purpose of approving annual estimates or discussing any urgent matter which in the Committee’s opinion is in the interest of the co-operative society; or
- (b) on receipt of a written notice for such meeting signed by such number of the members of the co-operative society as may be prescribed in the rules and stating the objects and reasons for calling the meeting.
- (7) If the Committee fails to convene a meeting within fifteen days of receiving the notice under subsection (6)(b), the members demanding the meeting may themselves convene the meeting by giving notice to the other members of the co-operative society,



stating the objects and reasons for the meeting and the fact that the Committee has failed to convene the meeting.

- (8) The Commissioner may convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting.
- (9) The chairman or in his absence the vice-chairman or such other person as may be prescribed in the by-laws of the co-operative society shall preside at a general meeting of a co-operative society.
- (10) The Commissioners may preside at any meeting convened under subsection (8).

61. From the reading of the *Co-operative Societies Act*, the commissioner of co-operative development has powers to convene a special general meeting. As such, the first limb on the prayers for Mandamus is feasible.

62. The Applicants have also argued on the grounds of constitutional violations. However, this court was not moved under the provisions of *the Constitution*; in other words, the Application was not brought under constitutional provisions. Therefore, this instant Application/case is unqualified to be review on its merit, to the extent of the constitutional violations.

63. The supreme court, while affirming that judicial review proceedings brought under the provisions of *the constitution* must involve a review of merits, in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), the supreme court observed that,

“(85) It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.”

64. In the instant matter, on the violation of *the constitution*, even if the Application had been brought under the constitutional provisions, and thus qualifying for a merit review on the same, in this matter the Applicants have merely alleged the violation of constitution provisions without demonstrating how the same has been violated. It is trite law that a party must provide evidence which demonstrates how their rights have been violated, as merely citing the provisions of *the constitution* alleged to have been violated is not enough.

65. I find guidance in *Consumer Federation of Kenya v Toyota Motors Corporation & 4 others* (Petition 455 of 2018) [2022] KEHC 15459 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment) the high court observed that,

“92. Likewise, the court in the case of *Meme v Republic* [2004] eKLR, restated the position in the *Anarita Karimi Case* (supra) stated as follows:-“Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with reasonable



degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellant.

93. My interpretation of the above provision is that for a constitutional petition to be sustainable a party must by way of evidence demonstrate how its rights have been violated. It therefore follows that the mere citing of constitutional provisions is not enough.”

66. From the foregoing, and having found that an illegality by the 1<sup>st</sup> Respondent has been established, the Applicants' Application dated 24<sup>th</sup> February, 2022 is found merited to the extent as ordered herein below:

**Orders:**

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1. An order of Certiorari be and is hereby issued to bring to this Court and to quash the Commissioner for Co-operative Development (1<sup>st</sup> Respondent's) administrative action of February/March 2021 being the inquiry and the inquiry report of February/March 2021 and any decision or action made thereunder.
2. An order of Prohibition be and is hereby issued prohibiting the Commissioner for Co-operative Development (1<sup>st</sup> Respondent) from implementing the inquiry report of February/ March 2021 with regards to Githongo Coffee Factory (the Applicants).
3. An order of Mandamus be and is hereby issued compelling the 1<sup>st</sup> Respondent to call for a special general meeting as regards the division of Githongo Coffee Factory (the Applicants) from the Komothai Coffee Growers Co-operative Society Limited (2<sup>nd</sup> Respondent).
4. Costs to the Applicants.

It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**CHIGITI (SC)**

**JUDGE**

