



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 11 OF 2020

IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT CHAPTER 490 LAWS OF KENYA

AND

IN THE MATTER OF MUKENIA FARMERS SOCIETY LIMITED

REPUBLIC.....APPLICANT

-VERSUS-

COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....RESPONDENT

***EX-PARTE*: MUKENIA FARMERS CO-OPERATIVE SOCIETY LIMITED**

JUDGMENT

1. After duly obtaining leave of the Court, the Applicant filed a Notice of Motion Application dated 03/08/2020 seeking the following orders:

a. THAT this Honourable Court be pleased to issue an order of Certiorari to bring to this court for purposes of being quashed the Respondent's Gazette Notice No. 10522 and the letter dated 14/07/2020 appointing one LIQUIDATOR MR. PHILIP ULUMA.

b. THAT a declaration that placing under Liquidation of the MUKENIA FARMERS SOCIETY LIMITED vide a Gazette Notice No 10522 dated 06/11/2019 and published on 08/11/2019 is unconstitutional illegal, irrational, and procedurally unfair and is therefore null and void.

c. THAT the costs of this Notice of Motion and the Chamber Summons dated 20/07/2020 be borne by the Respondent.

2. The Applicant is challenging Gazette Notice No. 10522 dated 06/11/2019, issued by the Respondent on 08/11/2019 and a letter dated 14/07/2020 by the Commissioner of Cooperatives appointing a liquidator for the Applicant. The facts of its case are contained in the Supporting Affidavit of Evans Kamau, sworn on 20/07/2020 and his Further Affidavit dated 30/10/2020. Evans Kamau is the Chairman of the *Ex-parte* Applicant's Committee, a Co-operative Society registered in 1991 under the Co-operative Societies Act.

3. According to him, the *Ex-parte* Applicant's Committee became aware of letters related to the dissolution of the Applicant and an appointment of the Interested Party as the liquidator by sheer luck: the letters were neither addressed to it, its Committee members nor the Cooperative Officer responsible for the area the Applicant operates in. The Letter dated 14/07/2020 indicated that a liquidator had been appointed for the *Ex-parte* Applicant. The *Ex-parte* Applicant was never informed despite the last inquiry having been done in 2015, recommending that liquidation be done once land had been distributed to its members.

4. Evans Kamau says that even with the inquiry and recommendation given in 2015, the Committee could not implement the same as there were pending court cases regarding the *Ex-parte* Applicant. He is of the view that under the Co-operative Societies Act, the *Ex-parte* Applicant was under the Sub-County Co-operative Officer as per the letter of 21/10/2020. However, correspondence to the said Officer confirmed that the letter of 19/07/2019 was neither received by the *Ex-parte* Applicant nor the Sub-County Co-operative Officer.

5. It is the Applicant's case that the impugned Gazette Notice has violated the provisions of Section 61 of the Co-operative Societies Act which requires *inter alia* an order for dissolution or cancellation of registration of a Co-operative Society by the Commissioner be in writing. Consequently, not notifying the *Ex-parte* Applicant is denying it a chance to be heard and an inquiry held in 2015 cannot be invoked in 2019 to liquidate the society in secrecy. To the Applicant, dissolving the company using an inquiry held in 2015 would amount to an injustice to the members who are yet to receive their title deeds as was recommended in the inquiry.

6. He says that the cancellation is *ultra vires*, against natural justice and a contravention of Article 50(1) of the Constitution on the right to fair hearing and the decision was made with an ulterior motive contrary to Section 7(2) of the Fair Administrative Action Act.

7. Additionally, he says that the inquiry done in 2015 established that the Applicant had met its objective of purchasing land. The only thing left was distribution of the said land and the sole purpose of liquidation was to bring the society to an end.

Therefore, the Respondent ought to have acted fairly and in accordance with Article 47 of the Constitution and section 4(3) and 4 of the Fair Administrative Action Act.

8. The Respondent responded *vide* the Replying Affidavit of Geoffrey N. Njangombe dated 04/08/2020. He states that an inquiry into the *Ex-parte* Applicant's affairs was conducted in 2015 after its members lodged a complaint in respect to various contraventions by the *Ex-parte* Applicant. The inquiry determined that society had contravened the provisions of the Co-operative Societies Act and its bylaws. Additionally, the Management Committee failed to update the Respondent on whether the recommendations of the inquiry were implemented to pave way for liquidation. The Respondent also says that he continued receiving complaints from members of the failure to implement the recommendations of the inquiry and the failure to convene general meetings.

9. Subsequently, in a letter dated 19/07/2019 to the *Ex-parte* Applicant the Respondent directed that the Management Committee be removed from office for failure to comply with recommendations in the inquiry Report. The Respondent also communicated the intention to cancel the *Ex-Parte* Applicant's registration, appoint a liquidator to handle its affairs and allocation of land to *bona fide* members of the society. He then issued Gazette Notice No. 10522 dated 06/11/2019 for the dissolution of the *Ex-parte* Applicant and appointment of the Interested Party as its liquidator.

10. The Respondent depones that having failed to appeal the decision, the same took effect on the date of the Notice.

Consequently, the *Ex-parte* Applicant is a non-existent entity, incapable of suing and being sued. It is his view that if the orders sought are granted the members of the society will continue being mismanaged to the detriment of the society.

11. The Applicant's submissions are dated 18/11/2020. It reiterates that its Committee members were not aware of the notices and letters informing them of the intended liquidation and have therefore been condemned unheard. It is its case that the liquidation process was tainted with illegality, irrationality, and procedural impropriety. It refers the court to the meaning of illegality in decision making given in ***Council of Civil Service Union v Minister for the Civil Service [1985] AC 2, Francis Bahikrwe Muntu and Others v Kyambogo University, High Court, Kampala Miscellaneous Application Number 643 of 2005 [UR]*** and ***Municipal Council of Mombasa v Republic & Umoja Consultants Limited [2001]***

eKLR.

12. It submits that the decisions and actions of the Respondent are to be guided by Article 47 of the Constitution and Sections 2, 3, 4(3) and 4 of the Fair Administrative Action Act and argues that the *Ex-parte* Applicant was never given an opportunity to make its representations before the decision to liquidate it was reached. The Applicant therefore prays that the Notice of Motion be allowed.

13. The Respondent's submissions are dated 08/02/2021 and they raise four issues. The first issue is that the *Ex-parte* Applicant does not have the capacity to sue. This is because its registration was cancelled by the Gazette Notice, ceasing the *Ex-parte* Applicant's existence under Section 63 of the Cooperative Societies Act. The Respondent relies on the case of ***Kenton Kijabe Co-operative Society Ltd & Another v Liquidator, Kenton Kijabe Co-operative Society Ltd & 2 Others [2018] eKLR***, in which the Court struck out a Petition filed by a dissolved Co-operative Society.

14. The second issue raised by the Respondent's submissions is that the impugned Gazette Notice should not be quashed because first, the present application offends the provisions of Section 9(3) of the Law reform Act and Order 53 Rule 2 of the Civil Procedure Rules. The said provisions require that an application for an order of *Certiorari* be sought within six months of the action complained of. Second, because the procedure for appeal was not exhausted before the *Ex-parte* Applicant applied for Judicial Review. He cites Section 9(2) of the Fair Administration Action Act and Sections 61(2) and 3 of the Co-operative Societies Act.

15. It is the Respondent's submission that this Court should not entertain the *Ex-parte* Applicant until it has exhausted all the dispute resolution mechanisms available to it and relies on the case of ***Marimba Investments Limited v Director General of the National Transport and Safety Authority 7 2 Others [2018] eKLR***. Third, because the *Ex-parte* Applicant has failed to demonstrate how the Respondent's decision is irrational and/ or illegal. He submits that the facts of the Respondent's case do not fit the meaning of irrationality and illegality given under Section 7(2)(i) of the Fair Administrative action Act and in ***Republic v Law Society of Kenya Disciplinary Tribunal & another Ex-Parte Muema Kitulu [2018] eKLR***. Consequently, the Respondent submits that its actions were rational and in accordance with his mandate under Section 62(1) of the Co-operative Societies Act.

16. The third issue raised by the Respondent's submissions is that the letter of 14/07/2020 is not a decision that can be quashed. This is because, the Respondent says, it is merely a letter implementing an earlier decision. He cites the case of ***Republic v Kenya National Highway Authority & Others Exparte Kenya Transporters Association & 8 Others [2013] eKLR***.

17. I have keenly considered the issues raised by the parties in the submissions and I have read the cases they have cited.

18. The first preliminary issue to consider is whether the Applicant has capacity to sue. The issue the *Ex-parte* Applicant's capacity to sue is tied to the Procedure used to dissolve it. This is the main issue in this case, and which will determine the rights and interests of the *Ex-parte* Applicant and its members.

19. Foremost, the cited case of ***Kenton Kijabe Co-operative Society Ltd*** cited by the Respondent is easily distinguishable from this case. In that case, the Petition related to access of information by a Co-operative Society that was already in the process of liquidation. In the present case, the substratum of the suit is the manner of dissolution of the *Ex-parte* Applicant.

20. The Supreme Court dealt with a similar issue in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR***. In that case, the Supreme Court was tasked with determining whether a deregistered Petitioner had the capacity to sue and whether denying it the right to sue would amount to a technicality. The Court Pronounced itself as follows:

Even if the 1st Respondent was deregistered prior to filing a cause in this Court, the new Constitution directs that every person, including an association whether incorporated or not, can

institute proceedings before a Court challenging the contravention of the Constitution.

21. To deny the *Ex-parte* Applicant a fair chance to prosecute its case, which is in effect challenging its dissolution would be tantamount to denying the Applicant an opportunity to challenge an administrative decision made to liquidate it. That cannot have been comprehended by our Constitution or the statute.

22. However, this issue is intimately tied to two others whether this suit is barred by the six-month rule for an order of *Certiorari* and whether this Court is the right decision to challenge the substantive decision at issue.

23. We need to begin the analysis with the letter dated 14/07/2020. The Applicant says that that is one of the decisions to be quashed. The Respondents rebut that that letter is not a decision capable of being quashed.

24. The letter in question is worded as follows:

Reference is made to the Kenya Gazette Notice No. 10522 of 8th November 2019.

This is to inform you that as per the above notice, all transactions pertaining to Mukenia Farmers Co-operative Society Limited (in liquidation) are being handled by the liquidator- Mr. Philip Uluma with effect from the date of the notice. Please accord him the necessary cooperation to enable smooth execution of the liquidation process.

25. It appears readily obvious to me that there is a decision contained in this letter that is capable of being quashed; but that decision is not the decision to place the Applicant in liquidation. The only decision capable of being quashed in the letter dated 14/07/2020 is the decision to appoint a liquidator. That is an administrative decision capable of being quashed. However, that is not the true target of these proceedings; and the legal quality of that decision is dependent on the propriety of Gazette Notice No. 10522. This is because, the appointment of the liquidator was merely in operationalization of the decision contained in the Gazette Notice.

26. The real question, therefore, is whether Gazette Notice No. 10522 is one amenable to be quashed. The Respondents say it is procedurally impossible to do so in these proceedings for two reasons: one, that the proceedings are coming too late in the day; and two, that the proceedings have been brought in the wrong forum.

27. Section 61 of the Cooperative Act reads as follows:

(1) If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.

(2) Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the making of such order, appeal against the order to the Minister with a final appeal to the High Court.

(3) Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Minister or by the High Court, as the case may be.

28. Under this section, once the Commissioner had made his decision to liquidate a cooperative society, any aggrieved party has up to two months to challenge that decision by appealing to the Minister. A final appeal is allowed to this Court.

29. In this case, the Applicant did not challenge the decision of the Commissioner. The Applicant's

Committee, led by Evan Kamau, now that they did not challenge the decision in the manner laid down in section 61 of the Cooperative Act because they did not know that the decision had been made. Unfortunately, this is not availing for the Applicant. The gazettelement of an administrative decision is taken as sufficient notification of the decision. The notification in this case took place on 19/11/2019.

30. It may be understandable for the Applicant to be a few months late to challenge the decision – but not more than a year as was the case here. In any event, once the Applicant became aware of the publication of the Gazette notice, the correct avenue for it to follow would have been to seek permission to appeal to the minister out of time. One cannot simply skim out of the requirement to exhaust local remedies simply by filing a challenge to an administrative decision which is otherwise only challengeable through a statutory forum out of time and then filing it in Court. This would provide quite a perverse incentive for parties to not timeously file any challenges to the Commissioner’s decisions under section 61 of the Cooperative Societies Act.

31. In other words, the present challenge to the Commissioner’s decision through this Judicial Review action cannot stand both because it is being filed out of time; and because it is being filed in the wrong forum and against the judicial policy of requiring parties to first exhaust local remedies unless they can bring themselves within certain accepted exceptions. See: ***Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR*** and ***Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR***,

32. Is this too harsh an outcome for the Applicant for mere tardiness? It is not. This is because the Applicant has not been able to demonstrate the gripping irrationality or oppressiveness of the Commissioner’s decision to liquidate the Cooperative Society anyway. The Applicant says that the decision reeks of ill motives and irrationality because it is based on the Inquiry Report of 2015. It further says that the Inquiry Report had predicated liquidation of the Applicant only upon the distribution of the land it owns to the members. The Applicant says that the distribution is yet to happen – and that, therefore, it was premature to order the liquidation of the cooperative society. The Applicant also implies that the Inquiry Report was, by 2019, quite stale to form the basis of the Respondent’s administrative decision.

33. This Court is not, however, persuaded that Inquiry Report relied on by the Commissioner was stale. The Report was detailed and comprehensive. It showed that the Applicant was in dire governance straits. It also showed that there was no utility of the Applicant to continue its existence beyond the distribution of the land that it owned. The Committee in place was tasked to complete the distribution so that liquidation could proceed. More than three years later, the Committee members had not completed the distribution. The Applicant now claims that they could not complete the distribution because of two pending Court cases. This is a claim they first make in Court. As the Commissioner alleges without answer, the Committee members never updated the Commissioner of the efforts it was taking to complete distribution. Meanwhile, the Commissioner was receiving complaints from members. It would be a quite a stretch, in the circumstances, to conclude that the action by the Commissioner was irrational or otherwise administratively unwarranted. One could come up with a different decision, but to review that decision for merit is not one of the remits of judicial review. The decision might have been wrong; but it was not *Wednesbury*-unreasonable.

34. In any event, if the Applicant had achieved its mission and only remains with the task of distributing the assets while fighting the final legal battles it is engaged in, quashing the decision to liquidate the Applicant seems imprudent. The *Ex-parte* Applicant admitted that the sole purpose of the society was to purchase and distribute land. Its only concern is that land has not been distributed. Both parties attribute this to the ongoing court cases at the Environment and Land Court. If so, it is hard to see how quashing the decision of the Commissioner will serve any useful purpose.

35. In ***Redcliff Holdings Limited v Registrar of Titles & 2 others [2017] eKLR***, the Court of Appeal was of the view that it was pointless to give Judicial Review remedies where the same would not solve the issues between the parties. It was stated thus:

We agree with counsel for the respondents that even if the trial Judge were to issue the judicial review remedies sought, that would not solve the problem as the respondents alleged illegal and irregular allocation of public land; while the appellant was waving titles and claiming indefeasibility in a judicial procedure that does not allow an inquiry of the substantive and underlying issues of acquisition. There are also intervening circumstances since the revocation of titles and perhaps even earlier as it was claimed by the respondents that part of the suit premises is occupied by the headquarters of Ministry of Agriculture's Veterinary Laboratories. Granting the reliefs that were sought would have led to a crash between public and private interests as the substantive issues would remain unresolved.

36. Similarly in this case, quashing the dissolution of the *Ex-parte* Applicant would be a futile exercise. With the apparent tainted history of the management of its affairs, reinstating the Committee may only worsen the situation. If anything, having a liquidator will provide a focal point for distribution of the said land, handling of any pending litigation and eventual liquidation of the *Ex-parte* Applicant.

37. Having considered all the factors above, the Notice of Motion dated 03/08/2020 lacks merit and is hereby dismissed in its entirety.

38. Each party shall bear its own costs.

39. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF SEPTEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.