



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CONSTITUTION PETITION 3 OF 2020**

**IN THE MATTER OF ENVIRONMENT OF CHAPTER FOURS OF  
THE CONSTITUTION OF KENYA ON THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 27,  
36, 46 & 47 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JOHN MOSINGI MARUBE.....PETITIONER**

**VERSUS**

**THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....1<sup>ST</sup> RESPONDENT**

**THE KISII COUNTY COMMISSIONER FOR COOPERATIVE.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. John Mosingi Marube the Petitioner, in his petition dated the 4<sup>th</sup> February 2020 seeks the following reliefs;

- a). An order of mandamus to issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to forthwith act on the Resolution AGM MIN NO. 009/2016/2017/SPLIT OF SOCIETY passed at the Annual General meeting of Kenya Farmer Cooperative Society Limited.
- b) An order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from interfering with the operations of Nyabioto and Eburi coffee factories in the marketing of the coffee in any way and/ or any manner whatsoever.
- c). Costs of the Petition be awarded to the Petitioner.

2. The petition is supported by the petitioner’s affidavit dated 4<sup>th</sup> February 2020. The petitioner’s case is as follows; he is farmer and belongs to Nyabioto Coffee Factory under no. 525-02-8742. He brings the petition on his own behalf as a Kenyan and a coffee farmers and a member of Nyabioto Coffee Farmers which is a registered entity under certificate number 47477 dated 4<sup>th</sup> November 2019. Nyabioto Coffee Factory and Eburi Coffee Factory have been members of Kenya Farmers Cooperative Society limited until the 3.7. 2018 when the farmers resolved in an Annual General Meeting under minute AGM MIN NO 009/2016/2017 SPLIT to operate independently from Kenya Farmers Cooperative Society Limited. The issue of the split was put to vote and by a majority vote 212 to 119 it was resolved that the split be done. Following the said resolution on the split it was proposed that farmers from Nyabioto Coffee Society and Eburi Coffee Society be split and form Nyaburi Farmers Cooperative Society Limited. That the resolution of the farmers was to be effected by the 1<sup>st</sup> and 2<sup>nd</sup> respondents pursuant to their mandate under the Co-operatives Act. The Resolution for split was forwarded to the Commissioner of Co-operatives for action under the law as per the correspondences between the office of the Commissioner for Co-operatives and the Kisii County Commissioner for Co-operatives. That despite being informed of the Resolution the 1<sup>st</sup> and 2<sup>nd</sup> respondents have by omission and/ or inaction under the law refused, neglected and/or failed to act on the farmer’s resolution in breach of the farmers rights to freedom of

association under the Constitution hence the cause of action . That the farmers of Nyabioto Coffee Factory and those of Eburi Coffee Factory are entitled to their freedom to associate and form Nyaburi Farmers Cooperative Society Ltd pursuant to the said resolution and that they cannot be compelled by the inaction of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to belong to Kenyena Farmers Co-operative Society Limited. That as a result of the inaction of the 1<sup>st</sup> and 2<sup>nd</sup> respondents the farmers from Nyabioto Coffee Factory and Eburi Coffee Factory have been forced to withhold their coffee from marketing for fear of being exploited by the management of Kenyena Farmers Cooperative Society Limited and they are awaiting for the split to enable them to gain full benefits from the coffee produce, free from exploitation from middlemen. That the failure, delay and/or refusal by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to act on the resolution on split is actuated by ulterior motives other than genuine legal grounds hence this cause of action to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to act as directed by the farmers.

3. The 3<sup>rd</sup> Respondent despite being served did not respond to the petition. The 1<sup>st</sup> and 2<sup>nd</sup> respondent opposed the petition, a replying affidavit dated 17<sup>th</sup> June 2021 was sworn by Mr Kaburi an advocate who works with Kisii County Government as Senior Counsel and avers that he is well conversant with the matters. He depones as follows; that the petition is non- starter and an abuse of the due process of the Court as the same has been filed by a petitioner who is malicious who has no express mandate to file suit on behalf of Kenyena Farmers Co-operative Society Limited. That under the law Kenyena Farmers Co-operative Society Limited is a liability Company capable of suing and being sued on its own. That Nyabioto Coffee Farmers have duly elected members who can represent the factory and that the petitioner who hails from Nyabioto village where the said factory is situated does not give him the rights or powers to file the petition. That he has been informed by the 2<sup>nd</sup> respondent that Nyabioto Coffee Farmers is a private entity registered under Social Development Office and does not fall under Kenyena Farmer Co-operative Society which is registered under the Commissioner of Co-operative. He is further informed that the Commissioner of Co-operatives rightly refused the request of splitting Kenyena Farmers Co-operative Limited because of the laid down procedures and pertinent issues to be considered before such a split is done were not done. That Kenyena Farmers Co-operative Society has pending loan arrears running into millions from their bankers' which banks have not been notified of the intended splitting. That in the absence of involving the debtors no split can be allowed. That the Commissioner did write to Kenyena Co-operative Society informing them of the procedure to follow in division of the Registered Co-operative Society and particularly section 30 of the Co-operative Societies Act (amended) 2014 which was photocopied and sent to them and they did not comply. That Kenyena Farmers Co-operative is not a party in this petition though it is the one allegedly to be split hence any orders that may be granted may offend thousands of farmers who are bonafide members of the society who may end up being condemned unheard. That the 2<sup>nd</sup> respondent has a duty to safeguard the general interest of the farmers by ensuring that the duly registered coffee factories follow the laid down laws and procedures so that the farmers rights are safeguarded and the officer holding the 2<sup>nd</sup> respondent's office is guided by the Co-operative Societies Act ( as amended) 2014. That being a private entity Nyabioto Coffee Factory registered under the Social Services cannot qualify to complain against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as alleged. That the petition should be dismissed with costs as the same has been filed prematurely whilst the process of splitting was ongoing.

#### **SUBMISSIONS**

4. The petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed written submissions. In his submissions the petitioner reiterates what is deponed in his petition and supporting affidavit. According to the petitioner the main issue in this matter is whether Nyabioto Coffee Farmers is legible to be registered on its own. The petitioner cited the duties of the Commissioner and Registration of Co-operative as provided under sections 3 and 4 of Co-operative Societies Act Cap 15 of 2017. It is submitted that the majority of the members wanted to split from Kenyena Farmers' Cooperative Society Limited and that despite inquires to the 1<sup>st</sup> and 2<sup>nd</sup> respondent on the issue of splitting, the said respondents have neither acted on the same nor have they given any written reasons as to why it is not possible to register a Community Based Organization for the farmers of Nyabioto Coffee Factory and as such an infringement of the rights of the farmers are affected. Reliance was made on Article 36 and 46 of the Constitution on '*Freedom of Association and Consumer Rights*'.

On the issue of the order of mandamus the petitioner relied on 2 cases namely: Kenya National Examination Council vs. Exparte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR cited in Republic vs. County Co-operative Commissioner, Machakos; Henry Nzomo & 6 others (Interested Party) Exparte Kathekakai Farmers Co-operative Society Limited & another [2019] eKLR and the case of Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appln. No 81 of 2002[2002] 1KLR 486[2008] 2KLR (EP) 393. In the latter case it was held that, ***a person seeking an order of mandamus must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under an obligation, whether at common law or by statute to so perform. Where there is no such a duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant an order.***

The petitioner urged the court to find that the respondents have no plausible reasons to refuse to split Nyabioto and Eburi Coffee Farmers from Kenyena Farmers' Cooperative Society as resolved in the AGM MIN NO. 009/2016/20017 on split of Society to form Nyaburi Farmers Co-operative Society Limited.

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in its written submissions raised the following issues for determination;

a) *Whether the petitioner herein has locus to file the petition on behalf of Kenyena Farmers' Co-operative Society Limited which is a limited liability company capable to sue and be sued on its own.*

b) *Whether the petition as filed is properly filed before the Honouable court.*

c) *Whether the petitioner herein has powers and or consent to file the petition instead of the duly elected officials of Kenyena Farmers Co-operative Society Limited.*

d) *Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have ever interfered with the daily operations by the Nyabioto Coffee Factory which is private entity not governed by the Co-operative Act (Amended) 2014.*

It was submitted that the petitioner has not proved that he has ever supplied any coffee to any coffee factory within Kenya region or that he is an elected official of Nyabito Coffee Factory. That no single elected official from any of the affected coffee factories has filed any affidavit or made a party to affirm the allegations. That Kenya Farmer Co-operative Society Limited serves more than 5 coffee factories and all factories involved have elected officials. That the said officials have not filed any affidavit on the allegations made. That if the orders are issued it will amount to condemning all the affected coffee parties unheard. That without any official authorisation to have the petition filed the petitioner is a busy body who seeks to antagonise the smooth running of Kenya Farmers Co-operative Society Limited.

That the 1<sup>st</sup> respondent on the 23<sup>rd</sup> May 2018 wrote to the 2<sup>nd</sup> Respondent with instructions to forward the resolution and particulars of how liabilities owing to Kenya Farmers Co-operative Society Limited Creditors shall be met to enable completion of the split process, but the same has not been forwarded and/or submitted. That because that was not done the 1<sup>st</sup> and 2<sup>nd</sup> respondent could not sanction the split see provisions of section 31(1) a and b, 2,3,4,5 and 6. That the petitioner needs to mobilise the elected officials of the coffee factories affected and meet all the laid down requirements for a split as per section 30 and 31 of the Co-operative Act (Amended) 2014. Kenya Farmers' Co-operative Society Limited has not so far complained of any wrong doing by the 1<sup>st</sup> and 2<sup>nd</sup> respondent hence there is no petition. That the petitioner is seeking an order of Mandamus whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have not issued any orders which the court is being asked to quash, thus the petition should be dismissed.

### ANALYSIS AND DETERMINATION

5. I have considered the petition the affidavit in support, the replying affidavit and the parties written submissions. The main issue is whether the petitioner is entitled to the orders of mandamus and prohibition as sought in the petition. An issue has also been raised on whether the petitioner has the locus to file the petition.

6. The genesis of this petition is that at an AGM of Kenya Coffee Farmers Cooperative Society Limited (hereinafter referred to as Kenya Society) it was resolved by way of majority vote to split Nyabito Coffee Factory and Eburi Coffee Factory from Kenya Co-operative Society Limited form Nyaburi Farmers' Co-operative Society Limited. Min No 009/2016/2017/Split of Society reads as follows:

*‘Mr Jared Mogaka- County Cooperative officer Kisii asked the members whether there was enough time for the Notice of 15 days. The members responded that they were satisfied with time as per the notice of the meeting.*

*He told them that the conditions of split as per the Act have to be followed.*

*He also told them that such issue has to be discussed when at main factory.*

*He therefore asked for the proposer and seconder for the split.*

*M/No.2459-Philip Omwancha proposed seconded by M/No 12692 Mary Nyasinga.*

*However, the County Co-operative officer told them to show by vote of queuing. Those that were for were 212 members and against 119 members. The split was passed by 212 members.”*

7. The circumstances under which an order of mandamus can issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89* thus:

***"The order of mandamus is of 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 and 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." ...These principles mean that an order of mandamus compels 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."***

8. In this case the petitioner has moved the court to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to act on the resolution AGM MIN NO. 009/2016/2017/SPLIT OF SOCIETY passed at the Annual General meeting at Kenya Farmers Co-operative Society. The said minutes does indicate that the resolution was passed. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that though the resolution was passed the petitioner has no locus to file the petition and that there are parties who are not party to the petition being Kenya Farmers Co-operative and Eburi Coffee Factory and lastly that section 30 and 31 of the Co-operative Act has not been complied.

9. The resolution the applicant seeks to enforce was passed at a meeting of farmers of Kenya Farmer Co-operative Society Limited. I note that Kenya Society is not a party in this petition. Section 30 of the Act provides as follows on division of Cooperatives:

***“30. Division of co-operative societies (1) (a) A co-operative society (hereinafter referred to as the existing society) may, by special resolution (in this section referred to as the preliminary resolution), resolve to divide itself into two or more co-operative societies (hereinafter referred to as the new societies). (b) The preliminary resolution shall contain proposals for the division of assets and liabilities of the existing society among the new societies in which it is proposed to be divided and may prescribe the area of operation of, and specify the members who will constitute, each of the new societies.***

(2) A copy of the preliminary resolution shall be sent to all the members and creditors of the existing society, and to all other persons whose interests will be affected by the division of the existing society.

(3) Any member of the existing society may, notwithstanding any by-law to the contrary, by notice in writing given to the society within two months of the receipt of the copy of the preliminary resolution, intimate his intention not to become a member of any of the new societies. CAP. 490 [Rev. 2012] Co-operative Societies [Issue 1] 22

(4) Any creditor of the existing society may, notwithstanding any agreement to the contrary, by notice in writing given to the existing society within two months after his receipt of the copy of the preliminary resolution, intimate his intention to demand the payment of any money due to him.

(5) Any other person whose interest will be affected by the division may, by notice in writing given to the existing society within two months of the receipt of the preliminary resolution, object to the division.

(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.

(7) At the special general meeting held under subsection (6), provision shall be made by a further resolution of the society for— (a) the repayment of the share capital of any member who has given notice under subsection (3); (b) the satisfaction of any claims by creditors who have given notice under subsection (4); (c) the satisfaction of the claims of such other persons who have given notice under subsection (5) or the securing of their claims as the Commissioner may determine, or direct: Provided that no member or creditor or other person shall be entitled to such repayment or satisfaction until the preliminary resolution is confirmed as provided in subsection (8).

(8) The society may, by further resolution passed by a two-thirds majority of the members present and voting, confirm the preliminary resolution, with or without changes as in the opinion of the Commissioner are not substantial, and the decision of the Commissioner as to whether any changes are or are not substantial shall be final.

(9) If, the Commissioner is satisfied within such time as he considers reasonable that the provisions of the secondary resolution and the provisions of this section have been complied with, he may, register the societies into which the existing society has been divided and the by-laws of such societies and thereupon— (a) the registration of the existing society shall stand dissolved; (b) the registration of the new societies shall be sufficient to vest the assets and liabilities of the existing society in the new societies in the manner specified in the preliminary resolution, as confirmed; (c) the remaining members of the existing society shall become members of one or other of the new societies, as is provided by the preliminary resolution, as confirmed; and (d) any shareholders or creditors of the existing society and any other persons who have claims against the existing society and whose claims were not satisfied in accordance with the secondary resolution, may pursue such claims against one or other of the new societies, as is provided by the preliminary resolution, as confirmed.

(10) Where the Commissioner refuses to approve the division of an existing society under subsection (9), the society may appeal to the Minister within thirty days of the communication to it of the refusal.

10. The 1<sup>st</sup> and 2<sup>nd</sup> respondent argue that after the AGM the commissioner directed that the proposed sub-division resolutions were to be forwarded to the creditors and/ or interested person affected by the division and that the petitioner had not demonstrated that this has been done.

11. The provisions of section 30 (2) of the Act state as follows:

(2) A copy of the preliminary resolution shall be sent to all the members and creditors of the existing society, and to all other persons whose interests will be affected by the division of the existing society.

The above provision is a mandatory requirement which must be fulfilled. It is evident that the petitioner has failed to demonstrate that this provision was complied with. To come to court seek an order of mandamus without showing that the parties concerned complied the process of splitting the society as provided under section 30 which is very elaborate is an abuse of the court process. An order of mandamus is available to a party who has demonstrated that it as the applicant is not at fault but that the concerned authority despite being asked to comply has failed to carry out an action or comply deliberately. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same (see Kenya National Examination Council [C.A.266/1996]). In my view the 1<sup>st</sup> and 2<sup>nd</sup> respondents have demonstrated that they are awaiting for the members of the Society the petitioner is associated with to comply with the provisions of section 30 to enable them proceed with the Society's request. The societies involved have a duty to comply with the provisions of section 30 of the Act.

12. Another issue has been raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the petitioner has failed to demonstrate that he has the *locus standi* to file this petition. In his petition the petitioner describes himself as a member of Nyabioto Coffee Factory under number 525-02-8742 and currently a committee of Nyabioto Coffee Farmers Community based organisation. In his affidavit in support of the application the petitioner has attached his Identity Card "JMM1" and a letter addressed to the Governor Kisii dated 18/11/2019 where he has signed as the Vice Chairman "JMM2". There is nothing attached to show that he is a member of Nyabioto Coffee Farmers Community Based Organisation or that he has the authority to file this petition on behalf of the said organisation. Indeed as a citizen he has the right of association, however the petitioner being a member of organisation has to have the authority of the organisation to file suit on its behalf for any orders sought would affect not only the petitioner but also the concerned society or societies. I further note that Kenyena Farmers Co-operative society Limited

from which Nyabioto sought to Split from and Eburu Coffee Factories which is to join with Nyabioto to form Nyaburi are not parties to this petition. Having failed to demonstrate that the petitioner or the organisation has complied with the provisions of section 30, I decline to grant an order of mandamus as sought.

13. The petitioner also seeks to have an order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from interfering with the operations of Nyabioto and Eburu Coffee factories in the marketing of their coffee. In his petition and affidavit in support of the application the allegations made against the 1<sup>st</sup> and 2<sup>nd</sup> respondents are that they failed in their statutory duty to facilitate the said split and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have denied their farmers their consumer rights by denying the said farmers a coffee movement permit to sell their produce. It is averred at paragraph 8 of the supporting affidavit that the farmers from Nyabioto Coffee factory and Eburu Coffee Factory have been forced to withhold their coffee from marketing for fear of being exploited by the management of Kenyena Farmers Co-operative Society Limited and that they are awaiting for the split to enable them gain full benefits from their coffee produce, free from exploitation from middlemen. These allegations have not been backed by any evidence by the petitioner. There was need to have evidence to show that this is what is happening. The petitioner has failed to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted beyond their scope of powers.

14. Lastly the petitioner has cited various Articles of the Constitution in the heading of his petition and Articles 36 however, he has failed to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed (see *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154.)

15. My conclusion therefore is that the petition lacks merit. It is dismissed. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT KISII ON THE 28TH DAY SEPTEMBER 2021**

**R.E.OUGO**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. BEGI FOR THE PETITIONER**

**MR. KABURI FOR 1ST AND THE 2ND RESPONDENT**

**3RD RESPONDENT ABSENT**

**MS RAEL COURT ASSISTANT**