



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW MISC. APPL. NO. 11 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI &

PROHIBITION BY:- SONYACCO SACCO SOCIETY LIMITED

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 AND FAIR ADMINISTRATIVE ACT 2015

AND

IN THE MATTER OF A REPORT DATED 25TH OCTOBER 2018

BY THE MINISTER OF INDUSTRY TRADE AND CO-OPERATIVES

STATE DEPARTMENT FOR CO-OPERATIVES

REPUBLIC.....APPLICANT

VERSUS

THE MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES.....RESPONDENT

SONYACCO HOUSING CO-OPERATIVE SOCIETY LIMITED.....INTERESTED PARTY

SONYACCO SACCO SOCIETY LIMITED.....EXPARTE APPLICANT

JUDGMENT

Before me is an application for Judicial Review. The said application, which is dated 15th April 2019 was lodged at the High Court at Homa Bay.

1. However, Karanja J. recused himself from the case, and had it transferred to Kisumu.
2. The Exparte Applicant is **SONYACCO SACCO SOCIETY LIMITED**, whilst the Interested Party is **SONYACCO HOUSING CO-OPERATIVE SOCIETY LIMITED**.
3. Meanwhile, the Respondent is the **MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES**.
4. It is common ground that the Respondent, acting through the Commissioner for Co-operative Development, had appointed a team of three persons who were tasked to inspect the wrangles between the Applicant and the Interested Party, and to provide their recommendations on how to resolve the said wrangles.
5. The team of Inspectors, comprising Patrick O. Mak'Anyengo, Peter Chege and Suleiman Wandati presented their Inspection Report dated 25th October 2018.
6. The single most significant recommendation of the Report was that the Sacco should relinquish the plaza to the Housing Society.

7. The Report further recommended that the County Co-operative Commissioners for Homa Bay and Migori counties should convene a Special General Meeting of the original members of the Sacco who had contributed funds towards the acquisition and the development of the plaza.

8. The Sacco felt aggrieved, hence the application before the Court. Through the application dated 15th April 2019, the Sacco sought the following two reliefs;

“1. An order of Certiorari to remove into this court the decision of the Ministry of Industry Trade and Co-operatives, contained in a report dated 25th October 2018, by which it directed the applicant to hand over its property situated

on L.R. NO. 1432/556 in Homabay to SONYACCO HOUSING CO-OPERATIVE SOCIETY LIMITED.

2. An order of prohibition barring the County Co-operative Commissioners for Homabay and Migori Counties

from acting on the decision of the Ministry of Industry, Trade and Co-operatives contained in its report dated 25th October, 2018.”

9. In my considered opinion, the fundamental issue for determination is whether or not the Respondent acted in excess of authority.

10. By dint of the provisions of **Section 58** of the **Co-operatives Act**, the Commissioner of Co-operatives may make inquiries into the affairs of any co-operative society.

11. The inquiries may be undertaken by commissioner on his own accord, or on the direction of the Minister or on the application of not less than one-third of the members of the co-operative society who were present and voting at a meeting appropriately convened for that purpose.

12. After the inquiry is undertaken, the Commissioner is required to report the finding of his inquiry at a General Meeting of the Society, and he is also required to give directions for the implementation of the recommendation of the inquiry report.

13. It is common ground between all the parties herein that, in principle, the Commissioner for Co-operatives had the requisite legal authority to hold an inquiry into the by-laws, or the working and financial conditions of any co-operative society.

14. However, the parties hold divergent views regarding the question about whether or not the commissioner acted ultra vires. On the one hand, the Sacco asserts that the commissioner’s actions were ultra vires; whilst the Housing Co-operative and Respondent believe that the commissioner acted within the scope of his authority.

15. In the case of **ASSOCIATED PROVINCIAL PICTURES HOUSE LIMITED Vs WEDNESBURY CORPORATION (1945) 1KB 223**, the Court set out the standards of unreasonableness of public body decisions which would make them liable to be quashed on Judicial Review. The three standards are as follows;

(a) In making the decision, the defendant took into account factors that ought not to have been taken into account; or

(b) The defendant failed to take into account factors that ought to have been taken into account; or

(c) The decision was so unreasonable that no reasonable authority would ever consider imposing it.

16. Based on that authority, the Respondent submitted that they had not flouted any of the standards; and that therefore the decision embodied in the Inquiry Report, with regard;

“to the ownership of the Sonyacco Plaza”,

ought not to be quashed.

17. It was the Respondent’s submission that the Court ought not to substitute its own opinion with that of the public body which had the legal mandate to decide the matter in question.

18. On its part, the Interested Party submitted that an Applicant can only obtain orders for judicial review if he demonstrated to the Court that the act complained of was done without jurisdiction or in violation of either the law or of the rules of natural justice.

19. Both the Respondent and the Interested Party cited the case of **PASTOLI Vs KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS (2008) 2 EA 300**, for the proposition that the judicial review orders may issue if there was proof of illegality, irrationality or procedural impropriety. This is what the Court said in that case;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act

complained of was tainted with illegality, irrationality and procedural impropriety.....

Illegality is when the decision- making authority commits an error of law in the process of taking or making the act, the subject matter 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.

.....

Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority, in the process of taking a decision.....”

20. In this case the Applicant has submitted that the decision made or the action taken was made without jurisdiction.

21. In effect, the Applicant’s contention was that the decision in issue was tainted with illegality.

22. Having given due consideration to the submissions before me, I find that the impugned decision had the effect of transferring the ownership of immovable property from the Sacco to the Housing Co-operative.

23. The Commissioner of Co-operatives and the Ministry of Industry, Trade and Co-operatives do not have the legal mandate to compel a registered proprietor of land to transfer the ownership thereof to another person.

24. Pursuant to **Article 162 (2)** of the **Constitution**, the Environment and Land Court was established and conferred with the requisite legal mandate to hear and determine disputes relating to the environment, and the use and occupation of, and title to land.

25. Therefore, when the Respondent made a decision which would have the effect of divesting the ownership of the plaza from the Sacco, and conferring it upon the Housing Co-operative, the Respondent acted without legal authority.

26. Accordingly, the said decision cannot be allowed to stand:

it is therefore quashed.

27. Secondly as the decision was tainted with an illegality, it would be unlawful to implement it. Accordingly, the County Co-operative Commissioners for Homa Bay and Migori Counties stand prohibited from acting on the recommendations in the Report dated 25th October 2018.

28. In a nutshell, the reliefs sought herein are granted as prayed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER 2021

FRED A. OCHIENG

JUDGE