



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 155 OF 2018

MWENDE SAMSON.....PETITIONER

VERSUS

1. JITEGEMEE SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD

2. THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT

3. THE ATTORNEY GENERAL.....RESPONDENTS

J U D G M E N T

1. By a petition dated 18/5/2018 and filed in court the same day, the petitioner sought to be granted three substantive prayers:-

i. “A declaration that the elections to be held on 19th May, 2018 or any other date to the exclusion of the Petitioner is unconstitutional and null.

ii. A declaration that the elections to be held on 19th May, 2018 or any other date to the exclusion of the Petitioner is in breach of her fundamental rights particularly her freedom for discrimination on account of gender and political rights.

iii. A declaration that the Petitioner is duly qualified to vie for any position with the 1st Respondent and an order allowing her to participate and vie in any elections to be held by the 1st Respondent.

2. The disclosed facts to ground those prayer are that; being a co-operator of the 1st Respondent, she showed interest to contest the position of treasure, was duly nominated for such contest by the 1st Respondent’s nomination Board but two days before the scheduled elections, he received a text message disqualifying her from contesting the position. The petitioner viewed the action to be a violation of her rights and fundamental freedoms under the provisions of articles 19, 20, 21, 22, 23, 27, 36 738 of the Constitution.

3. With the petition, the petitioner filed a notice of motion for conservatory orders which exhibited the document showing her membership, the society’s By -laws to highlight the rules governing elections as well as the rights of the co-operators. That application for conservatory orders was dealt with *ex-parte* under certificate of urgency; interim conservatory orders granted and directed to be served for *inter-partes* hearing with a condition that the petition gives undertaking as to damages.

4. Before the matter could come for *inter-partes* hearing, the respondents filed another Notice of Motion dated 21/5/2018 seeking to discharge the interim orders.

5. When both applications came up for hearing, after the Respondent had filed a preliminary objection and Replying Affidavit and when it became evident that the matter could not proceed towards the expeditious disposal of the two applications, it was directed by the court, with the concurrence of counsel, that the applications be subsumed in the petition and that the motion by the petitioner as well as the plying affidavit to the respondents’ application be treated as part of the petition while that motion by the Respondent together with the Replying Affidavit and preliminary objection be treated as responses to the petition.

6. Pursuant to that order and the directions the petition the Notice of Motion dated 18/5/2018 and the Replying Affidavit of petitioner sworn on 28/5/2018 comprised the record of the petition while the response thereto comprising the Notice of Motion dated 21/5/2018, grounds of opposition dated 21/5/2018 and the Respondents list of documents dated 31/5/2018 and a preliminary objection contending that this court lacks jurisdiction to entertain the matter were deemed responses to the Petition. Having taken the view that the matter be fast-tracked, the matter was then fixed for hearing without the needs for written submissions. Accordingly, parties offered oral submissions and cited to Court

the provisions of the Constitution, Cooperative Act and decided cases in their respective submissions.

Submissions by the petitioner

7. In urging the petition Ms. Mukoya referred the court to paragraphs 3, 4, 8, 9 and 10 of the petition to be the specific constitutional provisions said to have been violated or threatened with violation by the Respondents. She stressed the fact that the petitioner was the only candidate from the female gender and that without her participation, the elections would from the start portend breach of the 1/3 gender rule.

8. On the alternative remedy under Section 76 of the Co-operative Societies Act, counsel submitted that this being a constitutional court, its jurisdiction under Articles 165(3)b of the constitution had not been ousted by the provision of the Cooperative Societies Act. In the alternative, it was argued that section could not be interpreted to mean a dispute as to whether or not rights and fundamental freedoms had been violated.

9. On the membership of the petitioner counsel submitted that being a **Class 'A' member**, the petitioner was entitled to the rights provided for under clause 13 of the By-laws including the right to attend all meetings to elect officials and be elected to a declared vacant office. On account of her rights as a Class A member, it was submitted that the petition showed an interest to seek to be elected at the elections called by the 1st Respondent and was duly nominated by the nomination committee as shown by the annexure T2 in the Affidavit of MALACHI KIBET TEWA yet in spite of such nomination and approval to contest, the Mombasa county director of Cooperatives excluded or disqualified the petitioner from contesting on account of Section 18(1) of the Act.

10. On Section 18(1) of the act, the Petitioner admit being a member of two societies with similar objects but contends that the proviso to Section 18 permit such membership. The petitioner then contended that her disqualification was thus dissimulative and unlawful because it was made without inviting representation from her and therefore denied her the right to fair administrative action.

11. For the Respondent, Mr. Chamwada Advocate opposed the petition on the basis of the papers filed as enumerated heretofore. On jurisdiction counsel submitted that Section 76 of the Act dictates that all dispute like the instant one, between a co-operator and the society be referred to the tribunal and stressed that to be an alternative and effective statutory dispute resolution mechanism which cannot be sidestepped even on account of Article 165 (3) b.

12. On the merits, counsel submitted that the matter filed here is a mere complaint that need not be elevated to the high pedestal of a constitutional petition. The following submissions were offered to demonstrate that the matter did not amount to a constitutional Petition.

13. On the right to make political choices under article 38, counsel submitted that the provision only applies to national elections and not an election for a co-operative society. On article 36, Rights to associate, the counsel denied that the petitioner had been denied her right to become a member of the society.

12. On the alleged discrimination counsel submitted that article 27(8) mandates parliament to legislate to give effect to the provision and that legislative action has been effected by the enactment of the National Gender and Equality Commission Act. Under that Act the mandate of the commission is to fight discrimination and in particular the commission has power under Section 29 to investigate complaints of discrimination and therefore coming to court should be an act of last resort.

13. On disqualification, counsel admitted that the petitioner was indeed cleared to contest by the board but that clearance was subject to a nod of the County Director Of Co-Operatives who disqualified the petitioner on account of being a member of both 1st Respondent and Nacico Co-operative Society pursuant to Section 18(1) of the Act.

14. Counsel then referred the court to the decisions in *John Odenyo vs Ulinzi Sacco Society [2002] eKLR* on ramification of Section 76 of the Act as well as the decision in *Githurai Farmers' Co-operative vs Attorney General [2016] eKLR* on the burden upon the petitioner to prove violation or threat to violation and what entity qualifies as a public entity. On fair administrative action and rules of natural justice counsel admitted there having been no evidence that the petitioner was notified and called upon to make representations before the decision to disqualify her was made but contended that it alone did not amount to violation of any right of fundamental freedom.

15. Having cited two decisions in his replying submissions without prior service upon the petitioner's counsel, it was ordered that the petitioner's counsel would get time to study those decisions and offer her closing submissions on another date.

16. When the court reconvened Ms. Mukoya came ready not only to comment on the cited cases but also sought to rely on the now famous case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR*. With regard to John Odiyo's case, counsel submitted that the dispute therein was a pure dispute between a co-operator and his society unlike in this case where there is the question of whether or not a right and fundamental freedom has been violated at threatened with violation. It was in the counsels submissions that the issue for determination here is not a dispute as defined under the section of the Act relied upon.

17. . On the provisions of natural Gender and equality common Act, counsel submitted that the Act provided for investigations and resolution of disputes but did not oust the jurisdiction of the court to discharge its mandate under Article 165(3) b.

18. On fair Administrative Action, as a right, counsel submitted that Section 3(4) of the Act laid mandatory steps to be taken by state and non-state actors before taking an action to include granting a chance to be heard to the person likely to be affected by the intended action.

19. Counsel then relied on the decision in Nicholas Kiptoo's case (supra) on the definition of what amounts to a constitutional petition or question to urge the court to find that what has been raised is a proper constitutional matter.

20. Based on the material provided, and having taken due regard of the submissions offered and the law cited, I have formed the opinion that the following issues isolate themselves for determination by the court:-

- a) Does this court have jurisdiction to entertain the petition with regard to Section 76 of the Co-operatives Societies Act?
- b) Has the petition, as presented, revealed a constitutional question for determination by the court?
- c) Has the petitioner proved to the requisite standards a violation of a right or fundamental freedom?
- d) Is the petitioner entitled to any of the remedies sought?
- e) What orders should be made as to costs?

Analysis and determination

19. There are two threshold questions that are not disputed and which must be acknowledged at the onset. Those questions are that the petitioner is undoubtedly a member of the 1st Respondent as well as a member of another society called Nacico Co-operative Society said and admitted to have limited liability and similar objects. The second question that is also common ground is that being such a member, the petitioner sought an elective position, was indeed cleared by the societies' organ mandated to vet candidates, but was subsequently disqualified by the County Director Of Co-operatives on account of Section 18(1) of the Act.

20. Those two issues are important for the court to proceed from the position that being a member the plaintiff was entitled, by the 1st Respondent's own by-laws which, are derived from and founded on the provisions of the Cooperative Societies Act. With that state of affairs I will then move to the issues for determination in the order I have set them out.

Jurisdiction

21. That jurisdiction is everything before a court of law embarks on resolving a dispute is not in dispute and need no over-emphasis. Here the Respondent contends that by operation of Section 76 of the Co-operative Societies Act there is a statutory forum for dispute resolution which the petitioner ought to have resorted to and not the court. In effect the respondent contends and maintains that this court lacks the requisite jurisdiction to entertain the matter which ought to be dealt with by the Tribunal Set under Section 77 of the Act.

22. To understand the jurisdiction of the Tribunal established under Section 77 of the Act, one needs to set out what that statute defines as disputes. Section 76(2) provides:-

“A dispute for the purpose of this section shall include:-

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco Society against a refusal to grant or a revocation of license or any other due, from the Authority”.

22. To answer the question whether there is a dispute meriting being referred for the tribunal, I must look and ascertain the dispute here. The length of the complaint in the petition and words used notwithstanding, the complainant and dispute by the petitioner can be put to be that ***‘being a Class A member of the 1st Respondent, it did seek to be elected into an office of the society, was cleared by the body mandated under the by-laws but such clearance was countermanded by the County Director of Co-operatives’***. Now can that dispute be one of those intended for resolution by the Tribunal?

23. My reading of the Act tell me that a dispute that qualifies to be entertained and decided by the Tribunal must be a dispute concerning a claim of debt by a co-operative society against its member or past member or representative of a deceased member or a claim by a member over such debt from the society. In this matter there is no debt situation in dispute. What is in dispute here is whether the decision by the county director of cooperatives was in violation of the petitioner right or fundamental freedom.

24. I do not accept it to be the position of the law that Section 76 ousts the jurisdiction of this court vested under Article 165(3). That is a special jurisdiction on the High Court and its ouster must be explicit and not by inference. This court in its decision in **Casablanca Holdings Limited v Kenya Power & Lighting Co. Limited [2018] eKLR** held:-

“The supreme court in *Judges and Magistrates Vetting Board vs the centre for Human Rights and Democracy & Others [2013] eKLR* I and the law on ouster of court's jurisdiction in the following words:-

“Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute and not outside it”.

...it is a principle of interpretation adopted in Anisminic, that when a statutory ouster clause is invoked, courts should interpret it in a manner likely to preserve the jurisdiction of the courts.

...the courts have a conventional inclination to interpret statutes in a manner that precludes acceding of jurisdiction to other agencies ... the court have recognized that indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language”.

(emphasis provided)

In coming to that decision the court went on a merited judicial expedition exploring very many decisions of other jurisdictions the confluence of which is that the general understanding is that the duty to determine legal disputes rest with the court but there are instances when due to exigencies or historical needs of the day or just need for expertise the legislature may vest legal rights determination duty on a quasi-judicial tribunal or body. However in ousting jurisdiction there must be exclusive jurisdiction created in a language that leave no room for more than one interpretation – ouster”.

25. In any event, I do consider that the dispute here is one anticipated by legislature for determination by the Tribunal. That objection was improperly taken, it fails and I do find that the court is duly seized of jurisdiction to entertain the matter as pleaded. I therefore do find that in so far as the petitioner alleges violations of his rights under Articles 19, 27 and 38 and 47 and approached the court pursuant to article 22 & 23, the court's jurisdiction under Article 165(3) has been properly invoked and it cannot be said that this court lacks jurisdiction to entertain the petition. One only needs to add that whereas Section 76 of co-operatives Act vests jurisdiction on dispute resolution to The Co-Operatives Tribunal, the disputes anticipated do not extend and include the determination whether or not fundamental freedoms and rights under the bill of rights have been infringed, violated or threatened with infringement or violation.

Does the petition qualify as a constitutional petition or it is a pretense of same?

26. While I am tempted that the drafter of the petition could have done better by better isolation of issues, I am convinced that there is an issue that begs the question whether the disqualification of the petition contained in the letter by the County Director of Co-operatives, dated 16/5/2018 passes the test of fair administrative action under article 47 of the constitution. This was never expressly set out as a violation but during the hearing and at the prompting by the court after the matter was brought to my attention, both parties did address the issue and I consider it a matter the parties considered due for court's determination.

27. Articles 47 provides:-

“(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) Promote efficient administration.”

28. Pursuant to that provision, parliament has enacted the **Fair Administration Action Act** which subjects all state and not state agencies, including persons exercising administrative authority, performing judicial or quasi-judicial authority under the constitution or any other law and whose decisions or actions may affect the rights and interests of any other person, to its dictates.

29. In this matter whether or not the 1st Respondent was a state or a non-state entity matters the least. It matters little because the right to fair administrative action is expected of all and every person and body. But more importantly, the decision to exclude the petitioner from the contest or to disqualify the petitioner was, by correspondence exhibited, was not by the 1st Respondent but by the 2nd Respondent which is a public office.

30. The law mandated and obligated the office of the County Director of Co-operatives to invite representations from the petition before he took the action that he took and communicated in the letter of 16/5/2018. That invitation he did not make and thereby outrightly affronted the provisions of Section 4 of the fair administrative action and thus article 47 of the constitution.

31. On the second issue whether the petitioner rights have been violated, I do find that the petitioner having been nominated under the Respondents by-laws and her name presented to the County Director of Co-operative, if there was any impediment to such nominations, the constitution under article 47 as given effect by the Fair Administrative Actions Act demanded that the petitioner be afforded a chance to be heard on the impediment before a determination was made to disqualify her from the elections and thereby divest and dissipate a vested right and legitimate expectation. To the extent that the petitioner was never given a hearing before the decision to disqualify her was made, I do find that her rights for administrative action was violated and therefore the decision of the County Director of Co-operatives cannot stand but must be quashed.

32. I therefore issue an order declaring that the decision by the County Director of Co-operatives contained in the letter of 16/5/2018 violated the petitioner's rights under article 47 and the same is hereby quashed.

33. The second reason beyond the violation of Article 48 and the Fair Administrative Actions Act is that the provision of co-operative Act cited by the said officer does not in its plain and ordinary words outlaw membership in two societies with same or similar objects.

34. The proviso to Section 18 reads:-

Provided that a person who—

(i) is a member of a co-operative society; and

(ii) carries on business on land or at premises outside the area of operation of that co-operative society, may be a member of a co-operative society in whose area of operation that land or those premises are situate, notwithstanding that its objects are the same as or similar to those of the first-mentioned society.

35. With such a window, the Director had a duty to call the petitioner for her to justify her membership in the said two societies.

36. I do find that petition is well merited, I do allow it and make the following orders:-

a) The disqualification of the petitioner by the County Director of Co-operatives, Mombasa County, was in violation of the petitioner's right to fair Administrative Action.

b) That if any election was to be conducted in exclusion of participation by the petitioner on account of the said disqualification, the same would be in further violation of the petitioners right to fair administrative Actions and thus unconstitutional".

37. I award to the petitioner the costs of the petition.

Dated and delivered at Mombasa on this 25th day of January 2019.

P.J.O. OTIENO

JUDGE