



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.174 OF 2019**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 19,20,21,22,23,24,27,32,33(1) (a), (b), 34(1), 35, 36(b), 38, 39, 40, 47 AND 50(g) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**IN ARTICLES 2,3,10,33,73,75,79,249, 258 AND 259**

**JULIUS ONGERI MOSE.....PETITIONER**

**VERSUS**

**ASILI SACCO SOCIETY LTD.....RESPONDENT**

**RULING**

**Petitioner's Case**

1. The petitioner through an amended petition dated 17<sup>th</sup> June 2019 seeks the following reliefs:-

**a) An injunction and or conservatory orders, permanently restraining respondents or any other person in the same capacity from interfering with petitioner's membership in Asili Co. Sacco Society Ltd.**

**b) The Respondent be compelled by this Honourable Court to supply the petitioner with the valuation report of Asili Co-operative House before it was disposed off, the amount it was sold and how the amount realized was utilized.**

**c) A declaration that respondent's actions amount to breach of and contravened the Articles 35(1), 36(1), 40(1), 47(2) and 50(1) and 50(1) (g) and amounted to the violation of the petitioner's rights and freedoms and hence the same are null and void and unconstitutional for all intent and purposes.**

**d) That respondent to pay costs of the petition.**

2. The petitioner filed at the same time a notice of motion dated 8<sup>th</sup> May 2019 seeking *inter-alia* the following orders, that pending hearing and determination of the application this court do issue a temporary injunction/conservatory orders against the Respondent from interfering in any manner whatsoever with applicant's membership and further pending hearing and determination of the Applicant's petition court do issue a temporary injunction/conservatory orders against the respondent's interfering in any manner whatsoever with Applicant's membership.

3. The application is based on the grounds on the face of the application and supportive affidavit of Julius Onger Mose sworn on 8<sup>th</sup> May 2019.

**Respondent's Case**

4. The Respondent filed a Replying affidavit dated 19<sup>th</sup> June 2019 opposing the Applicant's application and petition. The Respondent further proceeded on to file a Notice of Preliminary Objection to the Notice of Motion dated 8<sup>th</sup> May 2019 raising the following preliminary

objections on the following points of law:-

**a) The Honourable Court has no jurisdiction to hear the application and the petition, the same is fundamentally hinged on a "Co-operative Dispute" within the provisions of the Co-operative Societies Act (No. 12 of 1997) as amended by Act No. 2 of 2004, the Registered By-laws of the Respondent and the Co-operative Societies Rules of 2004.**

**b) The Petition and the Application dated 8<sup>th</sup> May, 2019 is an extreme abuse of the Judicial Process of this Honourable Court.**

### **Analysis and Determination**

5. I have very carefully considered the petitioner's Notice of Motion dated 8<sup>th</sup> May 2019, and affidavit in support as well as the annexures thereto; the Respondent's Replying affidavit, the Notice of Preliminary Objection, the petitioner's submissions dated 16<sup>th</sup> July 2019; the Respondent's submissions dated 18<sup>th</sup> June 2019 as well as oral submissions made before this court by both counsel. From the above the issues arising for consideration as I understand the Notice of Motion and the Notice of Preliminary Objection can be summarized as follows:-

**a) Whether there exist a "Co-operative Dispute" between the Applicant and the Respondent herein?**

**b) Whether the Honourable Court has jurisdiction to hear and determine the application and the petition herein?**

**A) Whether there exist a "Co-operative Dispute" between the Applicant and the Respondent herein?**

6. From the facts herein, the Applicant herein, has at all material times been a member of the Asili Sacco Society Ltd, a Co-operative Society established and operated under the provisions of the Co-operatives Societies Act (*No. 12 of 1997*) as amended by Act No. 2 of 2004, the provisions of the Co-operative Societies Rules, 2004 and the Registered by-Laws of Asili Co-operative Society. The system of administration of the affairs of the Respondent Society Ltd as provided in its by-laws is through delegate system as the membership of the Respondent are spread country wide.

7. From the Applicant's application and Replying affidavit, it appears the Applicant was on 21<sup>st</sup> March 2019 issued with a letter of suspension from the membership of the Respondent society (*annexure SOM-7*) which letter served to formally notifying the Applicant of the Board's decision to suspend the Applicant as a member of Asili Sacco Society Ltd under Section 19 (a) of Asili Sacco Society Ltd by-laws. The letter further advised the Applicant that in line with section 20 (b) of Asili Sacco by-laws, the suspension had been referred to the Annual Delegates meeting scheduled to be convened on 28<sup>th</sup> March 2019 where the Applicants was required to attend and present his case before the Annual Delegates meeting who would hear him and decide the way forward. The Applicant was on 28<sup>th</sup> March 2019 heard as per annexure "FK-6" and accordingly expelled from the membership of the Respondent Society as per letter of expulsion of 15<sup>th</sup> March 2019 (*annexure JOM-10*) as per Applicant's application.

8. In the instant suit there is no dispute, that the Applicant, at all material times relevant to this suit was a member of the Respondent. I find the Preliminary objection raised is based on facts pleaded by adverse party in this case and are admitted by the Petitioner and the Respondent. I therefore find the Preliminary objection as raised is properly before this court as the point of law flows directly out of the pleading, and touches on the issue of jurisdiction of this court. I further find that there is no dispute that the Respondent is "a Co-operative Society" which is duly registered and operates under the provisions of the Co-operative Societies Act (*No. 12 of 1997*) as amended by Act No. 2 of 2004.

9. The operative section as regards this issue is under **section 76(1) of the Co-operative Act** which provides as follows:-

**"(1) If any dispute concerning the business of a co-operative society arises—**

**(a) Among members, past members and persons claiming through members, past members and deceased members; or**

**(b) Between members, past members or deceased members, and the society, its Committee or any officer of the society; or**

**(c) Between the society and any other co-operative society, it shall be referred to the Tribunal."**

10. From the facts of this suit and the law quoted herein above, the dispute between the Applicant( a member) and the Respondent (a society), is a clear Co-operative Dispute, which must as per provisions of section 76(1) © of the Co-operative Act be referred to the Co-operative Tribunal for arbitration and not the Honourable Court. The dormant issue for consideration is the "membership" of the petitioner and not any other issue as the petitioner was duly heard and informed, that his suspension is hinged on section 19(a) and 20(b) of the Respondent's by-laws (see annexure "JOM-9").

11. In the case of **Gatanga Coffee Growers Co-operative Society Ltd vs Gitau Civil Appeal No. 135 of 1967** Harris and Simpson J held as follows:-

**"Business of the Society" is not confined to the Internal Management of the Society but covers every activity of the Society within the ambit of its by-laws and rules"**

12. I find from the pleadings, the dispute between the Applicant/Petitioner and the Respondent concerns the suspension and consequential

expulsion of the Applicant/Petitioner from the membership of the Respondent Society in accordance with the Respondent's by-laws. I find the dispute between the Applicant/Petitioner and the Respondent herein clearly relates to the business of a Co-operative Society and no other, and as such the dispute must surely be referred to the Tribunal and not to this court. The words used under section 76(1) (c) is that *"it shall be referred to the Tribunal"* making it mandatory. I therefore find that the Respondent has demonstrated, that there exist a *"Co-operative dispute"* which is the dormant issue in this petition between the Applicant/Petitioner and the Respondent herein.

**B) Whether the Honourable Court has jurisdiction to hear and determine the application and the petition herein?**

13. The Applicant/Petitioner contends his case touches or concerns with constitutional issues namely the right to fair administrative action spelt out in Article 47(1) (2) and (3) and right to fair hearing as provided in Article 50(1) (2) (a) (b) (c) (f) (g) (k) and (l) of the Constitution of Kenya 2010.

14. A quick perusal of the petition and especially the prayers sought, the petitioner seeks an injunction and/or conservatory orders, permanently restraining the Respondent or any other person in the same capacity from interfering with petitioner's membership in Asili Co-operative Sacco Society Ltd and a declaration, that the Respondent's action amount to breach of and contravened Articles 35(1), 36(1), 40(1), 47(2) and 50(1) and 50(1) (g) and amounted to violation of the petitioner's rights and freedoms and as such are null and void and unconstitutional. The petitioner's predominant issue in this petition is related to his membership in Asili Co-Society Ltd. The other prayers follows from the issue of membership and can be determined after predominant issue is decided or at the same time.

15. The Respondent contention is, that this court lacks jurisdiction to determine the predominant issue herein, thus to hear and determine *"Co-operative Dispute"* as clearly provided for under the provisions of the Co-operative Societies Act and the registered by-laws of the Respondent society.

16. The By-laws of the Respondent adequately provides for disciplinary procedure for removal of a member of the society. **Section 13 of the Co-operative Act** provides:-

**"The by-laws of a Co-operative Society, shall when registered bind the Co-operative Society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member for himself and his personal representatives to observe all the provisions of the by-laws."**

From the aforesaid section it follows that the Applicant herein being a member of the Respondent is as a member bound to comply with all the provisions contained in the Respondent's by-laws. **Article 20(c) of the Respondent's By-laws** provides as follows:-

**"A member who is expelled from the Sacco Society shall have the right to appeal to the Tribunal."**

17. From the aforesaid provisions it is clear, that an expelled member has the right to appeal to the Tribunal. He has the right to fair administrative action and a right to a fair hearing before the tribunal. The forum provided for seeking appropriate reliefs is clearly spelled out under Article 20(c) of the Respondent's by-laws. The forum provided for ventilating the aggrieved party's claim is clear, that it is only to appeal to the Appeal Co-operative Tribunal as established under section 77 of the Co-operative Act. It should be noted, that this court is not clothed with original jurisdiction in Co-operative Disputes but can hear parties by way of appeal as per **section 81(1) of the Co-operatives Act** which provides:-

**"Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court....."**

**Also Section 81(5) provides;**

**"The decision of the High Court on any appeal shall be final."**

18. In **Kirinyaga District Farmers Society vs Kirinyaga District Co-operatives Union Limited (Hccc No. 226 of 2000 (P.J.S. Hewett)** observed as follows:-

**"Note too that the High Court of Kenya has by Section 81 of the Act the appellate jurisdiction from a decision by the tribunal and that the High Court's decision is final. It would clearly be wrong for the same court – the High Court to have both original and appellate jurisdiction in the same matter. Note too that there is no reference in the Act to the Court of Appeal."**

19. Further Hon. Justice D. Musinga in the case of **Wakenya Pamoja Sacco Society Ltd vs Stephen Ogamba Hccc No. 8 of 2008** with the approval in the case of **The Speaker of the National Assembly vs Hon. James Njenga Karume, Civil Application No. 92 of 1992** observed thus:-

**"Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed."**

20. Considering this court's jurisdiction, this court cannot come to its conclusion without referring to the case of **JR No. New Murarandia Farmers Co-operative Society Ltd vs District Co-operative Officer Kahuho Sub-County** where Hon. Justice Ngaa Jairus relied in the decision in the **Court of Appeal in Civil Appeal No. 261 of 1998** (Kwach, Omolo and Tunoi JJA as they then were) considered the jurisdiction of the High Court in determination of disputes contemplated under **Section 76 of the Co-operative Act**. While striking out the Appellant's Appeal the Judges said:-

**"This was clearly a dispute under the Co-operative Societies Act. That Act sets out the procedure for settling which may rise under it. Disputes are to be settled through the Commissioner of Co-operatives, and the decisions of the Commissioner are appealable to the High Court. So the High Court has only appellate powers and there is (no) provisions for instituting suits in the High Court – under the Provisions of Cap 490. There is no further right of appeal from the decision of the High Court to this court. That is what Section 81(1) and (2) of Cap 490 says. This appeal is accordingly incompetent and we order that it be and is hereby struck out but we make no order as to the costs thereof."**

21. For further guidance on the issue raised here I refer to the case of Constitutional **Petition No. 520 of 2012 John Richard Ouma Nyamai vs The Co-operative Tribunal and 2 others** Hon. Justice Lenaola, as he then was, observed as follows:-

**"The Constitution has thus donated power to the Courts and Tribunals to exercise Judicial; authority and the mechanisms of disputes resolution with regard to Co-operative Societies are contained in the parent statute which is the Co-operative Societies Act which has established the 1<sup>st</sup> Respondent whose procedures are well articulated and defined in subsidiary legislation. The High Court should not be seen to be usurping the powers of Tribunals and inferior courts without good reason for doing so. I see none at this stage of present proceedings."**

22. It is now settled, that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all. That the court will pronounce on constitutionality of a statute only when it is necessary for the decision of the case to do so; court will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an application under some other legislative provisions or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights (see **Minister of Home Affairs vs Bickie & others (1985) LRC 755**).

23. Having considered the rival submissions by counsel on the issue of jurisdiction to proceed to hear and determine both the application and the petition and upon considering all relevant authorities relied upon, I find that without jurisdiction a court has no power to take any step, it has to down its tools, and call it a day as it lacks jurisdiction to deal with the matter presented before it. I find this court lacks jurisdiction to deal with the present dispute, which rightly is for Co-operative Tribunal created under section 78 of the Co-operative Societies Act.

24. In view of the conclusion that I have come to, I proceed to make the following orders:-

**a) The Respondent Notice of Preliminary Objection dated 20<sup>th</sup> May 2019 is meritorious and I find, that this Honourable Court has no jurisdiction to hear and determine both the application and the petition as both are fundamentally hitched on a "Co-operative Dispute" within the provisions of the Co-operatives Societies Act (No 12 of 1997) as amended by Act (No 2 of 2004), the Registered by-laws of the Respondent and Co-operative Societies Rules of 2004.**

**b) The Applicant/Petitioner's Application dated 8<sup>th</sup> May 2019 and the petition of even date are without merit and are accordingly struck out.**

**c) Costs of both the Application and petition to the Respondent.**

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of October, 2019.

J .A. MAKAU

JUDGE