



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 3 OF 2017

IN THE MATTER OF ENFORCEMENT OF PROTECTION OF FUNDAMENTAL FREEDOM UNDER ARTICLE 19, 20, 21, 23, 165, 258 AND 258 OF THE CONSTITUTION OF KENYA

IN THE MATTER FO THE THREATENED VIOLATION OF THE RIGHT OF PROPERTY GUARANTEED UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF VIOLATION OF THE RIGHTS TO A FAIR ADMINISTRATIVE ACTION AND IN FRAGRANT CONTRAVENTION OF ARTICLE 47 AND THE FAIR ADMINISTRATIVE ACTIONS ACT

IN THE MATTER OF VIOLATION OF THE NON DEROGABLE RIGHT TO A FAIR HEARING GUARANTEED UNDER ARTICLE 50 OF THE CONSTITUTION OF KENYA, 2010 AND

IN THE MATTER OF THE UNREASONABLE AND UNJUSTIFIABLE LIMITATION OF THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF AN INDIVIDUAL, CONTRARY TO THE VALUES OF AN OPEN AND DEMOCRATIC SOCIETY AND IN TOTAL DISREGARD OF THE SPIRIT, PURPORT AND THE OBJECTS OF THE BILL OF RIGHTS

IN THE MATTER OF THE CO-OPERATIVE SOCIETY OF KENYA ACT, 2014

IN THE MATTER OF THE ILLEGAL AND IRREGULAR CONSTITUTION OF AN INTERIM MANAGEMENT COMMITTEE OF CENTRAL NGANDORI FARMERS CO-OPERATIVE SOCIETY

IN THE MATTER OF ILLEGAL, ARBITRARY, MALA FIDES AND UTRA VIRES EXERCISE OF POWERS BY THE COMMISSIONER OF CO-OPERATIVE SOCIETY

IN THE MATTER OF AN ACTION FOR JUDICIAL REVIEW REMEDIES AND PUBLIC LAW REMEDIES UNDER ARTICLE 23 OF THE CONSTITUTION

IN THE MATTER OF ILLEGAL AND IRREGULAR INTERFERENCE WITH THE INTERNAL AND THE MANAGEMENT OF THE CENTRAL NGANDORI FARMERS CO-OPERATIVE SOCIETY LIIMITED

IN THE MATTER OF TH DRULES FOR THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION

BETWEEN

CENTRAL NGANDORI FARMERS

CO-OPERATIVE.....1ST PETITIONER

JAMES JOHN NJERU.....2ND PETITIONER

ALVIN RICHARD NJIRU.....3RD PETITIONER

JACKSOKN NJERU MYOROTHA.....4TH PETITIONER

EDWARD NJIRU JOB.....5TH PETITIONER

NIXON KARIUKI.....6TH PETITIONER

FRANCIS NJAGI.....7TH PETITIONER

VERSUS

COUNTY CO-OPERATIVE COMMISSIONER

(EMBU COUNTY).....1ST RESPONDENT

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....2ND RESPONDENT

OFFICER COMMANDING STATION (OCS)

MANYATTA POLICE STATION.....3RD RESPONDENT

ROBERT ASUMANI.....4TH RESPONDENT

MRS. PETER KINUTHIA.....5TH RESPONDENT

AND

CENTRAL NGANDORI FARMERS CO-OPERATIVE

SOCIETY MANAGEMENT COMMITTEE.....INTERESTED PARTY

RULING

1. Introduction

This is a ruling on a preliminary objection raised by the 1st respondent against the hearing of this petition on grounds that this court has no jurisdiction to determine this matter. The objection is based on four grounds:-

- (1) That this honourable court lacks the jurisdiction to hear and determine this petition.*
- (2) That this petition is improperly filed in that the 2nd to 7th petitioners have no locus standi to institute any legal proceedings on behalf of the 1st petitioner.*
- (3) That this petition is incurably defective in law and in substance.*
- (4) That the petition does not disclose any cause of action against the respondent.*

2. Arguments by the 1st respondent

It was argued by the 1st respondent's counsel Ms. Wairimu Rugaita that the 2nd to 7th petitioners are former members of the Management Committee of the 1st petitioner who were lawfully removed from office on 31/05/2017 owing to dissatisfaction of their leadership. In the same meeting the members resolved that an inquiry be conducted into the affairs of the society and in particular the conduct of the 2nd – 7th respondents.

The 1st respondent stated that in pursuance of the provisions of the Co-operative Societies Act Cap.490 Laws of Kenya and the By-laws of the society, the 1st respondent stepped in and advised the members to constitute an interim management committee as a short term measure to secure the society's interest. This was done in a special general meeting held on 31/05/2017.

The 4th and the 5th respondents are the officers of the 1st respondent who are engaged to assist in the inquiry into the affairs of the society since the 1st respondent did not have the capacity to do so. The said officers are therefore rightly engaged in the investigations of the allegations of mismanagement of the society by the petitioners during their tenure of office.

It is averred that 3rd respondent independently engaged in the investigations of stealing by servant facing the 2nd – 7th petitioners and is not under the influence or direction of the 1st respondent. It is not correct that the 1st respondent has acted *ultra vires* or in bad faith in its involvement in the affairs of the society.

In respect of ground 1, the respondent relies on Section 76 of the co-operative Societies Act which provides for the disputes that shall be determined by the Co-operative Tribunal.

The 1st respondent argues that the reading of the petition refers to matters of the society in that the petitioners accuse the impugned committee of doing or failing to do several things. This demonstrates that the petitioners in this petition have taken issues with the current management committee in its leadership of the society. It is clear from the documents filed that the removal of the petitioners from office was done by the collective membership of the society.

It was further argued that the removal of the petitioners from office, the conduct of the current committee, the legitimacy of the special general meeting, the jurisdiction and conduct of the 1st and 2nd respondent are all issues falling within the ambit of the Act and should be determined by the Co-operative Tribunal.

As for ground 2, the petitioners admitted that the affairs of the society are under the management of the interim management committee which was elected into office by the members of the society thus stripping them of the *locus standi* to file this petition.

In conclusion, the 1st respondent's counsel submitted that the issues raised in the petition have nothing to do with denial, violation or infringement of the Bill of Rights in that they are matters relating to the business of the society. For this reason the petition is incurably defective as argued in ground 3 of the objection.

It is stated under ground 4 that the petition does not disclose any cause of action against the 1st respondent. The petitioners were accused of mismanagement and looting of the society and were legally removed from office in a general meeting of the members. The 1st respondent played no role in the removal of the petitioners and neither was it a party to the resolution calling for investigation for various allegations of mismanagement. Under Section 58 of the Act the 1st respondent is legally empowered to conduct an inquiry into the affairs of any co-operative society. The petition does not therefore disclose any cause of action against the 1st respondent for he acted within the law.

3. The petitioners response

The petitioners argued that the issues raised in the petition fall within the jurisdiction of this court under Article 23 as read together with Article 165 of the Constitution. Section 76 of the Act does not cover the issues raised in the petition. The provision sets out clearly the person subject to the jurisdiction of the Co-operative Tribunal under which does not include the petitioners.

It was further stated that the matter before the court is a constitutional matter that affect a society and its members as well as administrative bodies. The High Court has unfettered jurisdiction to hear and determine applications for redress of the Bill of Rights involving denial, violation or infringement of, or threat to a right or fundamental freedom. It is only the High Court that has the jurisdiction to determine whether anything alleged to be done under the authority of the Constitution or any other law was actually done in accordance with the Constitution.

The petitioners said that they allege harassment by the police and violation of their right under Article 29 and 31 of the Constitution which are excess of power by the respondent. It is only the High Court that is competent to deal with such matters as opposed to the Co-operative Tribunal.

The petitioners relied on 2 authorities to support their argument namely:-

(i) ***Alex Malikhe Wafubwa & 7 Others Vs Elias Nambakha Wamita & 4 Others [2012] eKLR*** where the court held that disputes such as the one partly involved in the management of a society is not a dispute determinable by the Co-operative Tribunal.

(ii) ***Bernard Mugo & Others Vs Kagaari South Farmers Co-operative Society & 4 Others [2015] eKLR***. It was held in a suit challenging the legality of a society and which was accused of having the effect of infringing the rights of the plaintiffs, falls within the jurisdiction of the High Court.

4. The law applicable

In determining whether the court has jurisdiction to adjudicate this petition, the court must first determine its jurisdiction under Article 165 of the Constitution before analyzing the provisions of Section 76 of the Act.

It was held in the case of ***OWNERS OF MOTOR VESSEL 'LILLIANS' VS CALLTEX OIL KENYA LTD [1998] KLR 1***, *jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step. That is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the court must down its tools.*

Under Article 165, the High Court has unlimited original jurisdiction in criminal and civil matters. It also has jurisdiction to determine the question whether a right or a fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. As regards denial, violation of a right or infringement of a fundamental freedom, the High Court has exclusive jurisdiction.

The jurisdiction of the court is not ousted by the provision by statute conferring special jurisdiction on tribunals or other quasi-judicial bodies. However, *“it is in the interest of proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and th disputes be respected and allowed to perform their statutory responsibilities.”* This was observed in the case of ***ALICE MWERU NGAI VS KENYA POWER & LIGHTING CO. LTD [2015] eKLR***.

I proceed to examine the provisions of Section 76 of the Co-operative Societies Act which provide:-

Section 76(1)

(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.

(2) 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 licence or any other due, from the Authority.

This section defines what would be regarded as “the business of the Society”.

I have perused the petition which consists of the following prayers among others:-

(a) A declaration that the constitution of the impugned interim committee was illegal, irregular, mala fides and therefore invalid and void.

(b) An order of prohibition against the 1st and 2nd respondent from calling any special general or annual general meeting of the 1st petitioner.

(c) An order of certiorari to quash the sermons issued by the 4th and 5th respondent to the petitioners.

(d) An order of certiorari to quash the letter by the County Co-operative Commissioner dated 31/05/2017 giving notice of the illegal constitution of the impugned interim committee.

(f) An order of certiorari to quash the letter dated 18/07/2017 communicating the decision to conduct a purported inquiry.

The petitioners allege that there is a hatched plan to remove the management committee from office that was headed by the 2nd petitioner. The 2nd respondent is alleged to have drafted a letter purporting to set up an interim management committee to ensure that the members are paid, the society property is taken over and to prepare for a smooth election. It is also alleged that there was theft from the 1st petitioner's office. This allegation is being used to harass the petitioners through the police who seized their mobile phones and retained them.

It is noted that matters regarding payment of coffee dues to the members, taking over society property and preparing for smooth elections cannot be said to be individual concerns of the petitioners. Neither would they amount to violation or denial of individual rights and freedoms. In essence, these are matters of the business of the society that fall squarely under the description of disputes under Section 76 of the Act. The drafting of the alleged letters to set up an interim management committee and to communicate the decision to higher authorities are also the business of the Society.

The 1st respondent explained that the removal of the petitioners from the office was done in a general meeting of the members. The same meeting decided that the petitioners be investigated for mismanagement of the society's affairs. It is admitted in the petition that the management committee in which the petitioners were members was dissolved. The petitioners have not shown that any member has complained against the decisions made on 31/05/2017 save for themselves in the clamour to retain their positions in the former management committee.

The petitioners accuse “the impugned interim committee of being out to serve their own interests”. It is also alleged that the committee has not paid the members, has misappropriated the Society's funds, is being geared to disrupting the running of the society. All these allegations are the business of the society and do not concern violation or denial of the rights of the petitioners.

The claim of the petitioners is brought by way of constitutional petition alleging denial and violation of individual rights and freedoms. The main prayers seek for orders of judicial review to quash decisions of the 1st and 2nd respondents. The court ought determine whether this petition meets the constitutional threshold of a constitutional petition. It is noted that there is no single prayer seeking for a declaration that the individual rights of the petitioners have been denied, violated or threatened. The bulk of the prayers relate to judicial review remedies.

The High Court has jurisdiction to adjudicate and grant remedies in matters of judicial review. These are constitutional reliefs falling within the jurisdiction of the High Court. It is important to note that the Co-operative Tribunal does not possess powers to grant such reliefs.

The respondent in arguing that the 1st and the 2nd respondent acted within the law relied on Section 58(1) of the Co-operative Societies Act which provides:-

(1) The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.

The 1st respondent is therefore authorized by the law to hold inquiries in matters of co-operative societies regarding mismanagement or misappropriation of funds. The 1st respondent has not acted outside its mandate. The petitioners have not shown that the 1st and 2nd respondents acted *ultra vires*.

The petitioners relied on the case of **ALEX WAFUBWA (SUPRA)** which is distinguishable from the facts of this petition. The petitioners in that petition alleged that the term of office for the 1st to 5th respondents had expired about one year before the petition was filed and that they had continued holding the office illegally. It was also alleged that the management committee of Bungoma Co-operative Union had failed or refused to convene a general meeting as required by the law to facilitate the members to elect their office bearers. The court found that the petitioners right to vote and elect their office bearers had been violated and that the matter was within the jurisdiction of the High Court.

In this petition, the petitioners purport to be fighting for the rights of the 1st petitioner. Having been removed from office in a general meeting called by themselves while still in office. The petitioners were removed by the Society itself and therefore lack *locus standi* to file this petition. The dispute in the **ALEX WAFUBWA case (supra)** was determinable by the High Court for it involved violation of individual rights as opposed to the dispute in this petition that involves the business of the society. The petitioners have a right to sue for denial or violation of their individual rights and freedoms apart from the business of the society.

The allegations of looting the society were reported by the Society to the 3rd respondent. By virtue of the office, the 3rd respondent is mandated to investigate any complaints of criminal nature. It cannot be said that the office acted *ultra vires*. Any claim based on the allegation of excess of power is bound to fail. The petitioners did not show that their rights were violated by the 3rd respondent.

5. Decision

In view of the foregoing analysis, I find that the petitioners have no *locus standi* to ventilate the rights of the society since there is in existence an interim management committee appointed by the society. Even assuming that the petitioners are possessed of the *locus standi*, the nature of the disputes is such that it falls within the ambit of Section 76 of the Act.

I find that the matters contained in the petition are purely the business of the Society clothed in the style of a constitutional petition coupled with the absence of the *locus standi*, on the part of the petitioners, I uphold the preliminary objection and order that the petition is hereby struck out with costs to the respondents.

It is my considered opinion that the petition does not meet the threshold of a constitutional petition.

It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 27TH DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. K. M. Mwangi for petitioner

Ms. Musau of Ombura for 2nd & 3rd respondent

Ms. Wairimu for 1st respondent