



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 27 OF 2016

KENTON KIJABE CO-OPERATIVE SOCIETY LTD.....1ST PETITIONER

ISAAC KIGO MBUGUA.....2ND PETITIONER

VERSUS

THE LIQUIDATOR, KENTON KIJABE

CO-OPERATIVE SOCIETY LTD.....1ST RESPONDENT

THE CO-OPERATIVE OFFICER-NAIVASHA

SUB COUNTY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(IN THE MATTER OF THE PETITIONERS' FUNDAMENTAL RIGHTS

OF ACCESS TO INFORMATION UNDER ARTICLE 35(1) (A)

AND (B) OF THE CONSTITUTION OF KENYA)

JUDGEMENT

1. This Petition dated 19th May, 2016 but filed on 23rd May, 2016 by the 2nd Petitioner on behalf of the 1st Petitioner sought the following reliefs:

a. A declaration be made that the Petitioners have a constitutional right to access all the information, documents and materials in possession of the Respondents running from the date of appointment of the Liquidator in 1992 to date.

b. A declaration that the Respondent's refusal to deliver or disseminate to the Petitioners a full, complete, accurate and to-date information, account, books, registers running from 1992 to-date in all respect to the properties and membership (former and current) of the 1st Petitioner, including all dealings, transactions, disposals, alienations and transfers of its properties and recruitment of new members into the 1st Petitioner's membership is a violation of the Petitioners' constitutional rights under Article 35 of the Constitution.

c. A declaration that the Respondents' have violated the Constitution by disposing of, alienating, selling, transferring, wasting and dealing with the 1st Petitioner's properties and membership in total breach of fiduciary duties bestowed on them and contrary to Articles 75(1)(a), (b) and Article 76(1) of the Constitution.

d. A declaration that the Respondents have abused their office and positions contrary to the Constitution of Kenya under Chapter Six of the Leadership and Integrity (Article 73 (1) and (2) of the Constitution).

e. An Order that the Respondents do deliver unto the Petitioners certified true copies and up-to-date the following documents currently in the custody of the Respondents' from 1992 to-date:

i. A full cash account of the 1st Petitioner

ii. A full list of the current and former members register of the 1st Petitioner

iii. A full and accurate register of all the dealings of the Respondents from 1992 to-date on account of the 1st Petitioners affairs

iv. Copies of all the Title Deeds, deed plans, transfers and other instruments of transfer issued from 1992 to-date under the directions of the Respondents in so far as the same arises from the 1st Respondent's properties, plots, public parcels and all other sub-division titles from the original 1st Petitioner's parcels of land known LONGONOT KIJABE BLOCK 3 (Kenton) and LONGONOT KIJABE BLOCK 9 (Kenton Mwichiringiri)

v. All the original survey maps, titles, certificate of registration and books of account of the 1st Petitioner.

f. That the costs of this petition be borne by the Respondents.

2. The Petition was supported by the Supporting Affidavit of Isaac Kigo Mbugua who averred that he was the current chairman of the Board of Directors of Kenton Kijabe Co-operative Society Limited and the 2nd Petitioner. He averred that the 1st Petitioner had been registered under Certificate of Registration number 1499 as a Co-operative Society in 1967 to purchase land. according to the 2nd Petitioner, the 1st Petitioner had a total of 1448 registered members each with one equal share equated to a right of 61/2 acres each and that the 1st Petitioner had acquired 2 parcels of land namely LONGONOT KIJABE BLOCK 3 (Kenton) and LONGONOT KIJABE BLOCK 9 (Kenton Mwichiringiri) with total acreage of 11700 acres. He averred that between the years 1979 and 1980, the above-mentioned parcels of land were surveyed and sub-divided for allocation to members leaving several public utility parcels of land.

3. In further averments, the 2nd Petitioner stated that the members had balloted for their parcels of land and before they could be issued with title deeds, Mr. Bomett, the then Commissioner of Co-operatives appointed Mr. Mwangemi Mwangeka and subsequently Mr. Naftali Miranyi Omari, the 1st Respondent to liquidate the 1st Petitioner vide Gazette Notice No. 5272 of 1997. That the 1st Respondent has abused the office and power bestowed upon them as Liquidators by plundering, wasting, disposing, alienating, selling, transferring and fraudulently dealing with the 1st Petitioners properties. That the 1st and 2nd Respondents had violated the constitutional rights inter alia, access to information (Article 35) and fair administrative action (Article 47) of the 1st and 2nd Petitioners by denying them information pertaining the 1st Petitioner's property.

4. The Petition was opposed by the Replying Affidavit sworn on 8th September, 2016 by Naftali Miranyi Omari, the current Liquidator of the 1st Petitioner. He averred that Hon. Joseph Nyaga, the then Minister for Co-operative Development had ordered for a variation of the then Liquidator, Mr. Mwangemi, and this led to his appointment in accordance with Section 93 of the Co-operative Societies Act, Cap 490, on 22nd November, 2010 and that his appointment has been extended over the years. He averred that once the Society was liquidated, their certificate of registration was cancelled and that its legality was with the Liquidator. He averred that the 2nd Petitioner had no locus standi to institute the petition either on his own behalf or on that of the 1st Petitioner owing to lack of documentation appointing him as the Society's chairman.

5. He averred that the 2nd Petitioner was not a member but the son of a former member and this contributed to the dismissal of Civil Suit No. 63 of 2012. He averred that there was no directive lifting the 1st Petitioner's liquidation as provided for under Sections 65 to 71 of the Co-operative Societies Act. He urged court to dismiss the petition.

6. The Petition was further opposed by the Replying Affidavit of Sophia Mwangi sworn on 12th October, 2016. She averred that she was an officer working for the Sub-County Co-operative at Naivasha. She averred that the 1st Petitioner has been under liquidation since 1st September, 1997 and the duly appointed Liquidator was Mr. Naftali Miranyi Omari. She averred that upon liquidation, the 1st Petitioner ceased being a co-operative Society, thus did not have an elected management committee and its registration was cancelled.

SUBMISSIONS

7. Parties took directions to file written submissions. In their submissions, the 1st and 2nd Petitioners allege that their constitutional rights to access to information, fair administrative access and right to own property have been infringed. The 1st Respondent submitted that the 1st Petitioner's liquidation was never challenged and thus ceased to exist as a body corporate once it came under liquidation. They submitted that the 2nd Petitioner lacked locus standi by virtue of not being a member of the Society as there he failed to prove his membership and also by virtue that the elected committee ceased to exist once the Society came under liquidation. The 2nd and 3rd Respondents further submitted that the Society ceased being a body corporate when it was liquidated and also that the 2nd Petitioner was never a member of the Society. They stated that Mr. Naftali Miranyi Omari was the duly appointed Liquidator.

ISSUES FOR DETERMINATION

8. I have considered the grounds stated on the face of the Petition, the facts deponed in the affidavits, and written submissions of the parties. The issues that arise for my determination are:

a. Whether Kenton Kijabe Co-operative Society Ltd is a legal entity or not.

b. Whether the 2nd Petitioner has the legal capacity to institute this petition on his own behalf and that of Kenton Kijabe Co-operative Society Ltd.

c. Whether the reliefs sought are merited.

THE LAW

9. The relevant law in this petition is the Co-operative Societies Act, No. 12 of 1997. Section 12 provides:

Upon registration, every Society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

10. Section 62 provides:

1. Where a co-operative Society has—

a. less than the prescribed number of members; or

b. failed to file returns with the Commissioner for a period of three years; or

c. failed to achieve its objects,

2. the Commissioner may, in writing, order the cancellation of its registration and dissolution of the Society and the order shall take effect immediately.

3. A person aggrieved by an order of the Commissioner under subsection (1) may appeal against such order to the Minister within thirty days of the order.

11. The Petitioners have hinged their claim to their right to information provided for under Articles 35 (1) and 47 of the Constitution, Laws of Kenya as well as Section 4 of the Access to Information Act, 2016. I shall address this later.

ANALYSIS

Whether Kenton Kijabe Co-operative Society Ltd is a legal entity or not:

12. It is not disputed that Kenton Kijabe Co-operative Society Ltd went into liquidation on 1st September, 1997 vide Gazette Notice No. 5272 with Mr. Mwangemi Mwangeka being appointed the first Liquidator by the then Minister for Co-operative Development. It is also not disputed that Mr. Naftali Miranyi Omari is the current Liquidator.

13. By virtue of Section 63 (1), Kenton Kijabe Co-operative Society Ltd ceased to exist as a corporate body on 1st September, 1997 when a Liquidator was first appointed. The section states:

63 (1) Where the registration of a co-operative Society is cancelled, the Society shall cease to exist as a corporate body from the date the order takes effect.

14. Section 65 of the Co-operative Societies Act provides:

1. Where the registration of a co-operative Society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be Liquidator or Liquidators of that Society (hereinafter referred to as the Liquidator) and all the property of such Society shall vest in the Liquidator from the date upon which the order of cancellation takes effect.

15. It follows therefore from the above cited provision that the appointment of a Liquidator meant that the duties and responsibilities undertaken by the Society's management body were automatically assumed by the Liquidator. The effect of this was that the Society's legal capacity ceased to exist as the legal entity of the Society fell with the Liquidator. The ability of the Society to sue or be sued rests within the ambit of the Liquidator. I reiterate the words of the learned judge, Emukule, J, (as he then was) in **Civil Suit No. 63 of 2012** when he held:

“Section 63 of the Act further provides that where the registration of a Cooperative is cancelled, the society shall cease to exist as a body corporate from the date the order takes effect. For purposes of the liquidation of the Cooperative Society certain sections of the Companies Act (Cap 486, Laws of Kenya) apply to the liquidation of Cooperative Society (S. 64 of the Cooperative Societies Act). Among the provision of the Companies Act applicable is Section 223 (to stay or restrain proceedings against a company) and Section 309 (proof of debt).

In this case, once the Gazette Notice took effect after the expiration of the 2 months open window application period, the Plaintiff herein ceased to exist as a body corporate. That meant that it could not sue or be sued. Only the liquidator who stepped into his shoes, could sue or be sued. It also meant that the Management Committee of the Cooperative Society ceased

to function as such and only its individual member managers could be called upon by the liquidator from time to time to aid in his liquidation duties.”

16. To this extent, the Society lacks *locus standi* to institute this suit. This in essence nullifies and voids the purported authority donated to the 2nd Petitioner by the Society’s officials adduced as **IKM I**. The Liquidator once appointed took over the day to day running of the Society which included the capacity to sue and be sued, deal with creditors, sell property and prepare asset distribution schedule for members. The 2nd Petitioner alleged that the 1st Respondent abused his office and powers by selling, alienating and transferring property and this may well be so. However, the 1st Petitioner as an entity cannot bring a suit or claim against the 1st Respondent as it does not have the legal capacity to do so. The actions being questioned by the Petitioners within the responsibilities of the Liquidator as outlined under Section 66 of the Co-operative Societies Act. The Act provides the powers of the Liquidator as including:

(1) The Liquidator shall, subject to this Act, have the following powers—

(a) to appoint a day, in the prescribed manner, before which the creditors whose claims are not already recorded in the books of the cooperative Society shall state their claims for admission, or be excluded from any distribution made before they have proved them;

(b) to institute and defend suits and other legal proceedings by, and on behalf of, the Society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the Society;

(c) -

(d) -

(e) to determine from time to time the contributions to be made by the members and past members, and by the estates of deceased members of the Society, to the funds of the Society; to investigate all claims against the Society, and subject to this Act, to decide questions of priority arising between claimants;

(g) -

(h) to sell the movable and immovable property and rights of action of the Society, by public auction or private contract with power to transfer the whole thereof to any person or company or to transfer the same in parcels;

(i) -

(j) -

(k) to take possession of the books, documents and assets of the Society;

(l) to arrange for the distribution of the assets of the Society in a convenient manner when a scheme of distribution has been approved by the Commissioner;

(m) -

(n) -

(o) -

17. It would appear from the above that the recourse of a person aggrieved by any decision of the Liquidator would approach the Tribunal as provided for under Section 69 (1) of the Act.

Whether the 2nd Petitioner has the legal capacity to institute this petition on his own behalf and that of Kenton Kijabe Co-operative Society Ltd:

18. In accordance with Section 65 of the Act, the Petitioners lacked *locus standi* to institute this application owing to the Society being liquidated as illustrated above. To this extent, the 2nd Petitioner lacks the requisite legal competence to institute this petition in his capacity as the chairman as the Society ceased existing as a body corporate. Further, the 2nd Petitioner lacked the legal competence to institute this petition on his own behalf. I need not belabour the issue of the locus of the 2nd Petitioner. This was well-articulated by Emukule, J, (as he then was) in **Civil Suit No. 63 of 2012** when he held:

“Lastly, Mr. Gitu argued eloquently for himself and the deponent of the Supporting Affidavit of Isaac Kigo Mbugua, that they were sons of former members of the Cooperative Society and were there competent to bring suit against the Defendants. They gave no material that they were sons of former members of the Kenton Kijabe Cooperative Society Ltd. Secondly, even if they were, they also failed to give material to show transmission to them or either of them.”

Whether the reliefs sought are merited:

19. From the foregoing, this petition is bad in law owing to the fact that the petitioners lacked the requisite legal competence to institute the petition. This in essence means that this court cannot consider the reliefs sought including the claim to access information in respect of the Society under Articles 35 (1) and 47 of the Constitution and Section 4 of the Access to Information Act as the petition itself is incompetent.

DETERMINATION

20. The Petition is struck out with no order on costs.

Orders accordingly.

Judgement Signed

R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru this 26th Day of September, 2018

.....

JANET MULWA

JUDGE

In the presence of:

.....Court Clerk

.....For the Petitioners

.....For the Respondents