



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW 2 OF 2015

REPUBLICAPPLICANT

VERSUS

THE COMMISSIONER OF

COOPERATIVE DEVELOPMENT.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE2ND RESPONDENT

EX PARTE

JOYCE WANJIKU RUNYORA

EVANSON MWAMACHI suing as the chairlady

And secretary of PREVAILING SACCO..... SUBJECT

JUDGEMENT

Before court is the Notice of Motion dated 2nd February 2015 in which **JOYCE WANJIKU & EVANSON MWAMACHI (suing on behalf of PREVAILING SAVINGS & CREDIT CO-OPERATIVE SOCIETY** (hereinafter referred to as the Ex parte applicant) seeks the following orders

- a. That the court grants orders of certiorari to quash the decision of the 1st Respondent communicated through the letter dated 10th November, 2014 which effectively limited the area of operation of the applicant from the entire county to Njoro sub-county;*
- b. That the court grants an order of certiorari to bring into this court for purposes of quashing, the decision of the 1st Respondent made on 10th November, 2014 which decision had the effect of freezing the applicant's account number 01134506945400;*
- c. That the court grants an order of prohibition to restrain the 2nd Respondent and all his agents, servants, employees or any other person working at this behest or under his command or instructions from harassing or invading the offices of the applicant anywhere in the Republic of Kenya, seizing files, equipments and records under the pretext of enforcing the impugned decision of the 2nd Respondent;*

d. That the court grants an order of prohibition restraining the 1st Respondent from inciting the members of the applicant to demand a refund of their contributions before the expiry of the period set out under the applicant's regulations; and

e. That the costs of the application be provided for.

The application was supported by the statutory statement as well as the verifying affidavit of 'Joyce Wanjiku'. Despite having been properly served the Respondent did not file any response to the application. As such the assertion of fact made by the Ex parte applicant are taken as uncontroverted.

BACKGROUND

The background of this matter is as follows:

The Ex parte applicant is a Savings and Credit Co-operative Society registered under Section 4 of **The Co-operative Act, Cap 460, Laws of Kenya**. Its objectives includes, recruiting members to deposit savings in the society for a minimum period of three months and giving out loans to members of up to three times the amount they have saved.

Following an amendment to the Ex parte NBapplicant's by-laws, which amends the **Commissioner of Co-operative Development** (the 1st Respondent herein) duly registered on 28th August, 2014, the Ex parte applicant expanded the scope of its operations country wide and there after proceeded to open branches in various different towns.

By a letter dated 1st December, 2014, the 1st Respondent cancelled the by-laws as amended by the Ex parte applicant and confined the latter's operations to Njoro Sub-County as per the original by-laws registered on 23rd April, 2014. Thereafter the 1st Respondent instructed Co-operative Bank to freeze the Ex parte applicant's accounts. The 1st Respondent further instructed the Inspector General of police (the 2nd Respondent) to close the Ex parte applicant's offices and to seize their records and equipment. The 1st Respondent was also said to have been inciting members of the Ex parte applicant to withdraw as members and demand for a refund of their deposits.

The court directed that the matter be disposed of by way of written submissions. The Ex parte applicant filed his submissions on 30th August, 2016. The Respondents did not file any submissions.

The Ex parte applicant submitted that the decision of the 1st Respondent in their letter dated 18/12/2014 was illegal, unreasonable, ultra vires and contrary to the Ex parte applicant's expectations. The 1st Respondent was only entitled to cancel the amended by-laws if the same were contrary to the Co-operative Societies Act or the regulations made there under or if the amendment was effected through a misrepresentation or concealment of a material fact. The 1st Respondent it was submitted had registered the amendment after having been satisfied that the same did not contravene the Act. The 1st Respondent could not then proceed to cancel the amended by-laws without giving any reason for its action.

It was further submitted that the 1st Respondent failed to take into account the Inspection Report which found no wrong doing on the part of the Ex parte applicant. There being no valid reason to cancel the amendment, it was submitted that the action of the 1st Respondent were motivated by malice and bad faith.

ANALYSIS

The remedy of judicial review is concerned not with the merits of a decision but rather with the manner in which that decision was reached *ie* the decision making process. The applicant must show that the decision making body acted illegally, in excess of its jurisdiction (*ultra vires*), irrationally, abused its discretion, or that the decision was based upon improper motives, (see, **REPUBLIC Vs KENYA**

REVENUE AUTHORITY Ex Parte YAYA TOWERS LIMITED [2008] eKLR and KEROCHE INDUSTRIES LIMITED Vs KENYA REVENUE AUTHORITY & 5 OTHERS 2007 eKLR).

Section 8(3A) of the Co-operative Societies Act vests in the Commissioner for Co-operative Societies the power to cancel an amendment to the by-laws of a society made under that Section if he is satisfied that the said by-laws were effected **‘pursuant to a misrepresentation or concealment of a material fact by the person applying for registration’**.

It was in exercise of the powers under Section 8(3A) that the 1st Respondent cancelled the Ex parte applicant’s amendment to its by-laws registered on 28/8/2014, in which the Ex parte applicant extended its operations country wide. This cancellation meant that the Ex parte applicant was only permitted to carry out operations within Njoro sub-county in terms of its original by-laws which were registered on 23/4/2014.

In registering the amendment to the by-laws, the 1st Respondent gave the Ex parte applicant permission to carry out its operations throughout the country, and in so doing conferred upon the Ex parte applicant a legal right. By cancelling the said amendment the 1st Respondent withdrew the benefit which it had itself conferred upon the Ex parte applicant. This constituted an administrative action within the meaning of Section 2 of the Fair Administrative Action Act, 2015 in which Administrative Action is defined to include

“Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates”

The 1st Respondent had an obligation to comply with the rules set out by Article 47 of the Constitution of Kenya, 2010 as well as with the provisions of the Fair Administrative Action Act. Article 47 of the Constitution provides that

“47. (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”.

The Fair Administrative Action Act was enacted to give effect to the right to fair administrative action. Section 3(1) of the said Act provides that all its provisions will apply to all state and non-state actors including any person whose action, omission or decision affects the legal rights or interests of any person to whom such action omission or decision relates. The Act goes on to provide for the procedure which a decision maker must follow in order to achieve fairness.

A reading of Section 4 (6) of the Act is that the procedure set out therein is mandatory unless there is another procedure set out by written law which conforms to the provisions of Article 47.

Section 4 (2) of the Act provides as follows

“4(2) every person has the right to be given written reasons for any administrative action that is taken against him” (own emphasis)

In their letter dated 18/12/2014 the 1st Respondent notified the Ex parte applicant that the registration of its amendment had been cancelled and further cautioned that the Ex parte applicant not to operate outside of the authorized area else its registration would be cancelled altogether.

The 1st Respondent did not inform the Ex parte applicant of the reasons behind that decision. By failing to supply the reasons behind its decision 1st Respondent contravened the provisions of Section 4(2). This

failure to provide reasons for their decision means that the 1st Respondent did not exercise its statutory powers or discretion in accordance with the law.

The Co-operative Societies Act provides that the 1st Respondent may cancel the amendment ‘**pursuant to a misrepresentation or concealment of a material fact by the person applying for registration**’. The 1st Respondent did not allege much less show that any such misrepresentation or concealment had occurred. Since no reasons were given for the cancellation this court cannot rule out the very real possibility that factors other than those set out in the statute influenced that cancellation. Where a statute has conferred upon a body powers to act then, that body can only act within the limits and in accordance with the powers donated by that statute.

In **KISUMU MUSLIM ASSOCIATION HC MISC APPLICATION NO. 280 OF 2003**, Warsame, J, (as he then was), held that where an officer is exercising statutory power, he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. In **HARDIAL SINGH & OTHERS [1979] KLR 18** the court held that a minister should give reasons for his decision particularly in cases, which affect life, liberty or property and where he gives none, then the court is entitled to infer that he had no good reasons. The minister must act in good faith, extraneous considerations ought not to influence him and he must not misdirect himself in fact or law. Odunga, J further held in **REPUBLIC Vs ATTORNEY GENERAL [2014]eKLR** that even where the law does not expressly enjoin the concerned authority to give reasons for the exercise of discretion, it ought to give reasons so as to satisfy the requirement that it is acting *bona fide* and not abusing the statutory power or discretion conferred upon it.

It is important to note that the 1st Respondents decision to cancel the Ex parte applicants licence was preceded by an inspection into the affairs of the Ex parte applicant by the Sub-County Co-operative officer which inspection was conducted between 21st and 30th October, 2014. One of the recommendations made was that the Ex parte applicants close its branches other than those in Nakuru, Eldoret and Nairobi until it had effective and approved structures in place. It is quite probable that the 1st Respondent was merely giving effect to these recommendations when it decided to issue the cancellation letter. However, the lack of effective structures does not constitute a ground for cancellation of an amendment to the by-laws under Section 8(3A).

In **REPUBLIC Vs MINISTRY OF PLANNING & ANOTHER EX PARTE PROFESSOR MWANGI HC Misc Application 1769 of 2003**, the Court held that

“.....where a body uses its powers in a manifestly unreasonable manner, acts in bad faith, refuses to take relevant factors into account in reaching its decision, or based on irrelevant facts, the court would intervene on the ground that the body has in each case abused its powers. The reason why the court has to intervene is because there is a presumption that where Parliament gave a body statutory, power to act, it would be implied that Parliament intended it to act in a particular way”.

As such the decision made by the 1st Respondent must be quashed as it contravened Section 4 (2) of the Fair Administrative Action Act, in that the 1st Respondent failed to give the Ex parte applicant written reasons for its decision and by failing to record the reasons for their decision the 1st Respondent failed to show that their decision was made on the basis of the grounds set out in Section 8(3A) of the Co-operative Societies Act.

The Ex parte applicant also argued that the 1st respondent acted unfairly in cancelling the amended by-laws without according to the Ex parte applicant a chance to be heard before that decision was made.

Procedural fairness is one of the principles that govern administrative action under Article 47(1) of the Constitution and Section 4(1) of the Fair Administrative Action Act. It is a rule of natural justice that a man must not be condemned unheard. The right to be heard requires that any person who stands to be affected adversely by a decision, should be informed in advance of the case against him, given adequate

time to prepare his defence and given a chance to make representations on his behalf before such decision is made.

In **GRACE KAZUNGU & ANOTHER Vs NSSF No. 703 OF 2010U/R** it was held

“The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second they will be provided with specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be given an opportunity to make submissions to the case”.

In **ONYANGO OLOO Vs ATTORNEY GENERAL** it was held that even where the statute does not provide for the right to be heard, it will be inferred into a statute unless it is expressly excluded:-

“There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice it is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided it is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated... Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character... Denial of the right to be heard renders any decision made null and void ab initio”.

Given that Section 8(3A) of the Co-operative Societies Act does not provide for the procedure to be adopted by the Commissioner when considering whether or not to cancel an amendment under that Section, the provisions of Section 4(3) of the Act would apply. Section 4(3) provides as follows:

“4(3) where an administrative action is likely to adversely affect the rights or fundamental rights of any person, the administrator shall give the person affected by the decision:-

- a) Prior adequate notice of the nature and reasons for the proposed administrative action;***
- b) An opportunity to be heard and to make representation in that regard;***
- c)***
- d)***
- e)***
- f)***
- g) Information, materials and evidence to be relied upon in the making of the decision or taking the administrative action”.***

There is no evidence that the 1st Respondent informed the Ex parte applicant of its intention to cancel its by-laws. There is no evidence that the Ex parte applicant was informed of any allegations against it or that the Ex parte applicant was ever invited to make submissions regarding any allegation against it. There is no evidence that at the time the inquiry was conducted the Ex parte applicant was heard before the recommendation to limit its scope of operations was made. I find that the decision made by the 1st Respondent clearly contravened Article 47(1) of the Constitution as well as Section 4(3) of the Fair Administrative Action Act.

In the **Onyango Oloo** case (supra) the court held that any decision made in contravention of the right to

be heard is null and void *at initio* regardless of whether or not the same decision would otherwise have been reached. As such the decision made by the 1st Respondent to cancel the amendment to the Ex parte applicant by-laws cannot be allowed to stand.

Based on the foregoing I allow the Notice of Motion dated 2/2/2015 in its entirety and issue orders as prayed. Costs are awarded to the Ex parte applicant.

Dated and Delivered in Nakuru this 31st day of May 2017

Maureen A. Odero

Judge