



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 4'B' OF 2015

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE COOPERATIVE SOCIETIES ACT

AND

IN THE MATTER OF SECTION 8 & 9 LAW REFORM ACT

REPUBLIC.....APPLICANT

- V E R S U S -

THE COUNTY COOPERATIVE COMMISSIONER, NYERI...1ST RESPONDENT

THE COUNTY EXECUTIVE SECRETARY OF AGRICULTURE,

LIVESTOCK, FISHERIES AND COOPERATIVE DEVELOPMENT,

NYERI COUNTY GOVERNMENT.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF NYERI.....3RD RESPONDENT

AND

ONESMUS NDIRANGU RIMWA.....EX PARTE APPLICANT

RULING

On the 14th April 2015, members of Aguthi Farmers’ Cooperative Society Limited from Kagumo Coffee Factory held elections for their representatives to the Management Committee of the Cooperative Society. There were five candidates including the *ex- parte* applicant. According to the minutes of that meeting, 246 members of Kagumo Coffee Factory were present. The first respondent was represented by Mr. Joe Githaka, Co- operative Officer Tetu Sub county. Elections were held, and Mr. Githaka declared Mr. Onesmus Ndirangu Rimwa the *ex-parte* applicant, the winner, and the factory representative of Kagumo Coffee Factory to the Management Committee.

On 22nd of April 2015, a meeting of the Management Committee was held and the *ex-parte* applicant attended, as the elected member for Kagumo Coffee Factory and also as its secretary.

It was in this meeting that the 1st respondent brought a letter cancelling the elections and calling for fresh ones. Acting on that letter and for reasons unstated, the same Mr. Githaka in a letter dated the same day, 22nd April 2015, the wrote to the chairman Aguthi Farmers’ Cooperative Society Limited, informing them of the cancellation of the elections, and directing the conducting of fresh ones. He wrote;

“The Chairman

Aguthi Farmers’ Cooperative Society

KAGUMO FACTORY ELECTIONS

This is to inform you that the above elections that were held on the 14th April 2015 at Kagumo Factory grounds have been annulled by the County Co-Operative Commissioner.

You are hereby directed to call for fresh elections for the said zone on 5th May 2015.”

Following the said letter, a notice calling for fresh elections was issued on the same day viz.

“TO ALL COFFEE FARMERS

KAGUMO FACTORY

RE: ELECTION OF FACTORY REPRESENTATIVE

The Co-operative Commissioner nullified the election that was held on 14th April 2015 and decided that there will be a re-election of the factory representative on 5th May, 2015 at Kagumo Factory Ground at 10:00am.

All members are requested to attend”.

According to the replying affidavit of the respondents sworn by the 1st respondent, following the elections on the 14th April 2015, on the 15th April 2015, some un named person or persons wrote to the Ethics and Anti -Corruption Commission complaining that the elections were rigged, and that the DCO Tetu had not allowed the candidates to choose their representatives and ‘they’ wanted repeat elections. They set out the reasons for wanting the fresh elections as follows;

-the shorter queue was declared the winner

-the factory workers participated in the elections

-Government officers were used in the exercise

The author(s) indicated in the latter “*Attached is a list of members of Kagumo coffee factory*’.

Attached to it are three pages of hand written lists of names, without heading or date.

The letter was copied to ‘the office of the Governor’.

Copies of the letter were received in the office of the Governor, Nyeri County, office of the County Secretary, Chief Officer Agriculture, Livestock, Fisheries, and Cooperative Development, on 17th, 20th and 21st April respectively.

The letter contains annotations by various persons ostensibly telling the County Cooperative officer to look into the issue and take necessary action. It appears that the Chief Officer Agriculture, Livestock, Fisheries, and Cooperative Development noted it on 22nd April 2015 and indicated ‘*action to be taken*’.

The action to be taken resulted in a frenzy of actions; the decision to cancel the elections of 14th April 2015, the writing of the letter by the 1st Respondent cancelling those elections and calling for fresh ones, the setting of the date of 5th May 2015, the writing of the letter by the DCO Tetu directing the holding of fresh elections, issuing of the notice for fresh elections by the Chairman, of the Society. All this action took place on the same date of 22nd April 2015.

The ex-parte applicant came to court on the 4th May 2015 seeking leave to file this application to quash the decision cancelling his election and calling for fresh elections. Leave was granted on the 22nd of June 2015. The application by way of Notice of Motion was filed on 10th July 2015, under Order 53 rule 3 of the Civil Procedure rules. The ex- parte applicant seeks;

(a) “*an order of **certiorari** removing to this Honorable Court for purposes of quashing, the decision of the County Cooperative Commissioner to cancel the election of members of the Management Committee of Aguthi Farmers’ Co -operative Society Limited, in respect of Kagumo Coffee Factory, held on the 14th April 2015, and the decision to call for fresh elections on the 5th of May 2015.*

(b) “*Costs be provided for*”.

The grounds for the relief sought are set out on the face of the Notice of Motion and the accompanying statement of facts dated 8th July 2015;

1. That County Cooperative commissioner Nyeri made a decision to cancel the elections citing an undisclosed dispute

2. That County Cooperative commissioner Nyeri had no powers to cancel the elections and call for fresh ones,
3. That the decision to cancel was made citing an undisclosed dispute,
4. That no reasons were given for the decision
5. That the decision was against the rules natural justice
6. That the decision was unreasonable as no member of the coffee factory has complained of any impropriety or dissatisfaction.
7. That the decision was apparently biased against the applicant
8. That the decision was illegal as only the members are legally mandated to elect remove or suspend a member of the management committee of the society
9. That the decision was against the legitimate expectations of the applicant to act as representative of the members, and of the members to be so represented.

In the replying affidavit the 1st 2nd and 3rd Respondents through 1st respondent deponed that elections of the 14th April were marred with irregularities having been held through the *mlolongo* style and that complaint was raised by members of the Kagumo coffee factory. That that letter was the basis for the annulment of the elections and calling for fresh ones. That when the fresh ones were called the *ex -parte* applicant boycotted the same but that a new member of the management committee was elected in a free and fair manner.

Parties agreed to deal with the matter by way of written submissions.

Ex Parte Applicant's submissions

Citing a host of authorities, the *ex -parte* applicant submits that the order is sought on the grounds of illegality, unreasonableness, failure to give reasons or consult, legitimate expectations and bias. Counsel submitted that the 1st respondent did not have the powers to cancel the elections, but even if he did, those powers were expected to be exercised reasonably.

He relied on the following authorities.

1. **The Commissioner of Lands – vs- Kunste Hotel Ltd (1997) eKLR**
2. **R –vs- Commissioner of Cooperatives ex-parte Kirinyaga Tea Growers Cooperative Sacco Ltd (1999) I EA, 239**
3. **Anisimic Limited –vs- Foreign Compensation Commission (1969) AC, 147**
4. **Washington Silvanus Washiali Khwale – vs – District Cooperative Officer & 5 others (2014) eKLR**
5. **R-vs- Commissioner of Cooperatives Developments ex parte KPCU Ltd. (2014) eKLR**
6. **Gatanga Coffee Growers Ltd – vs – Gitau (1970) E.A. 361**
7. **R –vs- Paddington Valuation Officer ex parte Peachey Property Corporation Ltd (1965) 2 All ER, 836**
8. **Wednesbury Corporation – vs – Ministry of Housing and Local Government (1965) 3 All ER, 571**
9. **O'Really – vs – Mackman (1982) 2 All ER, 1124**
10. **A.G. of Hong Kong – vs. Ng Yuen Shiu (1983)2 All ER 346**
11. **Council of Civil Service Union – vs – Minister for the Civil Service (1984) 3 All ER, 935**
12. **Lloyd – vs – McMahon (1987)1 All ER 1118**

Relying on the case of **Commissioner for Lands vs Kunste Hotel Ltd** the *ex parte* applicant submitted that Judicial review is about the decision making process. He argued that in the cases of **Washington Silvanus Washiali Khwale vs. District Cooperative Officer and 5 others** and **Republic vs. Commissioner of Cooperative Development ex parte KPCU** the court was of view that statutory powers must not be exercised arbitrarily.

Further that although the 1st respondent has powers under s.93A of the Cooperative Societies Act to call for elections, he has no powers to cancel any elections hence the action he took was *ultra vires*. That only members of the of the factory have the legal mandate to elect, remove or suspend a member of the management committee of the society.

Counsel also submitted on the jurisdiction of this court vis-a-vis that of the Co-operative tribunal as provided for under s. 76 of the Act, although that was not in issue.

1st 2nd and 3rd Respondents Submissions

The respondents set out the issues for determination as follows;

- i. Whether the decision by the 1st respondent to cancel the elections was illegal or *ultra-vires*
- ii. Whether the ex parte applicant is entitled to the remedy of an order of certiorari.

On the 1st issue they relied on the provisions of section 58(1) of the Cooperative Societies Act arguing that that provision of the law empowers the 1st respondent to nullify the elections.

(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.

(2)

(3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.

(4)

It is argued for the respondents that the 1st respondent acted on a petition alleging rigging of the elections on 14th April 2015, conducted an inquiry, recommended the nullification of the elections at a general meeting of the Aguthi Farmers Society Limited held on 22nd May 2015 which the ex-parte applicant attended.

That it was as a result of the inquiry that the 1st respondent gave directions for the elections and that all this was done within the law. Hence, the decision was not unreasonable, at there were complainants, it was not against the legitimate expectations of the *ex-parte* applicant of the members of the Aguthi Co-op society, and there was no bias because he was informed of the new date.

On the 2nd issue, the respondents argue that the ex-parte applicant is not entitled to the orders sought because the 1st applicant acted within the law, and that the matter has been overtaken by events.

They relied on the following cases;

Kenya National Examination Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR

Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

Republic vs Commissioner for Co-operative Development & 69 others Ex Parte Katelembo Athiani Maputi Ranching & Farming Co-operative Society Limited [2016] eKLR.

Applying these principles to the remedies sought by the Applicant, the Court notes that the first remedy sought is that of certiorari to quash the decision of the 2nd Respondent contained in his letter dated 10th August 2015 suspending the management committee of the Applicant. In light of the finding of this Court that the said decision was not ultra vires, the remedy cannot issue.

Republic v Ambrose Odwaya O Onyango & another Ex-parte Ceasar Ngige Wanjao [2014] eKLR

In this case, it is submitted that the 1st interested party has since vacated the suit premises. If that be the position it would follow that the application has been overtaken by events and that the orders sought herein are no longer efficacious and may only serve as an academic exercise.

Analysis and Determination

I have carefully considered all the submissions and perused the authorities cited by both parties. Two issues stand out for determination: -

1. Whether the 1st respondent's decision to cancel the elections of 14/4/15 and call for fresh ones on the 5th of May 2015 was *ultra-vires*.
2. Whether the remedy sought by the *ex parte* applicant has been overtaken by events.

In Commissioner of Lands vs. Kunste Hotel Ltd the Court of Appeal in setting out the scope from Judicial review cited with approval the case of Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155, where Lord Hailsham of St. Marylebone said,

“The purpose of Judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court”

In addition, the Court of Appeal stated;

“But it must be remembered that Judicial review is concurred not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”.

In dismissing the appeal, the court stated;

“The appellant was exercising his statutory powers...when he decided to allot the subject land to the interested party. That exercise of discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision.”

In this case, the 1st respondent alleged that he had canceled the elections following an inquiry as per s.58 of the Cooperative Societies Act.

That provision of the law empowers the commissioner to inquire into *“the by-laws, working and financial conditions of any cooperative society”*. He is also mandated to report the findings of the inquiry to a general meeting of the society and give directions for the implementation of the recommendations.

This position is fortified by rule 46 of the Co-operative Societies Rules and in particular sub rule (3).

(1) Any inquiry held pursuant to section 58 of the Act shall not be conducted continuously for a period exceeding sixty days.

(2) The Commissioner, may pursuant to section 58(4) of the Act, appoint a chairman of the interim Committee.

(3) The Committee shall implement the inquiry report and prepare for society elections.

(4) A copy of the inquiry report may be issued on application therefore and upon payment of a fee of two thousand shillings.

The submissions by the 1st respondent that an inquiry was conducted is not supported by any evidence. The letter of complaint was written by an anonymous person. It had an annexure of list of names alleged to be of members of the Kagumo Coffee factory. The lists bear no heading, no date and some names appear in more than one. It cannot be said with any certainty where those lists came from, or the purpose for which they were made. Neither is there any to show that these persons were present on 14th April 2014 to vote and were aggrieved by the manner of the voting.

It was a complaint addressed to EACC with a copy to all these other County Officials. There is no evidence that the subjects of the complaint were made aware of the same as no copies appear to have been served on any of them.

Did EACC conduct an inquiry? What was the outcome? This information was not availed to the affected parties or to the court.

Did the 1st respondent conduct any inquiry as required by law? If so where an when? Who was heard? Was the ex parte applicant heard? What about the two DCOs present during the elections? And the local administrators? All these persons were accused of election malpractices and failing to uphold integrity during the said elections. Together with the ex parte applicant they each and all of them were condemned unheard.

The law requires that the 1st respondent's recommendations be made to an AGM of the society. None was held on the 22nd April 2015 for the 1st respondent to make his report and recommendations as submitted. What happened on 22nd was a Management Committee meeting whose agenda and minutes were not attached provided to the court. The only conclusion this court can arrive at from the foregoing is that there was no inquiry. It is evident that the complaint landed on the Minister's desk on 22/4/2015, and on the same day the letter of cancellation of the elections was issued and the notice calling for fresh elections. There is no evidence of any inquiry and the decision was made arbitrarily.

In fact, the 1st respondent confirmed in her affidavit at paragraph 7 – that

“Due to the concerns raised in the petition by members of Kagumo Coffee Factory, my predecessor nullified the elections held on 14/4/2015 and chairman of the management committee of the Aguthi Farmers Cooperative Society Limited relayed the decision to the management committee in a meeting of the management committee held on 22/4/15”. (Emphasis added)

There was no inquiry report. There were no recommendations for the committee to implement. The 1st respondent simply pulled the decision

to cancel the elections of 14th April 2015 from the air and gave no reasons to call fresh ones for the 5th of May 2015. This was contrary to the requirements of the law. Clearly therefore the 1st respondent cannot rely on this provision as giving him statutory powers to cancel an election in the manner that he did.

In **Republic v. Commissioner of Cooperatives ex parte Kirinyaga Tea Growers** the Court of appeal held that: -

“No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith”

It may be argued that the 1st respondent has powers under the statute to call for elections as provided for under s.93A. However, it is clear that that is the only power he has. He has not been given any powers to cancel the elections of an official.

In the case of **Washington Silvanus Washiali Khwale vs. District Cooperative Officer Mumias and 5 others [2014] eKLR**

The respondents held a meeting to discuss a report and the way forward for the union. However, during the said meeting, the issue of removal of the appellant and all the officials was discussed and a resolution passed to hold fresh elections.

The Court of Appeal found that even though the members of the union had sat through the meeting and discussed the issue of the removal of the appellant from office and the calling of fresh elections, the meeting had been called by the 1st respondent, the district Cooperative officer and he was responsible for all the resolutions that were passed in that meeting, hence the resolution to remove the officers could not be said to be the resolution of the union members.

“The irregular resolutions were made as a result of the meeting that had been convened by the 1st respondent. The 1st respondent was responsible for all the matters that ensued. He was acting in his official capacity and judicial review was certainly available to the appellant to question the irregularities that took place at the meeting.”

The court went ahead to quash the decision reached at the special general meeting that led to the removal of the appellant as chairman of the union, and ordered fresh elections within 90 days.

The circumstances of this case are similar to those in the **Washiali** case to the extent that an irregular decision was made remove elected officials. The Court of Appeal was quick to quash that decision.

It goes without saying that since there was no inquiry the 1st respondent did not give the ex parte applicant any opportunity to be heard. No reasons were given to him as to why his elections was canceled.

From the foregoing the 1st respondent acted *ultra vires*. Secondly his action was arbitrary, without reasons and contrary to the rules of natural justice as the ex parte applicant was never heard.

On the submissions that the remedy sought has been over taken by events, this case distinguishable from the case of **Republic vs. Ambrose Onyango ex parte Ceaser Wanjao.**

In the **Kirinyaga Tea Growers** case the Court of Appeal, upon finding that the decision of the Commissioner of Cooperatives was unreasonable and made in bad faith issued an order of certiorari removing the commissioner’s decision to the High court and quashing it, together with all the acts flowing from that decision.

The court added

“It follows that all not any act(s) flowing from the said decision are also quashed.”

In the **Washiali** case the decision was quashed three years after it had been made. Clearly the issue of the remedy sought being over taken by events cannot arise.

An unjust and unfair process cannot just be upheld simply because time has run, and other persons have benefitted from that process. Then unscrupulous persons in positions of authority would be fortified in their opaque, arbitrary and capricious and ultra vires decision making processes basking in the confidence that the passing of time would entrench those decisions.

That is why I must find that the remedy sought by the ex parte applicant herein cannot be said to have been overtaken by events. It is very much available to him.

I find: -

1. That the decision by the 1st respondent to cancel the elections of 14/4/14 and call fresh elections on 5/5/15 was ultra vires and against the rules of natural justice.
2. An order of certiorari to issue in favour of the ex parte applicant

3. The decision of the 1st respondent of 22/4/2015 is hereby quashed, together with all the ensuing acts.

4. After the elections were cancelled, the 1st respondent called elections within 13 days. In these circumstances I order that fresh elections be held within 30 days of the date of this ruling where the ex parte applicant may participate as a candidate if he so wishes.

5. The ex parte applicant will have costs of this suit.

Right of appeal within 30 days.

Dated, delivered and signed at Nyeri this 17th November 2017

Teresia Matheka

Judge

In the presence of;

Court Assistant Catherine. N/A for parties and Counsel both of whom had notice.