



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
MISC APPLICATION NO. 115 OF 2015

JAMES NGANGA NDIRANGU----- APPLICANT

VERSUS

BUSIA COUNTY COOPERATIVE COMMISSIONER----- RESPONDENT

RULING

1. This Decision determines prayer 2(c) of the Applicant's Notice of Motion dated 20th July 2015 in which this Court is asked to compel the Respondent to provide the Applicant with information as to the last time Busia Dairy Farmers Cooperative Society filed Returns with the Respondent. Although the Notice of Motion had other prayers, at the hearing The Applicant pressed with only prayer 2(c).
2. In an Affidavit sworn on the same day, the Applicant explains that through a letter dated 9th July 2015 by his Advocate, he requested the Respondent for records as to the existence or otherwise of Busia Dairy Farmers Cooperative Society. That the Commissioner, one Samuel Khatenya having at first promised to furnish the information has gone back on his word and refused to give the information.
3. The Applicant hinges his application on the provisions of Article 35 of The Constitution and believes that the Provisions of that Article gives him an unfettered right to be provided with the information by the Respondent. That at any rate Section 26 of the Cooperative Societies Act mandates the Respondent to receive information from Members of Cooperative Societies. The Applicant swore a Supplementary Affidavit on 6th August 2015 but this was in reply to Mr. Khatenya's Affidavit of 30th July 2015. As the contents of that Supplementary Affidavit can only be clear in the context of Mr. Khatenya's reply, let me set out that highlights of Mr. Khatenya's Affidavit.
4. Mr. Khatenya depones that he was summoned to testify in Busia Environment and Land Case No. 31 of 2012 (hereinafter also referred to as E & L Case) and he gave evidence on 11th March 2015. During the hearing of this matter, The State Counsel gave Court a copy of the proceedings therein and it was agreed by Counsel for both sides that the Court be at liberty to study the contents and to consider them in its decision.
5. Mr. Khatenya received the letter of 6th July 2015 from the Applicant's Counsel. He thought it unnecessary to respond to the request as, in his view, the testimony he gave in Court responded to all the issues raised. But in his Replying Affidavit he gave some information.
 - a. That the Society was registered on 16th May 1973 by the Commissioner for Cooperative Development
 - b. That at the time of making the affidavit, the Society did not have a physical address because the Applicant had obtained a Court Order evicting the Cooperative Society from its former address.
 - c. That the Applicant destroyed all the property on the Society occupied by the Society by pulling

- down the buildings and destroying the records of the Society.
- d. That on information by the former Commissioner in charge, the last elected officials were elected on 23rd March 2003.
 - e. That annual returns are usually filed with the Commissioner for Cooperative Development in Nairobi and that he would therefore not know the last time the Society had filed annual returns.
6. In closing Mr. Khatenya emphasized that during his testimony in the E & L matter, he gave all information regarding the Society.
 7. In reply to that Affidavit, the Applicant stated that the E & L Case has nothing to do with the matter at hand. And that the Respondent had asked the Applicant's Advocate's clerk to collect the information sought only to change his mind. The Applicant made the point that it was strange that the Respondent only has information dating back to 1973 and 2009 but none in respect to the time he was in the office in the County. The Applicant deponed that the E & L case concerned the ownership of Land described and known as Busia Municipality/20 and not the information requested. The Applicant also averred that the eviction alluded to by the Respondent was a lawful exercise done in execution of a Court order.
 8. The State Counsel reiterated that the Respondent had furnished the information sought by the Applicant in paragraph 8 of his affidavit of 30th May 2015. Paragraph 8 states as follows:-

That I know of my own knowledge that as we speak the Busia Dairy Farmer Cooperative Society do not have a physical address because the Applicant herein had obtained a Court order evicting the Cooperative Society from their former Address.

It was further submitted that the Respondent had given information on the names of officials of the Society in the annexure to paragraph 10 of his Affidavit.

9. The State Counsel also told Court that the E&L matter was due for further hearing on 21st January 2016 and that the Applicant would have an opportunity of asking the Society the questions sought in the Application.
10. Responding to that argument, Counsel for the Applicant emphasized that the Respondent sought to have all documents to information of Societies under it. And that the Applicant required the information so as to use it in cross-examining the Society in the E & L case.
11. Hearing both sides, there does not seem to be consensus that the Applicant would be entitled to the information as to when Busia Dairy Farmers Cooperative Society last filed its returns. And although it initially crossed my mind that the Society ought to have been enjoined to these proceedings, it became clear to me that the nature of information sought by the Applicant was available on public inspection by dint of the Provisions of Rule 45 of the Cooperative Societies Rules, 2004. That Rule provides:-
 1. **The by-laws, annual returns, audited accounts and balance sheet of every cooperative society and the register of charges shall be open to the public for inspection at the office of the Commissioner, on payment of a fee of one thousand shillings for each inspection.**
 2. **For every inspection made pursuant to section 57(1) of the Act the fee payable shall be one thousand shillings.**
 3. **The Commissioner shall upon request and on payment of a fee to be determined by him and not exceeding two thousand shillings for each copy, supply certified copies of the by-laws, annual returns, audited accounts and balance sheet of a co-operative society.**
 4. The Documents set out in Sub Rule 1 are available for inspection by the Public as a matter of Right with the only condition being that inspection fee of Kshs. 1000/- be paid.
12. This Court has looked at the proceedings in Busia E & L Case No. 3 of 2012 and notes that the issue of Returns was not brought out directly. But in respect to the Application at hand, it may be premature because the Applicant has not demonstrated that it has first sought Public inspection of the annual returns from the office of the Commissioner of Cooperative Societies pursuant to the provisions of Rule 45 of the Cooperative Societies Rules 2004 Rule 45(2) required the Applicant to pay the sum of Kshs. 1000/- to the Commissioner to enable him inspect the annual returns of

the Society. It has not been argued that the fee charged is unconstitutional or excessive or is in any other way an impediment to the access of that inspection.

13. It is expected that on inspection of the annual returns, the information sought as to when the Society last filed returns would be readily available. Also available would be the information that must be availed by a Society in making the Annual Returns. Rule 14 of the Cooperative Societies Rules 2004 Provides:-

The annual return required to be filed pursuant to section 25 of the Act shall be in Form IVA set out in the schedule to these Rules and shall be filed with the Commissioner after the closure of the end of the financial year.

Form IVA requires the Society to furnish, inter alia, the Particulars of Officers of the Society and the date when the Annual General Meeting was held.

14. The Information on Returns should not therefore have been sought from the Respondent through letter. The Provisions of Rule 45 are clear. It bears repeating, the information is available on inspection at the Office of The Commissioner upon payment of the requisite fees. For this reason these proceedings are premature and are for dismissal.

15. The result, I do hereby dismiss the Notice of Motion of 20th July 2015 with costs.

Dated, signed and delivered at Busia this 24th day of February 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Orwasa - C/Assistant

N/A -for the Applicant

Tarus - for the Respondent