



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW CASE NO.178 OF 2015

**KATELEMBO ATHIANI MAPUTI RANCHING AND
FARMING CO-OPERATIVE SOCIETY LIMITED.....APPLICANT**

VERSUS

THE COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....1ST RESPONDENT

THE CO-OPERATIVE COMMISSIONER

MACHAKOS COUNTY 2ND RESPONDENT

AND

WILSON MASILA MUEMA & 67 OTHERSINTERESTED PARTIES

EX PARTE:

KATELEMBO ATHIANI MAPUTI RANCHING & FARMING

CO-OPERATIVE SOCIETY LIMITED

JUDGMENT

Introduction

The *ex parte* Applicant (hereinafter referred to as “the Applicant”) is Katelembo Athiani Farming and Ranching Co-operative Society Limited, which is a co-operative society registered under the Co-operative Societies Act and whose objective is to mobilize funds for the purpose of buying land. The Applicant was registered on 10th June 1970 and its members are drawn from Katelembo Athiani and Maputi areas within Machakos County.

The 1st Respondent is the Commissioner for Co-operative Development appointed under section 3 of the Co-operative Societies Act (Chapter 490 of the Laws of Kenya), while the 2nd Respondent is the Co-operative Commissioner in Machakos County. The Interested Parties are members of Katelembo Athiani Farming and Ranching Co-operative Society Limited.

The Applicant commenced these judicial review proceedings after leave was granted to do so by this Court on 24th September 2015. The Applicant in its substantive application by way of Notice of Motion dated 6th October 2015, is seeking the following orders of judicial review:

- 1. An order of certiorari to bring into the High Court for purpose of quashing and to quash the decision of the Machakos County Co-operative Commissioner, the 2nd Respondent herein, contained in his letter dated 10th August 2015 suspending the elected management committee of Katelembo Athiani Farming and Ranching Co-operative Society Limited.**
- 2. An order of mandamus compelling the 2nd Respondent to effect the decisions of the Applicant in the change of the officials of the Executive Committee contained in the Applicant's letter dated 8th July 2015, and the to communicate the changes to the Applicant's bankers to effect the changes to the Applicant's signatories.**
- 3. An order of mandamus compelling the 1st Respondent, the Commissioner for Cooperative Development, to take up his mandated functions/roles under the Co-operative Societies Act and the Rules thereunder, and to act within the laws as provided under the Cooperative Societies Act and in particular by directing the 2nd Respondent to act within the law.**
- 4. An order of prohibition prohibiting the 2nd Respondent herein from having any dealings and/or exercise of constitutional rights of the Applicant and /or shareholders/members as owners of the Applicant.**

The Applicant in addition prayed that the costs of this suit be provided for. The said Notice of Motion was supported by an affidavit sworn on 6th October 2015 by Joseph Mutua Muinde, the Chairman of the Applicant.

The 1st Respondent filed a replying affidavit sworn on 28th August 2015 by P.N. Gichuki, the acting Commissioner for Co-operative Development, and the 2nd Respondent, Charles Nalyanya, relied on a replying affidavit he swore on 27th October 2015. The Interested Parties relied on a replying affidavit and further affidavit sworn by Daniel Nthani Mutisya and Peter Muasya on 19th August 2015 and 22nd September 2015 respectively. The two deponents are the 6th and 2nd Interested Parties respectively.

The parties also filed written submissions on the issues raised in their pleadings, and supplementary submissions on the applicability of section 15 of the Sixth Schedule to the Constitution, and sections 23 and 24 of the Transition to Devolved Act, and if applicable, whether the said provisions were complied with, after directions were given to this effect by the Court.

Before proceeding with the respective cases of the parties, this Court observes that at the time of granting leave to commence judicial proceedings, it was found that no evidence had been provided by the Applicant on the formation of a Katelembo task force by the Machakos County Co-operative Commissioner, and denied it leave to apply for an order of certiorari to quash the said decision. Pursuant to this order, this Court will therefore not address any averments or arguments presented by the parties in their pleading and submissions which relate to the formation and/or actions of the alleged task force.

The following are the relevant facts from the cases put forward by the Applicant, Respondents and Interested Parties by their learned counsel. The Applicants were represented by Orina Riechi & Company Advocates, the 1st Respondent by its State Counsel Mary Nyamichaba, the 2nd Respondent by the County Law Office Machakos, and the Interested Parties by Gladys Gichuki & Associates Advocates.

The Applicant's Case

The Applicant's case is as set out in its aforesaid Notice of Motion and supporting affidavit, and in its

written submissions filed in Court on 11th November 2015 and supplementary submissions filed on 10th February 2016. The Applicant avers that it has elected *bona fide* management committees in compliance with the Co-operative Societies Act, and that the 2nd Respondent has been harassing the elected management committee arising from their refusal to allocate him a plot. Further, that the Applicant then caused a letter to be written to the Commissioner for Co-operative Development, *inter alia* complaining about the 2nd Respondent, and a copy of the said letter dated 5th August 2013 was annexed.

It was contended by the Applicant that upon receipt of the letter, the 2nd Respondent became hostile and suspended the entire management committee by a letter dated 10th August 2015 which was also annexed. Further, that 2nd Respondent in his letter of suspension alleges that the elected management committee members have pending criminal cases in court. The Applicant sought to explain the nature of the cases in Court and averred that the only pending relevant case is in respect of management staff and junior staff, for failure to keep proper books.

The Applicant further stated that prior to the suspension, the elected management committee made changes in the executive management committee by removing one Daniel Kasinga who was the then Honorary Secretary and replacing him with Jones K. Nzau, and that the changes were promptly communicated to the 2nd Respondent by a letter dated 8th July 2015 which was annexed, but that the 2nd Respondent without any reasons has not effected the changes by communicating to the Applicant's banker.

Further, that on 10th August 2015, the Applicant went to the bank to transact business only to find that the 2nd Respondent had advised the bank not to recognize the elected management committee. The Applicant states that as a consequence its operations have been put to a halt and it is unable to pay salaries to its employees and casual workers.

According to the Applicant, the power to suspend an elected management committee lies with the 1st Respondent, and only after conducting a duly constituted legal inquiry under section 58 of the Co-operative Societies Act. Further, that in the alternative, the power to remove or suspend an elected management committee is vested in the annual general meeting where all members can participate, and according to the Applicant's bylaws (bylaw number 29), the 2nd Respondent has no powers to suspend the *bona fide* elected management committee. A copy of the Applicant's by-laws were annexed.

The Applicant explained that the 1st Respondent had appointed various inspection teams to investigate its members' complaints, and which teams prepared reports in 2009, 2010 and 2012 and made recommendations which were to be implemented by the elected management committee. The said reports were annexed. The Applicant averred that the management committee has been implementing and addressing the concerns raised by its members, and that the 1st Respondent has been getting regular briefs. It was alleged that the 2nd Respondent is now interfering with the progress so far made in the implementation of the recommendations contained in the said reports.

It is the Applicant's contention that it is being directed by two conflicting authorities namely the 1st Respondent and the 2nd Respondent, and therefore finding it difficult to comply with their orders and directions.

The Applicant in its submissions filed in Court by its learned counsel on 11th November 2015, argued that under section 3 of the Co-operative Societies Act, it is under the direction of the Commissioner of Co-operative Development. It was contended that it was necessary for county governments to legislate relevant statutes to govern co-operative societies, or in the alternative for Parliament to amend the Cooperative Societies Act to conform with the constitutional provisions that devolved co-operative societies functions to the county governments. Further, that since the current Co-operative Societies Act does not have provisions for a county co-operative officer, the holder of that office is unrecognized in law and cannot purport to enjoy duties not given to him by statute.

The Applicant further submitted that it is the 1st Respondent and not the 2nd Respondent who is given power under section 28(7) to suspend a committee member charged in Court, and even then only after he has conducted an inquiry under section 58 of the Co-operative Societies Act. Further, that under section 27(1) of the Co-operative Societies Act it is the members of a co-operative society in a general meeting who elect the office bearers of the society, and under Rule 23 (4) of the Co-operative Societies Rules the elected management committee can only be removed by two thirds majority of members present at a general meeting.

It was thus submitted that the 2nd Respondent had no capacity under the Co-operative Societies Act to suspend the Applicant's elected management committee, and his actions were contrary to the principles of natural justice which provide that a party ought not to be condemned unheard, which are also provided for in Rule 51 of the Co-operative Societies Rules of 2005.

It was also contended that this Court has no jurisdiction to hear and determine a dispute between the Interested Parties and officials of the Applicant, as the Co-operative Societies Act in section 76 provides that any dispute concerning the business of a Co-operative society shall be referred to the Co-operative Tribunal and as held in **Murata Farmers Sacco Ltd vs Co-operative Bank Ltd (2001) KLR.**

Lastly, it was submitted by the Applicant that section 28(3) of the Co-operative Societies Act and the by-laws of the Applicant give powers to the elected management committee of the Applicant to enter into any contract of sale of its property without seeking approval of the 2nd Respondent.

The Applicant in its supplementary submissions urged that the Applicant still wholly relied on the 1st Respondent for the delivery of the functions set out in the Cooperative Societies Act, and that Parliament has not enacted relevant legislation to govern registered co-operative societies to the county government levels pursuant to section 15 of the Sixth Schedule to the Constitution.

Further, that the 1st and 2nd Respondents have not complied with the provisions of section 23 and 24 of the Transition to Devolved Government Act, as the 2nd Respondent has not obtained the necessary approval by the Devolution Authority before taking over registered co-operative societies. It was also submitted in this respect that the County Government has not built enough capacity to handle the functions of the 1st Respondent; the 2nd Respondent did not consult the 1st Respondent; and has not acted within the framework of a county law.

The Respondents' Case

The 1st Respondent's Case

The 1st Respondent averred that the supreme authority of a Cooperative Society is vested in the Annual General Meeting where members' affairs are discussed and decisions made, and that co-operative societies are managed by the Co-operative Societies Act, the rules made thereunder and the society's by-Laws. Further, that although the functions of co-operative societies are devolved by the Constitution, the law governing co-operative societies has not been changed, and that his office was not consulted about the issues raised by the Applicant for him to discharge his statutory functions under section 3 of the Co-operative Societies Act.

It is the 1st Respondent's view that disputes relating to Co-operative societies should be settled by established dispute resolutions mechanisms at the Cooperative Tribunal, and that it is in the interest of justice and the Applicant's members that this matter be settled in accordance with the law governing Co-operative Societies.

The 1st Respondent's learned counsel filed written submissions filed on 2nd December 2015 and dated 30th November 2014, and supplementary submissions dated 14th February 2016 and filed in Court on 15th February 2015. It was urged in the initial submissions that the applicable law to this dispute is the Co-

operative Societies Act, and that the said Act does not provide for a County Commissioner of Co-operatives, neither do sections 2 and 3 of the said Act provide for, refer to, or confer any powers to the 2nd Respondent. Accordingly that the action of the 2nd Respondent to suspend the Applicant's management committee was *ultra vires* as he is not the Commissioner of Co-operatives appointed under sections 2 and 3 of the said Act.

According to the 1st Respondent a law needs to be enacted to give the 2nd Respondent powers and authority to act, and that the transition clauses allow the Co-operative Societies Act to apply until it is amended to accommodate the county governments.

Further, that an elaborate procedure for the removal or suspension of the Applicant's management committee is provided for under section 58 and 73 of the Co-operative Societies Act which was not followed as no inquiry was conducted. It was also submitted that the Applicant's management committee members were not afforded an opportunity to defend themselves before suspension from office.

Lastly, it was the 1st Respondent's contention that the elections of the management committee of the Applicant were a sham intended to hide the irregularities and illegal suspension of the Applicant's management committee. It was submitted in this regard that there was no legally constituted meeting and that there were no election held.

The 1st Respondent in its supplementary submissions urged that the secondment of the 2nd Respondent to the County Government of Machakos was not the same as the transfer of functions of power and functions envisaged under section 15 of the Sixth Schedule to the Constitution and sections 23 and 24 of the Devolved Government Act, and was merely aimed at building the capacity of the Machakos County. Further, that the legislation referred to in section 24(1)a of the Devolved Government Act has not been enacted, and therefore the 2nd Respondent has to act within the existing provisions of the Co-operative Societies Act under which he has usurped the powers of the 1st Respondent.

The 2nd Respondent's Case

The 2nd Respondent on his part states that the Applicant's application is wanting in form and substance, and does not meet the standard criteria for judicial review applications and should be struck out. Further, that the prayers in the said application for an order of certiorari to quash his decision to suspend from office the then management committee has been overtaken by events, as the said management committee has since been voted out of office and a new management committee has since been elected in its place. He annexed copies of a notice for elections and minutes of a special general meeting of the Applicant.

It was the 2nd Respondent's averment that pursuant to Schedule 4, part 2 paragraph 7(d) of the Constitution, the dealings of cooperative societies have been devolved and are now the responsibility of the County Government, and as the County Commissioner of Cooperative Societies, the mandate and authority of the Cooperative Societies Act is conferred to him at the county level. He stated that the defunct management committee members had been charged in court with *inter alia* neglect of official duty and stealing by servant a sum totalling to over Kshs. 5 million, and that he suspended them as per the law pending determination of their criminal matter. He annexed a copy of the charge sheet.

It was further averred by the 2nd Respondent that the letter alleged to have been sent to him to effect the changes of officials by the defunct former management committee has not been annexed to the application, and the order of mandamus sought to compel him to do so cannot therefore be granted. Further, that the said prayer has since been overtaken by events as the Applicant elected a new management committee and the new officials have made themselves known to all the requisite stakeholders including the banks, and thus have access into their accounts on behalf of their members.

The 2nd Respondent contended that the order of mandamus sought by the Applicant to compel the 1st Respondent to direct him to work within the law cannot also be granted, as the 1st Respondent has no

supervisory jurisdiction over him and cannot direct him to act in the manner sought by the Applicant, since the mandate of cooperatives is solely in the purview of the County Government. Further, that the Applicant in their prayer for an order of prohibition are seeking to prohibit him from exercising his legal mandate as per the Constitution and the Cooperative Societies Act, and from having institutional oversight over cooperative societies.

It was also the 2nd Respondent's contention that the directives by the 1st Respondent's that allegedly conflict with his directives have not been shown, and that the 1st Respondent's superior, the Principal Secretary of Industrialization and Cooperative Development, wrote to the County Government in response to the allegations made by the Applicant referring the matter back to the county as per the Constitution. A copy of the said letter dated 18th August 2015 was annexed.

According to the 2nd Respondent, the Applicant's affidavit is full of mere allegations against him most of which are defamatory and libellous in nature, to which no proof has been provided which is an offence under the Oaths and Statutory Declarations Act and Civil Procedure Rules. Further, that most of the actions alleged to have been committed by him are criminal in nature and yet the Applicant did not report the same to the police or any relevant authority. The 2nd Respondent asked the Court to order the striking out of any matter that is scandalous, irrelevant and oppressive.

The 2nd Respondent's learned counsel in written submissions dated 1st December 2015 reiterated that the 2nd Respondent's office is drawn from the Fourth Schedule, Part 2 of the Constitution, and that the function of regulating cooperative societies under the said schedule is not a shared function but one that falls solely in the purview of county governments. Further, that section 3 of the Co-operative Societies Act does not specify whether the office of Commissioner for Co-operative Societies is a national commissioner or county commissioner. The 2nd Respondent also submitted that he is not an employee of Machakos County Government but of the national public service, and has been seconded to the County government to exercise the 1st Respondent's functions at the County level.

The 2nd Respondent submitted that under section 7 of the Sixth Schedule of the Constitution, the Co-operative Societies Act continues to be in force but is to be construed in conformity with Schedule 4 of the Constitution where cooperative societies are now solely the function of county governments, and that section 2 of the Co-operative Societies Act gives the 2nd Respondent powers to act as the Commissioner at County level.

On his powers to suspend the Applicant's officials, the 2nd Respondent submitted that under section 28(7) of the Co-operative Societies Act, the Commissioner has discretion to suspend a committee member who has been charged with an offence involving fraud or dishonesty pending the determination of the matter in Court, and that the same is not subject to any procedure. Further, that the suspension is pending the determination of their cases therefore they are not being condemned unheard.

Lastly, the 2nd Respondent submitted that the notice to call for the Special General meeting for the election of new officials was done by the members on 3/8/2015 before the Applicant's application was filed in Court, and that it is the Applicant who has to court with soiled hands.

The 2nd Respondent's learned counsel also filed supplementary submissions dated 15th February 2016 wherein it was argued that sections 24 and 25 of the Transition to Devolved Government Act actualize the provisions of section 15 of the Fourth and Sixth Schedules to the Constitution which distribute and transfer the functions between the National and County Governments, and that the said provisions are applicable to the matter before the Court.

Further, that the said provisions have been complied with by way of the Kenya Gazette Notice 116 which provided in Legal Notice 168 of 2013 that the function of cooperative societies was transferred to the County Government of Machakos with effect from 9th August 2013.

The Interested Parties Case

The Interested Parties' learned Counsel filed written submissions dated 1st December 2015 on 4th May 2015 and further submissions dated 15th February 2016 and filed on the same date, in addition to the Interested Parties' replying and further affidavits. The Interested Parties contend that the current prayers as sought by the Applicant are intended to defeat the orders issued in Machakos HCCC No. 39 of 2015, in which the suspended management committee members of the Applicant were required to return all the society documents, records and the society's seal which they had carried away on 10/8/2015 to an unknown location after their suspension.

Further, that the orders also stated that they should not interfere with the affairs of the society until the suit is heard and determined. The pleadings and court orders issued in Machakos HCCC No. 39 of 2015 were annexed. According to the Interested Parties, the issues raised by the Applicant in this suit can be heard and be determined in the said pending case, and that the Applicant should not be allowed to abuse the process of this court.

The Interested Parties stated that they have been closely following the affairs of the society including the conduct of the suspended management committee, and that a majority of the membership is in support of the County Cooperative Commissioner's decision to suspend them from office. Further, that pursuant to section 28(7) of the Co-operative Societies Act, the County Co-operative Commissioner does have power to suspend the committee members pending the hearing and determination of the criminal charges, and that the actions of the Commissioner are therefore within the law.

It was alleged by the Interested Parties that the suspended management committee members have been charged in court with various criminal offences related to fraud and other criminal offences, and that this is confirmed from the various charge sheets which they annexed. Further, that the majority of the society members are aggrieved by the suspended committee members mismanagement of the society's and members' properties, and they gave details of the said grievances including on the mismanagement of the society's affairs, illegal disposal of members plots and failure to address members grievances, and the recommendations in various inquiry reports that have been conducted.

It was stated that on 20/8/2015 the membership of Katelembo Athiani Muputi Society, totaling about 2500 members held a special general meeting pursuant to an earlier petition by a member, whereof they unanimously voted to dissolve the suspended management committee and a new committee was put in place. Therefore, that the current application cannot stand and is an abuse of the court process in view of new developments. Copies of the letter petitioning for the said Special General Meeting and dated 3/8/2015 and the minutes of the said meeting were annexed by the Interested Parties.

The Interested Parties reiterated the submissions that the Commissioner for Co-operatives at national level has no mandate over the implementation of the Co-operative Societies Act in the Counties, and that the 2nd Respondent acted within his powers in suspending the management committee of the Applicant as provided for in section 28(7) of the Act, as there is proof the Applicants have been charged with various offences in Court. Further, that there was no need for an inquiry and that the allegation of violation of the rules of natural justice does not arise.

The Interested Parties further relied on Articles 186(1), 185(2) and 187 (2) as well as Schedule Four of the Constitution on the transfer of functions of the national to county governments. It was also urged that transitional clauses in sections 7 and 33 of the Sixth Schedule to the Constitution do not make it necessary for county governments to legislate on statutes to govern cooperative societies, or for the National Assembly to amend the current law to conform with the Constitution.

It was also submitted by the Interested Parties that pursuant to section 15 of the Sixth Schedule to the Constitution, the Transition to Devolved Government Act was enacted which provides for phased transfer of devolved functions to county governments, and that on 9th August 2013 the Transition Authority established under the Act published Legal Notice 168 in Kenya Gazette Supplement No 116, which transferred various devolved functions to Machakos County Government including that of co-operative

societies. Further, that for the Transition Authority to have transferred the said function it was satisfied that the county government had put in place all the framework and mechanisms requisite for the discharge of the function.

The Issues and Determination

I have considered the pleadings and submissions made by the Applicant, Respondents and Interested Parties. The following are the issues that arise for determination:

- 1. Whether county governments need empowering legislation to exercise functions previously exercised by national government and which were transferred to county governments under the Fourth Schedule to the Constitution.**
- 2. Who as between the 1st and 2nd Respondent has the mandate to exercise the powers of the Commissioner of Co-operatives under the Co-operative Societies Act.**
- 3. Whether the 2nd Respondent acted in excess of his powers if any, in suspending the management committee of the Applicant.**
- 4. Whether the Applicant is entitled to the reliefs sought.**

On whether county governments need empowering legislation to exercise functions previously exercised by national government and which were transferred to county governments under the Fourth Schedule to the Constitution.

It is not disputed by the parties that the function of regulating co-operative societies was by the Fourth Schedule to the Constitution assigned to county governments. What is in dispute is whether for the County governments to exercise the function, there is need for a statute to give them specific powers in this regard. It is the Applicant's and 1st Respondent's argument that there is need for such a statute passed by the Machakos County, or an amendment to the existing Co-operative Societies Act to give specific powers to county governments and officials. In addition that this is required by section 24(a) of the Transition to Devolved Government Act before a function is transferred to a county government.

The 2nd Respondent and Interested Parties have on the other hand argued that the transitional provisions of the Constitution adequately cater for this situation in section 7 and 33 of the Sixth Schedule to the Constitution.

Legislation made by Parliament has the force of law throughout Kenya by virtue of Article 94(5) of the Constitution. Under Article 185 (2) of the Constitution, county assemblies are also given powers to make any laws that are necessary for the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Such laws only have the force of law within the respective county.

In the event of any conflict between national law and county law with respect to matters falling within the concurrent jurisdiction of both levels of government, Article 191 provides that the national legislation shall prevail if it is aimed at preventing unreasonable action by a county; if it provides for a matter that cannot be regulated effectively by legislation enacted by the individual counties; and where it provides for a matter that requires uniformity throughout Kenya.

The Co-operative Societies Act is in this regard a national legislation, and has the force of law throughout Kenya. The function of cooperative societies is however under the Fourth Schedule of the Constitution allocated to county governments. No evidence was brought by the parties of any law passed by the Machakos County Assembly as regards regulation of co-operative societies in Machakos county. Such a hiatus was however envisaged at the time of coming into force of the current Constitution and consequent establishment of county governments in 2010, and was addressed by Article 262 of the Constitution

which provides for the transitional and consequential provisions set out in the Sixth Schedule, that took effect on the effective date of the Constitution.

Part 2 of the Sixth Schedule to the Constitution is dedicated to existing obligations, laws and rights at the time of coming into force of the Constitution, and section 7(1) of that part provides as follows:

" (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

Since the function of co-operative societies is no longer a function of the national government, the Co-operative Societies Act which is still in force consequently has to be construed as applying to the regulation of co-operative societies at the county governments, until a county government has enacted its own law regulating co-operative societies, and this construction is the only one that can make the Act conform with the provisions of the Constitution.

In addition, the only time limits that were provided by the Constitution for enacting legislation were in the Fifth Schedule of the Constitution with respect to certain laws required to be passed by Parliament, and no such time limits have been set for county governments to enact any particular legislation, either in the Constitution or by the County Government Act. It is therefore the finding of this Court that pending the enactment of a county legislation to regulate co-operative societies by the Machakos County Assembly, the Co-operative Societies Act continues to regulate co-operative societies in Machakos County with the necessary alterations, modifications and exceptions.

As to whether empowering legislation is needed before a function can be transferred to a County under section 24(1)(a) of the Transition to Devolved Government Act, which lists the existence of legislation relating to the function as one of the criteria for transfer of a function to a county government, this Court is in agreement with, and adopts wholly the holding in **Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others** [2013] eKLR as follows:

"The applicants also contend that the Respondent has ignored the mandatory provisions of Section 24(1)(a) of the *Transition to Devolved Government Act, 2012* by failing to ensure that there was in place legislation relating to the Health function before transfer of that function. There is currently no Health Act or even a National Health Policy in existence. Under the said section one of the criteria for transfer of the services is whether there is in existence legislation relating to the function applied for. It is clear that the Act does not require the enactment of new legislation but only requires the Respondent to determine whether the relevant legislation exists. The Respondent has averred that there are several pieces of legislation dealing with the provision of health services. However, these legislation have been faulted by the applicants on the ground that they were enacted before the current Constitution. In our view the mere fact that the legislation were enacted before the current Constitution does not render them irrelevant. What is required under section 7 of the Sixth Schedule to the Constitution is that all existing laws are to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the current Constitution. Under section 2(3)(b) of the said Schedule as read with Schedule 5 thereof laws relating to devolved government are to be enacted within three years. The applicants have not contended and we have not been convinced that the laws currently in place do not satisfactorily address the applicants' concerns."

Who as between the 1st and 2nd Respondent has the mandate to exercise the powers of the Commissioner of Co-operatives under the Co-operative Societies Act.

The 1st Respondent argued extensively that the 2nd Respondent is a seconded officer of the national government to the Machakos County Government, and has no powers or mandate under the Cooperative Societies Act and has in this regard usurped the powers and functions of the Commissioner of

Cooperatives. The 2nd Respondent on the other hand contended that as the County Co-operatives Commissioner for Machakos County, he can exercise the powers and functions of the Commissioner of Co-operatives at county level, as the function of co-operative societies has been devolved to the county governments.

This Court in addressing this issue firstly has regard to Article 186 of the Constitution which provides that:

"(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(4) For greater certainty, Parliament may legislate for the Republic on any matter."

Therefore, while the Fourth Schedule allocates functions to the national and county governments, there is still a possibility of having concurrent functions between the two levels of governments, and any residual function that may be retained by the national government can only be with respect to functions that are not expressly assigned by the constitution to either the national or the county governments.

In addition, there is also provision for transfer of functions from one level of government to another under Article 187 of the Constitution. Under this Article, a function or power of government of one level of government may be transferred to another level of government by agreement between the two levels of government. However, even then, the constitutional responsibility for the performance of the function or exercise of the power remains with the level of government to which the function is assigned by the constitution in general, and the Fourth Schedule in particular.

In the present case, the Fourth Schedule is clear that co-operative societies is wholly a function of county governments, and there is no allocation of any aspect of regulation of co-operative societies assigned to the national level. Such concurrent jurisdiction exists in other functions such as health, agriculture and transport, where the aspects of policy and standard setting of these functions are allocated to national government.

Secondly, the Constitution in addition to allocating functions to the county governments also provides for a phased transfer of these functions to the County Governments in section 15 of the Sixth Schedule as follows:

"(1) Parliament shall, by legislation, make provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185."

The legislation which was enacted pursuant to this provision is the Transition to Devolved Government Act, which provided as follows in section 23:

"(1) The Authority shall, by notice in the Gazette at least thirty days before the first elections under the Constitution, identify functions which may be transferred to the county governments immediately after the first elections under the Constitution.

(2) After the initial transfer of functions under subsection (1), every county government shall make a request in the prescribed manner to the Authority for transfer of other functions in

accordance with section 15 of the Sixth Schedule to the Constitution.

(3) The Authority shall, upon the request of a county government under subsection (2), determine whether a county government meets the criteria set out under section 24, to allow the transfer of a function.

(4) The Authority shall—

(a) consider and dispose of any application under subsection (2); and

(b) make its determination within sixty days of receipt of such an application.

(5) The decision of the Authority under subsection (4) shall be based on the criteria for transfer of functions, provided under section 24.”

The Authority referred to in the said section is the Transition Authority that was set up under the Act. In the present case, the Applicant and 1st Respondent argued that the provisions of the section 15 of the Sixth Schedule and of the Transition to Devolved Government Act had not been complied with. The 2nd Respondent and Interested Parties on their part brought evidence of, and relied on Legal Notice 168 published in the Kenya Gazette Supplement No 116, which they submitted transferred the function of co-operative societies to the Machakos County Government as with effect from 9th August 2013.

I have perused the said Legal Notice 168 that was published on 9th August 2013, and it provides as follows:

"PURSUANT TO section 15 of the Sixth Schedule to the Constitution as read with sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to the Legal Notice No.16 of 2013, the Transition Authority approves the transfer of the functions specified in the Schedule to the county government of Machakos, with effect from the 9th August, 2013:

Provided that the responsibility for the personnel emoluments related to the discharge of the devolved functions shall be managed by the national government for a period not exceeding six months or as shall be agreed upon between the two levels of government, whichever

comes first.

SCHEDULE

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6. Trade development and regulation:

(a) fair trading practices including—

(i) verification of weighing and measuring instruments;

(ii) inspection of weighing and measuring instruments and pre-packed goods;

- (iii) investigation of complaints relating to unfair trade practices; and**
- (iv) prosecution of offences arising from unfair trade practices.**
- (b) co-operative societies—**
 - (i) promotion of co-operative societies;**
 - (ii) processing of application for registration;**
 - (iii) inspections and investigations;**
 - (iv) training needs assessment for co-operative movement;**
 - (v) market information dissemination & advisory services;**
 - (vi) banking inspections local Savings and Credit Cooperative Societies;**
 - (vii) risk assessment in Savings and Credit Cooperative Societies;**
 - (viii) investment advisory services;**
 - (ix) co-ordination and monitoring of co-operative indemnity by co-operative leaders;**
 - (x) promotion of co-operative ventures and innovations for local co-operatives;**
 - (xi) carrying out certification audits;**
 - (xii) carrying out continuous and compliance audits;**
 - (xiii) co-operative advisory services;**
 - (xiv) pre-cooperative education;**
 - (xv) settlement of disputes (arbitration);and**
 - (xvi) registration of co-operative societies audited accounts.”**

The Court in this respect also notes that the acts of the 2nd Respondent complained of and sought to be quashed are alleged to have occurred between July and August 2015, after the transfer of the function of co-operative societies to Machakos County Government.

The sum total of the foregoing facts is that the function of co-operative societies is now wholly and exclusively transferred to the Machakos County Government. The legal and practical effects of the transfer of a function is that the financial and human resource allocations will follow the function, and are held and managed by the repository of the function. The objectives of devolution set out in the Constitution and service delivery by county governments will accordingly not be achieved unless County governments are allowed to undertake the functions assigned to them. In addition, for citizens to hold the different levels of governments accountable, they must know which level of government they can expect to receive different services from.

It is therefore the finding of this Court that the powers and functions set out in the Co-operative Societies Act including those of Commissioner of Co-operatives are in the present case to be exercised by the County Government of Machakos through its officers, and specifically through the 2nd Respondent, who is the Machakos County Co-operative Commissioner.

Lastly, on this issue, the Court will comment on the continued existence and functions of the 1st Respondent after the coming into force of the new Constitution, which is regulated by section 7(2) of the Sixth Schedule of the Constitution as follows:

“(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.”

This Court is of the view that the relevance of, and continued exercise of powers and functions by the 1st Respondent is therefore only in those counties where either the function of co-operative societies has not been transferred, and/or where there is an agreement between a county government and national government that the 1st Respondent shall continue to exercise the functions and powers conferred on it under the Co-operative Societies Act in relation to that particular county government. In the absence of these circumstances, the powers of the 1st Respondent are to be exercised by the County Governments and officers of the County Government in accordance with, and to give effect to the above-cited provisions of the Constitution.

Whether the 2nd Respondent acted in excess of his powers if any, in suspending the management Committee of the Applicant.

There were two limbs of arguments made on this issue, the first of which was that under section 28(7) of the Co-operative Societies Act, the power to suspend a committee member charged in Court is given to the 1st Respondent and not the 2nd Respondent. This limb has been addressed in the previous issue where this Court has found that with the transfer of the co-operative societies function to the Machakos County Government, the 2nd Respondent is entitled to exercise the powers of the Commissioner of Co-operatives under the Co-operative Societies Act.

The second limb put forward by the Applicant and 1st Respondent was that the 2nd Respondent can only exercise the powers set out in section 28(7) of the Co-operative Societies Act only after he has conducted an inquiry under section 58 and section 73 of the Co-operative Societies Act. The 2nd Respondent and Interested Parties on the other hand argued that under section 28(7) of the Co-operative Societies Act, the Commissioner has discretion to suspend a committee member who has been charged with an offence involving fraud or dishonesty pending the determination of the matter in Court, and that the same is not subject to any procedure.

I have perused the provisions of law cited by the parties. Section 28(7) of the Co-operative Act provides as follows:

“(7) The Commissioner may suspend from duty any Committee member charged in a court of law with an offence involving fraud or dishonesty pending the determination of the matter.”

Section 58 of the said Act provides as follows:

“(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) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.

(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) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—

(a) dissolve the Committee; and

(b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.

(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.”

Lastly, section 73 of the Co-operatives Societies Act provides as follows:

“(1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—

(a) has misapplied or retained or become liable or accountable for any money or property of the society; or

(b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.

(2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.

(3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.”

I have also perused the letter dated 10th August 2015 by which the 2nd Respondent suspended the Applicant’s management committee members. The said letter makes reference to various offences the management committee members are charged with in court, and purports to suspend them pending determination of cases with effect from 10th August 2015.

It is my view that section 58 of the Co-operative Societies Act is inapplicable to the circumstances of this case, as it is evident that an inquiry under the said section is to be made when the subject thereof is the by-laws, and working and financial conditions of a co-operative society. I am also of the view that section 73 of the Act is inapplicable as the 2nd Respondent’s sole reason and motivation as indicated in his letter for suspending the members of the Applicant’s management committee was the cases in court in which the Applicant’s management members had been charged. There was no indication nor any evidence brought by the Applicant and 1st Respondent, that the 2nd Respondent had been informed or was aware that the said members of the management committee had misapplied funds or been guilty of breach of trust, which are the actions that trigger an inquiry under section 73 of the Act.

Lastly, I also agree with the submissions that the provisions of section 28(7) of the Act are not expressly subjected to an inquiry, and grants the Commissioner of Co-operatives and by extension the 2nd Respondent, wide discretion to suspend officers charged with a criminal cases in Court. The 2nd Respondent did provide copies of the charges by which the members of the Applicant's management committee were charged with various criminal offences, and I find the exercise of this discretion was not unreasonable. The failure on the part of the 2nd Respondent to hold an inquiry was therefore not *ultra vires* for the foregoing reasons.

Whether the Applicant is entitled to the reliefs sought.

The scope of the judicial review remedies of *certiorari*, *mandamus* and prohibition was the subject of the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

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.

The second remedy sought is for an order of mandamus compelling the 2nd Respondent to effect the decision of the Applicant to change the officials of the Executive Committee that was contained in a letter dated 8th July 2015, and that the 2nd Respondent communicates the said changes to the Applicant's bankers.

I have perused the annexure marked "JMM6" to the Applicant's supporting affidavit sworn by Joseph Mutua Muinde on 6th October 2015, which the Applicant alleges is the said decision and letter dated 5th July 2015. The said annexure is an extract of a minute of an unspecified meeting, in which it was resolved that certain persons named therein are office bearers and authorised to sign the Applicant's cheques and contracts. It is not addressed to the 2nd Respondent, and no evidence was brought of any communication of the said resolution to the 2nd Respondent. The said remedy therefore cannot be granted for this reason.

The third remedy sought is an order of mandamus compelling the 1st Respondent to take up his roles under the Co-operative Societies Act and to act and direct the 2nd Respondent to act within the law. This remedy cannot issue as it has been found that the 1st Respondent no longer exercise powers and functions under the Co-operative Societies Act in relation to Machakos County Government, as the functions of co-operative societies has been transferred to and is now an exclusive mandate of Machakos County Government and its officers including the 2nd Respondent.

The last remedy sought is an order of prohibition to prohibit the 2nd Respondent from having any dealings and/or exercising any constitutional rights of the Applicant. The said remedy is also not available for the reason that the Applicant is now firmly under the regulation of the 2nd Respondent by virtue of the Constitution and Co-operative Societies Act, as found in the foregoing.

Before I conclude I wish to point out that judicial review proceedings do not deal with the merits of a decision but with the decision making process as held in various judicial decisions, including **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.

Therefore, this Court cannot for this reason address the concerns raised by the Applicant and 1st Respondent about the sham elections of new management committee members of the Applicant, or by the 2nd Respondent about the defamatory and libellous allegations by the Applicant. These are issues of private and substantive rights that should be litigated in the appropriate causes of action.

In the premises, I find that the prayers sought in the Applicant's Notice of Motion dated 6th October 2015 are not merited for the foregoing reasons, and the said Applicant's Notice of Motion is accordingly dismissed with costs to the 2nd Respondent.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 23rd DAY OF MARCH 2016

P. NYAMWEYA

JUDGE