



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION APPLICATION NO. 344 OF 2015

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF
MANDAMUS**

-AND-

IN THE MATTER OF THE CONSTITUTION OF KENYA ART. 1(1),

(2), (3), (4) (b) ART. 2(1), ART. 3(1), ART. 10(1)(2), ART. 47(2)(3),

ART. 48, ART. 165(3)(d)(ii),(6), (7) ART. 25(1), ART. 259

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER, CO-OPERATIVE DEVELOPMENT.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

NG'ATI FARMERS CO-OPERATIVE SOCIETY LTD.....1ST INTERESTED PARTY

NG'ATI FARMERS CO-OPERATIVE SOCIETY MEMBERS...2ND INTERESTED PARTY

EX PARTE

NGUGI NJOROGE

KINYANJUI KONGO

JULIUS KARIUKI

STEPHEN KINUTHIA

BONIFACE MWANGI MWIGA

WANJIRU KIGERA

NJOROGE KANINI

BENARD GITAU

JUDGEMENT

Introduction

1. By a Notice of Motion dated 15th October, 2015, the ex parte applicants herein seek the following orders:

1. That the Applicants be granted an order of judicial review by way of Mandamus directed to the 1st Respondent to preside over the official hand over of Ng’ati Co-operative Society committee to the elected officials “Applicants” pursuant to a members’ Special General Meeting held on 12th August 2015 in Naivasha.

2. That the costs of this application be provided but abide the outcome of the substantive motion.

Ex Parte Applicant’s Case

2. According to the Applicant, on 12th August 2015 at Naivasha Crayfish Hotel as members of the 1st interested party herein, **Ng’ati Co-operative Society Ltd** (hereinafter referred to as “the Society”) held a special General Meeting whose agenda was elections of the co-operative officials. According to them, the election results were never challenged and thus there exists no legal impediment or bar to the Respondent being compelled to carry out a handover of the affairs of the Society to the elected members. The averred that on 18th August, 2015 through their advocates they returned the results of the said election to the 1st Respondent, the Commissioner for Co-operative Development (hereinafter referred to as “the Commissioner”) and requested that the Commissioner undertakes and carries out a handing over to the elected officials pursuant to a members meeting held on 12th August 2015.

3. It was averred that despite Commissioner acknowledging receipt of the return of election results and the elected members of the Co-operative society and promising to preside over a handover for the elected officials of the society, the Commissioner failed and refused to preside over the same function despite numerous requests to do so which refusal has continued to jeopardize the operations of the society.

4. It was the applicants’ case that the Commissioner owes a duty to ensure the smooth running of the Society by virtue of preamble of the **Co-operative Act Cap 490** (hereinafter referred to as “the Act”) which provides that the object of the Act is to “regulate Co-operatives Societies and for purposes incidental thereto”. According to the Applicants, under section 1(3) of the Act, the Respondent is “mandated and is responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement, and dissolution and the administration of the provisions of the Co-operative Act”.

5. It was averred that the members on 3rd July 2015 issued a notice to the defunct committee to convene a meeting pursuant to section 27(6)(b) as read together with rule 25(2)(a) and (b) of the Act, and demanded that the defunct chairman convene a special general meeting for purposes of carrying out elections. The defunct committee however deliberately failed and neglected to convene a meeting of the membership of the society as required by the said notice and prolonged their disobedience as they had failed to convene the same for a period of 8 years in outright violation of the societies By-laws and the Act. It was contended that as a result and upon the expiry of fifteen (15) the members exercised their right under section 27(6)(b) and held a special statutory members meeting on 12th August 2015 at Naivasha Clayfish Hotel. Being a statutory meeting, it was the Applicants’ case that the Commissioner, pursuant to section 1(3) of the Act, is mandated to implement the Agenda and resolution of the members.

6. The Applicants further contended that the defunct committee of the Society used a fictitious members' resolution dated the 16th December 2011 allegedly passed by the members to the effect that the current committee would continue in office until they have issued all titles to the members of the society members. In the Applicant's view, the defunct committee has thwarted all efforts to have the society members convene and for a period of 8 years refused to conduct elections of the Society and has unlawfully and continues to unlawfully without the consent of the society members to plunder, sell and allocate land and money belonging to the Society.

7. It was disclosed that the defunct committee chairman filed a Tribunal Case No. 575 of 2014 in which the Tribunal issued an order on the 5th January 2015 that sought to stop the society from holding a special general meeting on the 24th December 2015 on the grounds of insecurity. However the tribunal directed that members hold a meeting that complied with the provisions the co-operative Act Cap 490. However in an attempt to frustrate and circumvent the order of the tribunal issued on the 7th January 2015, the defunct committee continued to thwart and prevent the convening of the society meeting by failing to issue a notice of the special general meeting. Despite that on 19th February 2015 a meeting was held that culminated into the election and the ex parte Applicants were elected as the officials of the Society. It was further averred that the defunct committee instituted an urgent application dated 25th February 2015, which alleged that the elections of the society were conducted at night. Apart from this, on that very same day the President His Excellency Uhuru Kenyatta was touring the area and the meeting had been planned specifically to coincide with the date of the president visit so as to frustrate the members from holding the meeting and roadblocks were erected on the road and all members of the Society were detained at Kongoni Police Station which was also aimed at ensuring that the members of the Society did not hold their meeting as planned. It was however upon the intervention of Nakuru Senator **Hon. James Mungai** and the area member of parliament **Hon. John Kihagi** that the said members of the Society were released.

8. According to the Applicants, the interference by the police was orchestrated by the defunct committee. Despite that the members carried out the special general meeting and dealt with the only agenda of the meeting which was electing new officials, which exercise was conducted in a free, transparent and accountable manner. However, the Tribunal issued an order dated 8th May 2015 setting aside the resolution of special general meeting held on 19th February 2015 electing the officials and maintaining *status quo* and ordered that another special general meeting be conducted. Thus another meeting was scheduled for vide a notice dated 15th May 2015 which was to be conducted on 4th June 2015, at Crayfish Hotel Naivasha, whose agenda was to conduct the co-operative society elections of officials, which meeting was however stayed by another application Judicial Review No. 15 of 2015.

9. It was the Applicants' case that the said Judicial Review application was instituted in bad faith as it was instituted by a person who is not a member of the Society and had no right to be involved in the affairs of the Society thus was an act in furtherance of the defunct committee's impunity to illegally hold office for a period of more than 8 years, in contravention of the law.

10. The Applicants averred that the Tribunal did issue an order directed to the Commissioner dated 9th June 2015 directing an inquiry into the issues bedevilling the Society and to report its findings on the same which order has not solicited any results.

11. The Applicants further contended that through their elected Chairman **Ngugi Njoroge** and Maella Ward MCA **Hon. M. Kariuki**, petitioned the President vide Petition dated 3rd July 2015 to intervene and save the noble and most supportive members of the Society from the ignominy of the defunct committee. Pursuant thereto, the President vide a letter dated 12th August 2015 acknowledged receipt of the Petition and promised to forward the same to the relevant agencies to formulate proposals agreeable to all parties which would unlock the impasse in the management of the Society. In the meantime, it was disclosed, the defunct committee had relocated from the registered offices of the Society and carried out its activities from unregistered offices which ensured they perpetuated illegality and failed to be accountable.

12. It was contended that the defunct committee has failed to provide audited reports to the members for a period of 8 years and failed to submit the same to the Co-operatives Officer, in contravention of the Act. Further, the defunct committee continued to unlawfully appropriate, utilize, distribute the Applicants property and funds, in total breach of the fiduciary duty owed to the Society by them.

13. It was asserted that the member's resolution arrived at the Special General Meeting on 12th August 2015 has not been challenged and thus the Respondent is mandated to enforce the same and preside over the handing over of the affairs of the Society to the elected officials. In the Applicants' view, the failure to enforce the resolution of the meeting held on 12th August 2015 will result in a continued waste and illegal sale and dealing with the Society's property by a committee that is illegally in office.

14. The Applicants' position was supported by **Ng'ati Farmers Cooperative Society Members**, the 2nd interested party herein.

Respondents' Case

15. In opposing the application the Respondents filed the following grounds of opposition:

1. **THAT the Application is frivolous vexatious and an abuse of court Process.**
2. **THAT the Application does not meet the threshold of issuing the order of mandamus sought.**
3. **THAT the application as drawn and taken out is incurably defective incompetent and is otherwise an abuse of court process.**
4. **THAT the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.**
5. **THAT judicial review deals with the processes of decision making and not the merits of the decision.**
6. **THAT it is only fair and just that this Application be dismissed with costs to the Respondent.**

The Society's Case

16. In opposition to the application, the Society, through its chairman stated that the running as well as management of the Applicant is premised on the By-Laws passed by the members in an effort to ensure that the activities of the Society are managed in accordance with the law. It was averred that the management of the society has been in dispute which has led to institution of several suits seeking to protect the interest of the members as well as follow due procedure. It was disclosed that vide a notice issued on 30th January, 2015, the sub-County Commissioner informed members of the Society of the convening of a special general meeting on the 19th day of February, 2015 whose agenda was communicated to the members vide the notice dated 30th January, 2015 in compliance with the court order. However, the meeting scheduled for 19th February, 2015 was made without knowledge of the fact that inauguration of the Geothermal Plant in Olkaria IV was scheduled for the same day which was a presidential function and consequently, the scheduled meeting could not take place. Based on the belief that the meeting was cancelled and that communication would be sent to the members on the convening of another meeting to effect the agenda of the meeting scheduled for 19th February, 2015, the management as well as the members attended the inauguration of the geothermal plant. It was however contended by the Society that in blatant disregard and without authority, persons who are not registered members of Ng'ati Farmers Co-operative Society convened a meeting as scheduled and sought to act in the stead of persons registered as members.

17. It was averred that whereas the meeting scheduled for 19th February was to be convened at 9.00 a.m., the impugned meeting was held as from 2000 hours and came to a close at 2150 hours. Further, whereas there were several matters on the agenda of the impugned meeting, the only agenda addressed was the election of persons to form part of the management of the society creating parallel management offices in respect of Ngati Farmers' Co-operative Society. It was therefore the Society's position that the impugned meeting was not validly constituted as the persons present were not members of the Society as evidenced by the list of persons in attendance who have no known interest in the continued existence of the Society. It was contended that in the meeting illegally held, there was no register for members of Ngati Farmers and neither was there a list of members present to justify as well as authenticate the votes cast and the persons allegedly elected were not endorsed by the registered members as the meeting had been rescheduled due to the inauguration. It was reiterated that the meeting complained of was convened at night which imputes the legality or the intentions of the persons present whereas the scheduled meeting was to take place at 9.00 am during working hours which was open to all registered members of the Society.

18. The Society denied knowledge of a notice by the Applicants seeking to convene a meeting pursuant to section 27(6)(b) as read with rule 25(2)(a) and (b) of the Act demanding that he convenes a Special General Meeting for purposes of carrying out elections. To the Society, since the Management Committee is the duly elected representatives of the members, they must be given proper notice not only to explain the Society's position but also their management of the affairs of the Society. Further, there is need for service of such a notice so as to facilitate the convening of the meeting as requisitioned by the members therefore denying the chairman the opportunity to execute his mandate as per the requisition.

19. The Society's position was that the allegations levelled by the Applications as to the disobedience and or failure to convene a meeting for the last 8 years are mere allegations which require to be proved as his committee has always taken the interests of the members under consideration in running and managing the Society which committee under his chair has continued in office based on a resolution passed by the members on 16th December, 2011 to the effect that the committee would continue in office until issuance of all title deeds to the members of the society. Its view was that the committee in office has continued to lawfully run and manage the affairs of the Society as per the By-laws and there has been no proceedings, civil or criminal which has sought to oust the Committee from office as per the allegations levelled by the Applicants.

20. According to the Society the committee and the chairperson were excluded from the alleged meeting of 12th August, 2015 in clear breach of their rights to participate as members of the Society in the exercise further validating their belief that there was malice and bias in convening the meeting with a view of creating parallel management committees. Further, the Special General Meeting held on 12th August, 2015 was not in compliance with the Act and thus the Respondent is not mandated to implement the Agenda and resolution as passed during the impugned meeting. In the Society's view, Acts such as the **Co-operative Societies Act** and others with inbuilt dispute resolution mechanisms are self-embodiment and cannot be wished away at the altar of the Bill of Rights and that the mechanisms provided under these Acts for dispute resolution must be respected.

21. It was contended that the institution of suits in respect of the convening of meetings in respect of the society were done in line with the law and in an attempt to preserve the ends of justice as particularised hereunder:

- i. Tribunal cause no. 575 of 2014 sought to stop the Society from holding the Special General Meeting on the 24th day of December, 2015 on the grounds of insecurity.
- ii. Application dated 25th February, 2015 sought to nullify the elections as the same were held at night in breach of clear provisions and seeking to prejudice other members of the Society not in attendance.
- iii. Judicial review No. 15 of 2015 was instituted by a party interested in the affairs of the Society

for being a decree holder in respect of the property of the Society.

22. To the Society, section 27(1) of the Act vests the supreme authority of a cooperative society in the general meeting at which members have the right to attend, participate and vote on all matters while subsection (2) thereof obligates a cooperative society to hold an annual general meeting within four months after the end of each financial year. Subsections 6, 7 and 8 on the other hand provide circumstances under which a special general meeting may be convened.

21. According to the Society, for an order of *mandamus* to issue, an applicant must bring himself within the holding in the case of **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano**; Civil Appeal No.24 of 1985 for the proposition that person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.

23. It was contended on behalf of the Society that the Applicants herein did not serve the notice on the management committee to ensure their convening of the meeting as per the requisition thereby the basis of the meeting convened on 12th August had no force of law and should not be enforced as presented by the Applicants.

24. To them, section 3 of the Act, does not give the Commissioner powers to interfere with matters concerning co-operative societies but only sets out responsibilities as concerns registration, operation and dissolution of co-operative societies. However, this does not extend to the handing over of management as envisaged in this matter as it does not touch on registration, operation and or dissolution of the Society. Based thereon, the Society contended that this application is an abuse of the court.

Determinations

26. I have considered the material before me.

26. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *inter alia* as follows:

“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* compels 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.”

27. In Shah vs. Attorney General (No. 3) Kampala HCC No. 31 of 1969 [1970] EA 543 Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment.”

28. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393, it was held that *mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

29. It is however clear from Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (supra) that *mandamus* is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It therefore in my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, *mandamus* may go forth.

30. In this case section 3(3) of the *Cooperative Societies Act*, Cap 490, Laws of Kenya provides as follows:

The Commissioner shall be responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.

31. It is the Applicants’ case that following their requisition for a special general meeting which requisition the 1st interested party ignored, they proceeded to convene the said meeting as provided by the bye-laws and elected new office bearers of the Society and notified the Commissioner accordingly who promised to act thereon.

32. On behalf of the 1st interested party they acknowledge the said meeting did take place. Their only challenge to the said meeting was its legality. However, it is not the mandate of the 1st interested party to determine the legality or otherwise of a meeting. Where such illegality occurs, the 1st interested party ought to take legal steps to have such illegality nullified.

33. It is my view that the 1st interested party having not taken any step to have the purported illegal

meeting and elections set aside, and the Commissioner having been notified of the results of the said meeting including the resultant elections, he is under a duty to facilitate the growth and development of Ng'ati Farmers Co-operative Society by providing such services as may be required by the said Co-operative Society for *inter alia* its organization, operation, and advancement. In my view one of the ways in which the organisation and operations of a Cooperative Society ought to be advanced is by facilitating the elected officials of a co-operative society to manage the affairs of the said Society.

34. In my view, considering the broad statutory mandate of the 1st Respondent, it cannot be said that it is outside its mandate to perform what the applicants require him to do if to do so would be one of the ways in which the objects of the said office is to be achieved.

35. Having considered the issues raised in the Notice of Motion dated 15th October, 2015, it is my view that the same are merited.

Order

36. In the premises, an order of mandamus compelling the 1st Respondent, the Commissioner for Cooperative Development to preside over the official hand over of Ng'ati Farmers Co-operative Society committee to the elected officials pursuant to a members' Special General Meeting held on 12th August 2015 in Naivasha.

37. As this dispute revolves around the management of a cooperative society, there will be no order as to costs.

Dated at Nairobi this 27th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ndegwa for the ex parte applicant

Mr Mwangi for the 2nd interested party

Mr Makori for Mr Karanja for the 1st interested party

Cc Mutisya