



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
JUDICIAL REVIEW APPLICATION NO. 1 OF 2015

ERNEST B.M. ORANGA.....APPLICANT

VERSUS

KAKAMEGA COUNTY COMMISSIONER OF COOPERATIVES.....1ST RESPONDENT

COMMISSIONER OF COOPERATIVES DEVELOPMENT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

ALLOYS MANDU.....1ST INTERESTED PARTY

HANNINGTON WANGAYA.....2ND INTERESTED PARTY

MOSES NABULINDO.....3RD INTERESTED PARTY

SILAS CHUNGE.....4TH INTERESTED PARTY

RULING

1. The exparte applicant through a Notice of Motion dated 31st March, 2015 seeks the following orders:-

(i) That a prerogative order of certiorari be issued to remove into this Court and quash decision (sic) of the County Commissioner of Cooperatives to call a special general meeting on 26th February, 2015 together with the decision made at the aforesaid meeting.

(ii) Costs be provided for.

2. The application is anchored on the grounds that:-

(a) On 26th February, 2015, the 1st respondent caused to be held a (special general meeting) at which there was:-

(i) Confirmation of elected Board of directors;

(ii) Election of Union Supervisory Committee members;

- (iii) Constitution of executive board of directors;
- (b) The letter calling for the meeting of 26th February, 2015 was dated 2nd February, 2015;
- (c) The meeting was purportedly executing orders of the Court of Appeal in Kisumu Court of Appeal case No. 13 of 2014;
- (d) The aforesaid meeting was contrary to the provisions of the by laws of the Cooperatives Union;
- (e) There has not been a general meeting for the union since the ruling of the Court of Appeal Case No. 13 of 2014;
- (f) All officials of the Union can only be elected at a general meeting;
- (g) The 1st respondent acted ultra vires his powers in calling for a special general meeting to conduct business for a general meeting;
- (h) The 1st respondent acted contrary to the ruling of the court in civil appeal (sic);
- (i) The 1st respondent has submitted the officials (sic) so 'elected' contrary to the by laws for registration;
- (j) The submissions of the registration is contrary to by laws 6 (e) (i), (ii), and (iii) of the Cooperative Union;
- (k) There is no provision for confirmation of directors either through special meeting or general meeting (sic); and
- (l) The 1st respondent abused powers conferred on him by section 27(8) of Cap 490.
- (m) The exparte applicant filed a statement of facts which he relied upon and an affidavit in support of his application.

Responses

2. The 1st respondent filed a replying affidavit on 15th April, 2015 controverting the facts deposed to in the exparte applicant's affidavit.

The 1st Interested party filed a replying affidavit on his own behalf and on behalf of the 2nd, 3rd and 4th Interested parties on 28th September, 2015.

The exparte applicant filed a further affidavit on 16th December, 2015.

The exparte applicant's submissions.

3. At the hearing of the application, Mr. Elungata, learned Counsel for the exparte applicant submitted that the 1st respondent assumed powers that he does not have as in accordance with the provisions of section 27 (8) of the Cooperative Societies Act, the 1st respondent ranks third in priority with the 2nd and 3rd respondent having priority over him.

It was submitted that the 1st respondent believed that he was executing a Court order that directed that elections of Mumias Cane Growers Cooperative Union be conducted within 90 days, whereas the Court of Appeal did not direct the 1st respondent to conduct the elections. Mr. Elungata, added that the Court of Appeal directed that the elections be conducted properly. He submitted that the Cooperative

Societies Act (the Act) gives Cooperative Unions freedoms to conduct their own affairs including elections and that the duty of the 1st respondent is to regulate.

4. Learned Counsel for the exparte applicant cited Civil Appeal No. 39 of 1997 at Nairobi, **Republic Versus the Commissioner of Cooperatives Vs Kirinyaga Tea Growers exparte Cooperative Savings and Credit Society Limited** to show that the 1st respondent conducted himself in an unreasonable manner by calling for the elections of 26th February, 2016 thus rendering his actions to be ultra vires and in bad faith.

5. The exparte applicant also relied on the authority of **Republic Versus Musalia Mudavadi, Deputy Prime Minister and Minister for Local Government and another Exparte Richard Kwoba Nabibia** [2012] eKLR to show the prerequisite to all persons being treated fairly and being given an opportunity to be heard before decisions affecting them adversely, are made.

Mr. Elungata prayed for the application dated 31st March, 2015 to be allowed.

The respondents submissions.

6. Mr. Tarus learned State Counsel in opposing the application submitted that it was an abuse of the Court process and unmerited. He informed the Court that the 2nd respondent, the Commissioner of Cooperatives Development has delegated his powers to the 1st respondent, the Kakamega County Commissioner of Cooperatives who can call for elections at any time under section 93(a) of the Act.

It was submitted for the respondents that the applicant participated in the elections and never objected to the same.

7. It was further submitted that the Court of Appeal ordered that elections should be held within 90 days after the delivery of the Judgment. He cited the provisions of section 3(3) of the Act which gives the 1st respondent vast powers in calling for elections. Mr. Tarus' view was that the applicant had moved to this court after he was not elected.

Interested parties submissions.

8. Ms. Rauto, Learned Counsel for the Interested parties associated herself fully with the submissions for the respondents. She added that elections were done at the primary level and names of delegates were forwarded to the Cooperatives Union and the second phase of the elections was done. The applicant was present during the elections. She concluded by stating that confirmation of the officials was properly undertaken.

Analysis and determination of the application.

The issue that calls for determination is if the 1st respondent had the powers to call for elections through a special general meeting and if the elections that were held were valid.

Powers of the 1st respondent to call for elections through a special general meeting.

9. The Kisumu Court of Appeal decision in Civil Appeal No. 13 of 2014 ordered that fresh elections of the Mumias Cane Growers Union (Union) be held within 90 days of the date of the Judgment which was delivered on 10th December, 2014. The appeal had been filed by the 2nd Interested party.

10. Section 27(1) of the Cooperative Societies Act provides that:-

“The supreme authority of a Cooperative Society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters”.

Section 27 (5) thereof provides that:-

***“At the annual general meeting of a Cooperative Society, the members shall-
(e) elect the Cooperatives societies office bearers for the ensuring year”.***

This court notes that in the natural order of things, office bearers would have been elected at a general meeting of the Union. This was not to be as the elections were to be undertaken pursuant to a Court order.

11. Section 27(2) of the Act provides that:-

“subject to sub section (3) a Cooperative Society shall hold an annual general meeting within four months after the end of each financial year.” (emphasis added).

The Judgment of the Court of Appeal was delivered on 10th day of December, 2014. This court takes judicial notice that the end of each financial year is 30th of June and that 4 months after the end of the financial year 2013/2014 elapsed on 30th October, 2014. It was therefore not practically possible for an annual general meeting as envisaged under the provisions of section 27(2) to be held within the time frame of 90 days as ordered by the Court of Appeal.

11. It is therefore my considered opinion that the 1st respondent properly exercised his delegated powers under the provisions of section 27(8) of the Act by calling for a special general meeting. The said section provides that:-

“The Commissioner may convene a special meeting of a society at which he may direct the matters to be discussed at the meeting.”

12. The Notice issued by the 1st respondent dated 2nd February 2015, set the date for the special general meeting as 26th February, 2015. The agenda for the meeting was outlined as:-

- (i) Confirmation of elected board members;
- (ii) Election of Union Supervisory Committee members; and
- (iii) Constitution of executive board as per section 28(2) of the Cooperatives Act.

13. Prior to the notice calling for the meeting of 26th February 2015, the 1st respondent had issued a notice dated 2nd February, 2015 calling for a special general meeting on 17th February, 2015. The agenda for the said meeting was:-

- (i) Election of delegates 20 (in each society);
- (ii) Election of Board of Directors of the society; and
- (iii) Election of Union Board of Directors.

14. The 1st respondent attached minutes of the Union marked as *annexure 3* to his affidavit. The said minutes indicate that the meeting of the Union was held at the County Commissioner’s Office on 2nd February, 2015 and the venues for primary elections of the Unions was agreed on for the elections slated for 17th February, 2015.

15. A letter to the Registrar of the High Court Kisumu dated 10th March, 2015 and attached as *annexure 5* to the 1st respondent's replying affidavit indicates on page 3 that primary elections were held on 17th February, 2015 where delegates, Board of Directors of the Society and Board of Directors of the Union were elected. The exparte applicant was elected as one of the delegates for Lurambi Cane Growers

Farmers Cooperative Society. The said letter also indicates that elections were also held on the same date for the Union.

16. The *ex parte* applicant's affidavit largely dwells on the fact that elections of the Union should not have been held at a special general meeting but at a general meeting. This Court has in this ruling highlighted the special circumstances under which the 1st respondent called for a special general meeting. It is hereby reiterated that he did so pursuant to a Court order which gave the Union 90 days within which to hold its elections. I make a finding that the 1st respondent had powers to call for elections through a special general meeting under the provision of section 27(8) of the Act.

17. In **Pastoli Vs Kabale District Local Government Council and Others** [2008] 2 EA 300, the court restated the grounds on which the court exercises its judicial review jurisdiction. The court, cited with approval the case of **Council of Civil Servants Union vs Minister for the Civil Service** [1985] 2 AC which stated as follows:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety..... Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....”

18. After carefully considering the averments of the *ex parte* applicant, the responses by the respondents and interested parties as well as the submissions of Counsel on record, I am satisfied that due process was followed in the elections of the Union. I also hold that the provisions of the Union's by laws 69(e) (i), (ii) and (iii) are subservient to the provisions of section 27(8) of the Cooperative Societies Act. Consequently, the elections that were purportedly held on 9th March, 2015 by the Union were null and void *ab initio* and of no substance.

19. Having found that no illegality was committed by the 1st respondent, I hereby dismiss the application dated 31st March, 2015. Each party will bear its own costs.

It is so ordered.

DATED and **SIGNED** at **MOMBASA** on this Day of
2016.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and **SIGNED** in open Court at **KAKAMEGA** on this 21st day of July 2016

E.C. MWITA

JUDGE

In the presence of:-

..... for the *ex parte* applicant

..... for the respondents

..... for the Interested Parties