



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 30 OF 2015**

**(ARTICLES 19,20,21,23,30,40 & 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF INFRINGEMENT AND VIOLATION OF THE RIGHTS  
OF THE PETITIONER**

**AND**

**IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT**

**AND**

**IN THE MATTER OF CO-OPERATIVE SOCIETIES RULES, 2004**

**AND**

**IN THE MATTER OF COMMITTEE MEMBER OF NYAKOE FARMERS' CO-OPERATIVE  
SOCIETY**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND  
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 19(6<sup>TH</sup> SCHEDULE) OF THE CONSTITUTION 2010**

**BETWEEN**

**CHARLES KERAGITA ARWENYA.....PETITIONER**

**-VERSUS-**

**NYAKOE FARMERS' CO-OPERATIVE SOCIETY LTD.....RESPONDENT**

**RULING**

1. The petition dated 7<sup>th</sup> July 2015, is premised on Articles 19, 20, 21, 30, 40 and 165 of the Constitution of Kenya, 2010 and is in relation to the Co-operative Societies Act and membership of the respondent Co-operative Society.

The petitioner, **Charles Keragita Arwenya**, avers in his supporting affidavit dated 7<sup>th</sup> July 2015, that he was elected as a committee member, representing Ngege factory which is one of the factories forming the respondent Nyakoe Farmers' Co-operative Society but on or about the 4<sup>th</sup> September 2014, the respondent through its secretary manager acting on behalf of its chairman wrote a letter indicating to him that he had been suspended from the respondent's Board of Management. The suspension took effect on the 27<sup>th</sup> August 2014 without notice to himself and was based on the deliberations in a general meeting of the Nyakoe Ngege factory held on 3<sup>rd</sup> September 2014, in which he was not accorded a hearing.

2. The petitioner avers that the suspension was followed by a letter dated 24<sup>th</sup> June 2015, inviting him to attend a special general meeting to be held on the same date for purposes of discussing his expulsion from the Board of Management of the respondent. His case was on that date sneaked in by the respondent and without any discussions on the same and without him being accorded a hearing the respondent's chairman announced his expulsion amid the chaos in the meeting.

It is the petitioner's contention that his suspension on 27<sup>th</sup> August 2014 and expulsion on the 24<sup>th</sup> June 2015, were both illegal, unlawful and/or improper for want of ratification by a general meeting as required by the Co-operative Societies Rules and for failure by the respondent to accord him a hearing. Further, his rights and freedoms as a committee member of the respondent were infringed and violated contrary to the provisions of the Constitution and the Co-operative Societies Act and Rules.

3. The petitioner therefore prays for a declaration that his suspension and expulsion from the respondent's Board of Management was illegal, unconstitutional, null and void and an order re-instating him to the said Board. He also prays for costs of this petition.

The respondent opposed the petition on the basis of the averments by its chairman, **Stephen J. Keuku**, contained in the response dated 14<sup>th</sup> September 2015.

It is thus averred by the respondent that the petition is replete with deliberate falsehoods, mis-statement of facts and misrepresentation of issues as the petitioner was summoned under a notice dated 10<sup>th</sup> June 2015, to attend a general meeting in which the members resolved to expel him after giving him due notice to show cause why he could not be expelled and after being granted a full hearing.

4. The respondent denies that the general meeting degenerated into chaos save for the petitioner's rowdy conduct after he was expelled and the decision duly ratified in accordance with the Co-operative Societies Rules.

It is the respondent's contention that the dispute between itself and the petitioner falls within the jurisdiction of the Co-operative Tribunal and therefore, this court lacks the necessary jurisdiction to deal with it. In any event, the respondent contends that the petition is misplaced, defective and fit for dismissal.

5. In challenging the jurisdiction of this court in this matter, the respondent filed a notice of preliminary objection dated 8<sup>th</sup> December 2015, contending that the dispute was a preserve of the Co-operative Tribunal established under the Co-operative Societies Act. The objection was however, withdrawn by the respondent on the 1<sup>st</sup> March 2016, when the petition came up for "inter-parties" hearing.

Thereafter, it was directed by the court that the petition be canvassed by way of written submissions.

In that regard, submissions were filed on behalf of the petitioner by **J.O. Soire & Co. Advocates**, and on behalf of the respondent by **Sonye J. Ondari & Co. Advocates**.

6. Having considered the pleadings and the rival submissions by the parties, it is apparent to this court that the basic issue arising for determination is firstly whether this court has the necessary jurisdiction to deal with this matter and if so, whether the petition is competent and proper before the court and if so, whether the petitioner would be entitled to the orders sought in the petition.

7. With regard to jurisdiction, it is instructive to note that the challenge mounted by the respondent in respect thereof by way of a preliminary objection was withdrawn but the withdrawal was not accompanied by the withdrawal or striking out of paragraph ten (10) of the reply to the petition dated 14<sup>th</sup> September 2015, in which jurisdiction of this court is challenged.

The reply formed part of the respondent's pleadings in opposition to the petition and in so far as paragraph ten (10) remained intact then the respondent could not be restrained from arguing it at the hearing of the petition.

In any event, the withdrawal of the notice of preliminary objection by the respondent merely meant that the issue at hand could be raised as part of the respondent's arguments in opposing the petition unless the issue was abandoned altogether in the pleadings.

8. Consequently, the doctrine of estoppel as argued by the parties in their respective submissions would not apply in the present circumstances and estoppel being a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or being a bar that prevents the relitigation of issue (see, **Black's Law Dictionary 8<sup>th</sup> Edition**) it cannot be said that the respondent relinquished its claim that this court lacks jurisdiction merely by withdrawal of its earlier preliminary objection on the point.

9. On the question of jurisdiction or the authority which a court possesses to decide matters that are litigated before it, the respondent in its response to the petition made a clear challenge to this court's authority to hear and determine the matter and contended that the correct forum is the Co-operative Tribunal in terms of S.76 of the Co-operative Societies Act.

But, the petitioner is of the strong view that the jurisdiction of this court cannot be ousted in the absence of clear and express provisions to that effect and in any event, this matter was commenced by way of a petition seeking declaratory orders which can be granted by this court.

10. Indeed, what was presented by the petitioner is the petition dated 7<sup>th</sup> July 2015, to be more specific, a constitutional petition in so far as it essentially relates to the alleged violation of the petitioner's constitutional rights by the respondent.

Under Article 165 (3) (b) of the constitution, the High Court in addition to its original jurisdiction in criminal and civil matters also has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Further, the High Court has the jurisdiction to hear an appeal from a decision of a tribunal appointed under the constitution to consider the removal of a person from office other than a tribunal appointed for the removal of the president on grounds of incapacity.

Similar to the High Court, a tribunal derives its legal authority from the people.

11. The constitution donates power to the courts and tribunals to exercise judicial authority. However, the mechanisms of dispute resolution relating to Co-operative Societies are contained in the relevant statute i.e. the Co-operative Societies Act and where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed (see, **The Speaker of the National Assembly Vs James Njenga Karume Nbi Civil Application No. 92 of 1992**).

Herein, the dispute between the respondent and the petitioner revolve around the removal of the petitioner

from the committee or Board of Management of the respondent allegedly in contravention of the Co-operative Societies Act i.e Act No 12 of 1997 as amended by Act No. 2 of 2004.

12. Indeed, vide a letter dated 4<sup>th</sup> September 2014 (see, Exh marked “CKA 1”, in the supporting affidavit) the petitioner was informed of his suspension pending determination of his fate in a general meeting of the respondent. A special general meeting in that regard was slated on the 24<sup>th</sup> June 2015, and all members including the petitioner were notified. The petitioner was actually invited to attend the meeting which was to discuss his expulsion from the board of management. He attended the meeting but implied that nothing useful came out of it as it degenerated into chaos causing the chairman to disband the same with an announcement that he (petitioner) had been expelled. It was the petitioner’s contention that his suspension was unlawful and improper and was never ratified at a general meeting as required by the Co-operative Societies Rules.

13. S. 76 of the Co-operative Societies Act provides that any dispute concerning the business of a Co-operative Society and arising among members of a society or between members and the society or its committee or any officer of the society shall be referred to the Co-operative Tribunal and under S. 81(1) of the Act, any party aggrieved by the order of the tribunal may appeal to the High Court.

It would therefore appear that S.76 of the Act ousts the jurisdiction of the High Court in exercising original jurisdiction in disputes involving Co-operative Societies and its members. The only jurisdiction open to the High Court in such matter would be the appellate jurisdiction only.

14. In the case of **John Githinji & Another Vs. Othaya Farmers’ Co-op Society & Another NBI Civil Appeal No. 261 of 1998**, the Court of Appeal considered the jurisdiction of the High Court in determination of disputes contemplated under S.76 of the Co-operatives Act and held that such disputes cannot be instituted for determination in the High Court whose jurisdiction in such disputes is limited to its appellate jurisdiction only.

The court made it certain that the Co-operative Societies Act sets out the procedure for settling disputes arising under it. This present dispute is one such dispute and although it is styled as a constitutional petition it is far from being constitutional in nature especially considering that it does not demonstrate what rights under the constitution were violated by the respondent and how such rights were violated.

15. It is not enough for the petitioner to merely invoke constitutional provisions in the petition and allege that his rights were infringed and/or violated by the respondent. He did not set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed (see, **Anarita Karimi Njeru Vs Attorney General (1970) KLR 154**).

It was stated in the case of **Minister of Home Affairs Vs Bickie & Others (1985) LRC 755**, that:-

***“It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so ..... Court will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provisions or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”.***

16. From all the foregoing factors and noting that jurisdiction is everything and without it a court has no power to make one more step, this court must find that it lacks the jurisdiction to deal with the present dispute which rightly belongs to the Co-operative Tribunal created under S.78 of the Co-operative Societies Act.

With that, it does not fall upon this court to determine whether or not the petitioner is entitled to the orders sought herein. In any event, this court lacks the jurisdiction to do so. Besides, the petition as framed was incompetent and defective as a constitutional petition and not even Article 159(2)(d) could

cure it.

In the end result, the petition is hereby dismissed with costs to the respondent.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

(Read and signed this 5<sup>th</sup> day of **May 2016**)