



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO. 40 OF 2012

IN THE MATTER OF AN APPLICATION BY:

- 1. COLLINS OCHIENG OBORA
- 2. MICHAEL MAHINDA WAMBUGU
- 3. SIPROSA ATIENO NYAMBOK
- 4. SAMUEL JOSEPH RATEMO
- 5. LUCY MUKUNI WAITHAKA
- 6. HARRIET EUNICE NTHIRA MAINGISUBJECTS

**FOR JUDICIAL REVIEW ORDER OF MANDAMUS UNDER SECTION 8 AND 9 OF THE
LAW REFORM ACT AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

AND

IN THE MATTER OF AN APPLICATION BY:

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....RESPONDENT

EX-PARTE

- 1. COLLINS OCHIENG OBORA
- 2. MICHAEL MAHINDA WAMBUGU
- 3. SIPROSA ATIENO NYAMBOK
- 4. SAMUEL JOSEPH RATEMO
- 5. LUCY MUKUNI WAITHAKA

6.HARRIET NTHIRA MAINGI.....SUBJECTS

RULING

1. Pursuant to leave granted to the *ex parte* applicants, (hereinafter called “**the subjects**”) on 10th July, 2012 allowing them to apply for mandamus, the *subjects* filed the notice of motion dated 26th July, 2012 seeking an order of mandamus to compel the respondent to perform his public duty and convene a special annual general meeting of the Interested Party within such time as the court may specify in order for the officials of the interested party to be elected in accordance with the law.
2. The application is premised on, among other grounds, the grounds that under the Cooperative Societies Act and the Rules made thereunder the interested party is obligated to hold regular elections for purposes of electing its officials; that the interested party (Nakuru Workers Housing Co-operative Ltd.) has for more than two (2) years not held any elections nor filed any returns as required by law; that there is a leadership crisis at the interested party as the members do not know who to report their problems and concerns to. Further that in a bid to resolve the interested party's problems the subjects wrote to the respondent who despite having acknowledged that the interested party had neither held any elections nor filed any returns, as required by law, refused to convene a Special General Meeting of the Society to enable members elect their officials and see to it that the affairs of the Society are conducted in accordance with the law.
3. In reply, the respondent contends that the application is fatally defective for want of form; that the interested party ought to be deregistered and liquidated for failure to meet its objectives and file statutory returns as required by law; that an inspection report conducted by the District Cooperative Office recommended liquidation of the interested party, so in accordance with the recommendation of the District Cooperative Office he set in motion the liquidation process by signing a liquidation form.
4. It is further contended that when the then management committee of the interested party learnt about the interested party's imminent fate, it expressed its objection to liquidation and pleaded with the respondent to give it some more time to address its problems.
5. Being persuaded that the interested party could address its problems, the respondent granted it a new lease of life by suspending the liquidation process.
6. It is also argued that suspension of the liquidation process meant that the management committee, then in office, is the duly recognized management committee till the object set out in the request is met.
7. It is the respondent's case that the management committee started working towards realization of its objects and on 2nd October, 2010 the interested party held a Special General Meeting in which members resolved that the management committee continue in office and issue individual titles among other resolutions; it is argued that allowing the *ex-parte* applicants' petition for a Special General Meeting would have interfered with the ongoing process of issuance of title deeds to the members, and allowing the petition would not have served the common good of the members.
8. It is further argued that the respondent having suspended the liquidation process to ensure justice to the members could not subvert the ongoing process at the whims of a few restless members of the interested party. Further, that the orders sought, if granted, are likely to interfere with the respondent's statutory mandate and serve as an injustice to the members since the processing of titles is at an advanced stage.
9. Although the interested party entered appearance and appointed an advocate to represent it, it did not file any response.
10. Counsel for the subjects filed written submissions which I have read and considered.
11. The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair

treatment by the authority to which he has been subjected. (See **Republic V. Secretary of State for Education and Science** *ex parte Avon County Council* (1991) 1 ALL ER 282 at 285). The point was more succinctly made in English case of **Chief Constable of North Wales Police V. Evan** (1982) 1 W.L.R. 1155, by Lord Hailsham of St. Marylebone, thus:-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.”

12. For an order of mandamus to issue, an applicant must bring himself within the holding in the case of **Prabhul Gulabchand Shah V. Attorney General & Erastus Gathoni Miano**; Civil Appeal No.24 of 1985 where the Court of Appeal stated:-

“The 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.”

13. In the instant application the applicants, who are members of the interested party, contend that the respondent is by dint of the provisions of Section 27(8) of the Cooperatives Societies Act obligated to convene a Special General Meeting to enable them elect a management committee of the society, as by law required.

14. Counsel for the applicants has submitted that the day to day affairs of the interested party are to be managed by a management committee elected annually yet the interested party has neither held elections for a period exceeding two (2) years nor filed any returns. He argues that owing to absence of a management committee, the members of the interested party have no forum for addressing or channeling their concerns regarding the affairs of the Society; that their only option was to move the respondent to exercise his power under Section 27(8) of the Act to convene a special General Meeting for them to elect their officials. He laments that despite the respondent having acknowledged that the interested party has neither held elections nor filed any annual returns, he has refused, neglected or ignored the subjects' plea.

15. As regards the contention that the motion is bad in law for want of form (for being improperly entitled), counsel maintains that the application is proper and wonders what the respondent is complaining about; and as regards the respondent's contention that it acted in accordance with an inspection report by its officers, counsel argues that the respondent, in fact, acted contrary to its own internal report, which recommended that elections be held.

16. Section 27(8) aforementioned provides:-

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

17. It is common ground that at the time the subjects brought the application herein the interested party had neither conducted elections nor filed returns as required by law.

18. Section 27(1) of the Cooperative Societies 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. Subsection (2) thereof obligates a cooperative society to hold an annual general meeting within four months after the end of each financial year. Subsection 6, 7 and 8 provides circumstances under which a special general meeting may be convened. They provide:-

27(6) A special general meeting of a cooperative society may be convened-

(a) By the committee for purpose of approving annual estimates or discussing any urgent matter which in

the committee's opinion is in the interest of the cooperative society; or

(b) On receipt of a written notice for such meeting signed by such number of the members of the cooperative society as may be prescribed in the rules stating the objects and reasons for calling the meeting.

19. (7) If the committee fails to convene a meeting within fifteen days of receiving the notice under subsection (6)(b), the members demanding the meeting may themselves convene the meeting by giving notice to the other members of the cooperative society, stating the objects and reasons for the meeting and the fact that the committee has failed to convene the meeting.

20. (8) The Commissioner may convene a special meeting of a society at which he may direct the matters to be discussed at the meeting.

21. Although the subjects could convene the requested special meeting under Section 27(7) they contend they could not do so as there is no committee on which to issue the notice contemplated under section 27(6).

22. As regards this contention the respondent has submitted that on 2nd October, 2010 the interested party held a special general meeting and resolved that the committee, then in office do continue in office; and that following the suspension of his intention to suspend the interested party, the committee then in office was deemed to be the committee in office.

23. It is noteworthy that the position adopted by the respondent contradicts its reply to the subjects when they wrote to him requesting for particulars of the interested party's office bearers. In that reply the respondent had this to say about the interested party:-

“ANNUAL RETURNS

The Society has not at all filed their annual return with us for the last two years as required by the Act

AND AUDITED REPORT

The Society has also not filed their audited report with the ministry for the years requested by yourself”

24. On the strength of the evidence presented in this cause, I concur with the subjects that they could not serve the notice contemplated under section 27(6) on the committee as none existed at the time or none was lawfully in office at the time.

25. I also concur with the subjects that the only lawful course they could take to address their concern regarding the management of the interested party was to petition the respondent to convene a special general meeting under Section 27(8). The question to ask is whether the respondent was under any obligation to convene the special general meeting.

26. My interpretation of Section 27(8) of the Cooperative Societies Act is that the respondent was not obligated to convene the special general meeting requested by the subjects. Having so found, I take note of the fact that an order of mandamus would not issue if the duty sought to be compelled is permissive, as opposed to being imperative. See **Prabhulal Gulabchand Shah V. Attorney General & Erastus Gathoni Miano; Civil Appeal No.24 of 1985 (supra)**. However, given the special circumstances of this case, and for the purpose of giving effect to section 27(8) of Cooperative Societies Act, which I take to have been meant to address circumstances similar to the ones facing the subjects, I hold the view that the respondent ought to have taken steps aimed at ensuring that the interested party operated in compliance with the law. The only lawful means of so doing was to convene a special general meeting in which the concerns of the subjects would be discussed and be addressed.

27. In view of the foregoing, I will construe section 27(8) as not being permissive but imperative.

28. As regards the contention that the application is defective for want of form, having carefully examined the application I hold the view that the same is properly intitled. Even if it were not, the defect in intulement would, courtesy of Article 159(2)(d), not render the application fatally defective.

29. Consequently, I find the application to be merited and allow it with costs.

Dated and Signed at Nakuru this 21st day of March, 2014.

H.A OMONDI

JUDGE