



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 312 OF 2014

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR

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

CABINET SECRETARY,

MINISTRY OF INDUSTRIALIZATION

& ENTERPRISE DEVELOPMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

AMOS MWANGANGI.....1ST INTERESTED PARTY

CHARLES KIGWE.....2ND INTERESTED PARTY

PETERSON MUTHATHAI.....3RD INTERESTED PARTY

FRED KIRUBI.....4TH INTERESTED PARTY

SIMON NJOROGE.....5TH INTERESTED PARTY

CHARLES KARIUKI.....6TH INTERESTED PARTY

KIONGO WA NJUGUNA.....7TH INTERESTED PARTY

BERNARD WANJALA MAJANJA.....8TH INTERESTED PARTY

KIMATHI MUTUERANDU.....9TH INTERESTED PARTY

WACHIRA MWAGO.....10TH INTERESTED PARTY

ROWLAND NDEGWA.....11TH INTERESTED PARTY

FRANCIS GATIMO.....12TH INTERESTED PARTY

JOHN MUKUYA.....13TH INTERESTED PARTY

JACOB CHEMEI.....14TH INTERESTED PARTY

OREN MURIGI.....15TH INTERESTED PARTY

EX-PARTE KENYA PLANTERS CO-OPERATIVE UNION LIMITED

JUDGMENT

The ex-parte Applicant, the Kenya Planters Co-operative Union Limited, hereinafter simply referred to as KPCU, has through the Notice of Motion application dated 22nd August, 2014 prayed for orders that:

- “1. An ORDER OF PROHIBITION do issue prohibiting the Respondents and the interested parties, their agents, servants and/or associates from convening or presiding over or in any way holding a special general meeting (SGM) or an Annual General Meeting (AGM) of the Applicant or in any other way purporting to carry on the business, management and the operations of the applicant.**
- 2. An ORDER OF CERTIORARI to issue quashing the decision contained in the letter reference MCDM/10/20/(135) dated 25th June 2014 by Dr. Wilson Songa, MBS., regarding convening special general meeting in respect of the Applicant.**
- 3. An ORDER OF CERTIORARI do issue to quash the decision contained in the letter reference MCDM/2/10/VOL. VI/131 by P. L. M. Musyimi, HSC., dated 11th June, 2014 including the undated notices issued by the County Commissioners on behalf of the 1st Respondent pertaining to the convening and conducting of a special general meeting (SGM) on 31st July 2014 to elect Directors of Kenya Planters’ Co-operative Union Limited.**
- 4. An ORDER OF CERTIORARI do issue to quash the letter dated 28th July, 2014 and conveyed to the applicant’s directors on 28th July, 2014 at 8.15 pm calling for and or purporting to give notice of elections and intention to convene a Special General Meeting of the applicant.**
- 5. An ORDER OR CERTIORARI do issue to quash the illegal and irregular elections of the applicant held on 31st July, 2014 and any other form of election held prior thereto whether grassroots or by whatever name so called.**
- 6. An ORDER OF PROHIBITION permanently prohibiting the respondents and the interested parties, their agents, servants and/or associates from negatively interfering with the property, management, and operations of the Applicant in any manner.**
- 7. The applicant be granted leave to commence judicial review proceedings for an ORDER OF PROHIBITION restraining the 1st respondent and the interested parties, their agents, their servants, employees or any other authority from blocking and or preventing the handover and or takeover of the applicant from the receiver manager in whichever manner.**

8. That the cost of this application be provided for.”

The 1st, 2nd and 3rd respondents are Commissioner for Co-operative Development, the Cabinet Secretary in charge of the Ministry of Industrialization and Enterprise Development and the Attorney General respectively. There are fifteen interested parties led by Amos Mwangangi.

According to the pleadings filed in Court, this judicial review application has been filed on behalf of the ex-parte Applicant by “its board of directors.” The application is supported by a statutory statement, the verifying affidavit of the Managing Director, Mr. Joseph Kioko and several documentary exhibits all filed on 12th August, 2014 with the chamber summons application for leave.

According to the verifying affidavit of Mr. Joseph Kioko, KPCU is a limited liability company incorporated in Kenya under the Companies Act, Cap 486 Laws of Kenya under Certificate of Incorporation No. C.1/45 dated 2nd June, 1945 in the name of Kenya Planters’ Co-operative Union Limited.

The Managing Director avers that the 1st Respondent and the 2nd respondents issued notices to convene a Special General Meeting for KPCU to be held on 31st July, 2014. The 1st Respondent’s letter dated 11th June, 2014 is addressed to County Co-operative Commissioners and it states:

“KENYA PLANTERS CO-OPERATIVE UNION (KPCU) LTD (IN RECEIVERSHIP) DIRECTORS’ GRASSROOT ELECTIONS

Pursuant to Section 27(8) of the Cooperative Societies Act (CAP. 490), you are hereby requested to convene a Special General Meeting (SGM) to elect new Directors of Kenya Plants (sic) Co-operative Union (KPCU) Ltd. on Thursday 31st July, 2014 at a venue convenient to all shareholders.

Kindly note that the term of office of the current interim directors expires in July, 2014. Note further that the grassroots elections of directors were last held on 28th June, 2006. It has therefore become prudent for the directors to seek fresh mandate from the members as part of the Union’s revival strategies. The fifteen (15) Electoral Zones.....”

The author of the letter then goes ahead to list the electoral zones and urges the recipients to liaise with the county executives in charge of co-operative matters for logistical support including securing venues and publicizing the meetings.

The second letter is that of Dr. Wilson Songa, the Principal Secretary of the Ministry of Industrialization and Enterprise Development. The letter which is addressed to the governors is dated 25th June, 2014 and it states:

“KENYA PLANTERS CO-OPERATIVE UNION (KPCU) LIMITED (IN RECEIVERSHIP)-ELECTION OF NEW DIRECTORS

Kenya Planters Co-operative Union (KPCU) Limited is a farmers organization founded in 1937 with a current membership of over 700,000 small scale farmers through over 400 coffee Co-operative Societies and about 300 coffee estates. It has an asset base valued at over Kshs.5 billion and a share capital estimated at Kshs.76 million with a ratio of three (3) shares in the cooperative sector to every one (1) share in the coffee estate sector.

Over the years, the Union has successfully served coffee farmers through services which include; farm inputs supply, credit, warehousing, milling, marketing, quality control and extension.

It was the sole coffee miller for the peak production of about 130,000 metric tonnes of

coffee realized in 1987/88 crop year. It therefore contributed significantly to making coffee a leading foreign exchange earner in the 1970s and 1980s.

However, KPCU's performance has since declined due to factors which include adverse effects of liberalization on the coffee sector, the removal of its milling monopoly in 1996, stiff competition from coffee millers and marketers, poor governance and heavy indebtedness. This led to its being put under receivership by Kenya Commercial Bank (KCB) in October 2009 over failure to service an outstanding debt of about Kshs.644 million.

As part of the Union's revival strategies, the Ministry has organized Special General Meetings (SGM) pursuant to Section 27(8) & (10) of the Co-operative Societies Act (CAP. 490) in all its fifteen (15) electoral zones to elect 15 new directors.

The Special General Meetings will be held on Thursday 31st July, 2014 at venues convenient to all shareholders and will be presided over by the County Co-operative Commissioners. The zonal meetings will be followed by the Union's national SGM in August 2014 at its Dandora premises. This will enable the shareholders to give a fresh mandate to the new directors and pass resolutions on the Union's revival strategies including the lifting of the receivership by KCB.

In this regard, I hereby appeal for your logistical, financial and technical support through your County Executive Committee (CEC) in charge of co-operative matters and the County Co-operative Commissioners to make the meetings successful..."

The author then proceeds to list the electoral zones.

Although this application is brought in the name of KPCU, it is apparent that the same is brought in the interest of the current directors of KPCU. It is their case that the 1st and 2nd respondents are not members of KPCU and they therefore do not have power to call its meetings. According to them, the duty of calling and conducting meetings of the KPCU belongs to its directors.

It is the current directors' case that KPCU is going through a recovery process of redeeming itself from the receivership appointed by Kenya Commercial Bank Limited (KCB), over a loan of Kshs. 644 million it owes to the bank. By a letter dated 3rd June, 2014 it was proposed that a special general meeting be held on 29th July, 2014 so that the shareholders could be notified of the emergence of KPCU from receivership. A notice to this effect was put in the newspapers. After the issuance of the notice, 29th July, 2014 was through a Gazette Notice dated 18th July, 2014 declared a public holiday (Id ul fitr) and a fresh notice was placed in the newspapers that the special general meeting scheduled for 29th July, 2014 would now be held on 30th July, 2014.

It is the current directors' case that the 1st and 2nd respondents were on their part planning another special general meeting for KPCU but never relayed the information of the meeting up to 28th July, 2014 when the information was relayed to the chairman through an email. It is therefore their case that the special general meeting planned by the 1st and 2nd respondents and whose key agenda was elections was malicious, mischievous, done in bad faith and only intended to actualize fraudulent activities.

The Managing Director averred that although KPCU was not originally registered as a co-operative society it operated partially as a co-operative movement but was exempted from some of the provisions of the Co-operative Societies Ordinance 1945 under Gazette Notice No. 1095 of 18th December, 1945. That after the enactment of the Co-operative Societies Act No. 12 of 1997, the Companies Act ceased to apply to co-operative societies necessitating the revocation of all the exemptions that had been granted to KPCU under the Co-operative Societies Ordinance of 1945. The revocation was done through Gazette Notice No. 3099 contained in the Kenya Gazette of 25th April, 2005.

Mr. Kioko averred that on 19th October, 2009 KCB appointed a receiver and manager after KPCU failed to pay a loan amounting to Kshs.644 million. That when the current directors were elected, they found that the receiver and manager had intentionally failed, neglected and or refused to review the coffee marketing and milling licences with a view to making KPCU insolvent and thereby placing it under liquidation.

The Managing Director averred that the current directors had succeeded in removing the receiver and manager and they were in the process of starting the milling and processing of coffee which is the sole business of KPCU. It is the current directors' case that the 1st Respondent is acting in bad faith as he had not assisted KPCU to come out of the management of the receiver and manager. Further, that evidence of bad faith of the 1st Respondent is shown by the fact that on 25th June, 2009 he had registered a new outfit by the name of Kenya Co-operative Coffee Exporters (KCCE).

The Managing Director at Paragraph 24 of the verifying affidavit outlines what he says are signs of conspiracy between the 1st Respondent and other parties. He avers:

“24. THAT the Directors and the Applicant only became aware of the 1st and 2nd Respondent's actions on the 25th of July 2014 through a whistle blower who to the shock of the Directors informed them that the 1st and 2nd Respondents were secretly planning for a Special General Meeting to oust the current Directors as they have become a threat to their interests for it was not envisaged that they would have the capacity to remove the KPCU from receivership. Which was not intended to happen and the whistle blower gave the following reasons, which I have now confirmed of my own knowledge, through publicly available documents and other information which has come within my personal knowledge in the course of time:-

a) Sometimes early in 2009, the 1st respondent with others conspired to bring down the KPCU and the best method of bringing the KPCU down was for the 1st respondent to register another new outfit passing off as the KPCU to take over the role of the KPCU.

b) On 25th of June 2009, the 1st Respondent and others registered this new outfit in the name of the Kenya Co-operative Coffee Exporters (hereinafter referred to as KCCE)

c) The 1st Respondent sits in the Board and is involved in the deliberations and decisions of the said outfit registered as KCCE.

d) Being aware that the KPCU has a huge loan with the Kenya Commercial Bank, the 1st Respondent and others conspired that the best way to bring down the KPCU was to have a receiver and manager appointed to run it down to insolvency.

e) Successfully, three months after the registration of the KCCE, on the 19th of October 2009, a receiver and manager were appointed to take over the management and running of the KPCU and immediately the KPCU was put under receivership.

f) The 1st Respondent and others prevailed on the receiver and manager to ensure that the coffee processing, milling and marketing licenses of the KPCU were terminated in order to bring the KPCU into dormancy.

g) The 1st respondent and others agreed that the best way to dismantle the KPCU is to sell by public auction its core asset in a clever manner. The 1st respondent and others agreed that the best period to auction the KPCU property known as Wakulima House was when least expected and conspiracy was hatched to dispose of the property during the new Constitution referendum period on August, 6th 2010 (*I now annex and mark as*

“JK 11” copies of advertisements for auction of the aforesaid properties)

h) It was agreed that the receiver and manager to cleverly hand over and put KCCE into possession of KPCU in a manner disguised as a license (*I now annex and mark as “JK 12” copies of the aforesaid licenses*)

i) The 1st and 2nd respondents and others seriously believed that the current directors of the KPCU were persons of no financial might able to mobilize the huge finances required to remove the KPCU from receivership.

j) There was a panic in December 2013 when the current board managed for a short time to have the receiver and manager revoked and there was a celebration thereafter in January, 2014 when the receiver and manager were reinstated.

k) During the month of May and June 2014, the 1st, 2nd respondents and others became aware that the current directors were in the process of raising money to have the KPCU receivership and management revoked, they were in a panic but adopted a wait and see attitude. But when they finally became aware that the Directors had raised some money in June and paid to the Kenya Commercial Bank. The respondents and others declared the current directors of KPCU as dangerous and people who were likely to derail their gravy train and that they must be removed immediately the receivership is limited to be replaced with others amenable to the designs of dismantling the KPCU from within resulting in the secretive intended Special General Meeting for the KPCU. (sic).

l) THAT the respondents and their other conspirators in their scheme of things are of the firm belief that without the assets of KPCU and the KPCU being operational, the KCCE would be unviable *ab initio*.

m) THAT the whistle blower ended his reasons by stating that a visit to the KCCE website vide a banner at the bottom of every page discloses the fact the KCCE partners are the, the Cooperative Bank, CIC Insurance, and the 2nd respondent. This partnership is the one which caused the stealing of the KPCU coffee milling machine and is involved in frustrating the insurance claim from the CIC insurance with regards to the theft. It is highly likely that the milling machine is hidden somewhere in Kenya waiting for the KPCU to collapse (*I now annex and marked “JK13” a copy of a printout showing the partners of KCCE*).

It is the current directors’ claim that they negotiated with KCB and agreed on the removal of the receiver and manager which led to the revocation of the appointment of the receiver and manager by KCB on 4th July, 2014. The current directors assert that they are now in the middle of taking over KPCU from the receiver and manager which include verifying the inventory of all the property, equipment, machines and documents and establishing the level of any liability. That since the appointment of the receiver and manager on 19th October, 2009 and until the revocation of that appointment not a single cent was paid towards the loan with KCB. Further, that KPCU’s bank accounts were empty at the time the receiver and manager left.

It is the current directors’ view that the aim has been to bring down KPCU so that unscrupulous people can benefit from its assets. Further, that KCCE is operating from the premises of KPCU hence KPCU’s revival is definitely going to disrupt the operations of KCCE and its existence. The current directors’ case is that KCCE is a government backed outfit.

KPCU’s current directors assert that they are in office legally and the 1st and 2nd respondents had no reasons for calling elections.

The Managing Director of KPCU averred that on 29th February, 2012 Hon. John Michael Mututho

published a detailed report (the Mututho Report) of an inquiry into the circumstances under which KPCU was put under receivership. Among the recommendations in the report is that those individuals who were directors at the time of receivership should not assume board membership until after the expiry of two terms from the date of that report. It is the current directors' case that some of the individuals elected in the elections called by the 1st and 2nd respondents had been barred from contesting by the Mututho Report.

The Managing Director averred that on 20th July, 2012 an interim board made up of the current directors was set up and endorsed at a special general meeting. The interim board was, among other things, tasked with organizing elections. He averred that on 31st July, 2013 the current board was endorsed after annual elections. It is the current directors' assertion that on 30th July, 2014 at an annual general meeting the members resolved that KPCU stops operating under a dual statutory regime but only operates as a limited liability company under the Companies Act, Cap 486.

Further, that the persons elected in the elections called by the 1st and 2nd respondents are not members of the Applicant. The current directors also contend that they were no nominations of delegates by the farmers' cooperative societies and there could not have been any valid election of representatives to KPCU's board.

The current directors listed several grounds why the orders of judicial review should issue in this matter. Some of the grounds are a rehash of the arguments of the current directors as already reproduced. In summary the current directors assert that the 1st and 2nd respondents had no jurisdiction to act as they did. Their actions are *ultra vires*, arbitrary and contrary to the statutory provisions. They also contend that the respondents' actions are *male fides*, illegal, fraudulent and only amount to machinations to wrestle away the property of KPCU so as to personally benefit certain entities and/or individuals with no relationship to the organization. The current directors also contend that they have obtained money and property from third parties based on the legitimate expectation that the current board of directors will serve its full term. Further, that unless the current directors are allowed to continue serving, the ongoing process of redeeming KPCU from the receiver and manager may never be concluded thus leading to the liquidation of KPCU. They argue that the aim of the 1st Respondent is to ensure that KPCU's recovery plans are derailed permanently.

The current directors' case is that the 1st Respondent issued notices calling for elections surreptitiously, irregularly, illegally and against the rules of natural justice. Further, that their term of office has not expired and their continued occupation of office has never been challenged through any legal channels. It is their assertion that they were elected in 2013 for a term of three years which expires in 2016. Further, that the 1st Respondent has no role, responsibility or mandate whatsoever over KPCU and therefore lacks the jurisdiction to interfere with the running of its business.

The current directors assert that the acts of the respondents amount to political interference in the business of a limited liability company which is contrary to the best corporate governance standards. They argue that the purported grassroots elections were marred by illegalities which included election of persons previously found unfit to hold office or excluded from holding office for a period of two terms as per the Mututho Report.

The current directors contend that the 1st Respondent being a creature of the Co-operative Societies Act has no role to play over KPCU, a limited liability company incorporated and managed under the Companies Act.

The current directors assert that the 1st Respondent is illegally presiding over the fraudulent liquidation of KPCU by allowing KCCE of which he is a board member, to operate using the assets and facilities of KPCU and to illegally recruit members of KPCU into the membership KCCE in contravention of the provisions of the Co-operative Societies Act.

The Commissioner for Co-operative Development and Marketing swore an affidavit on 1st September, 2014 in opposition to the application. He averred that he is responsible for the growth and development of co-operative societies and he oversees the management of co-operative societies all over the country. It is the 1st Respondent's case that the application is fatally defective and an abuse of the court process. He averred that KPCU with a membership of about 750,000 drawn from about 452 co-operative societies and 20 coffee cooperative unions, is registered under the Co-operative Societies Act as well as the Companies Act. Approximately 2/3 of members are drawn from cooperative societies while 1/3 of the shareholding belongs to coffee related institutions like Coffee Research Foundation and Coffee Board of Kenya.

It is the 1st Respondent's case that it is a fallacy and a falsehood for the current directors to assert that he has no powers to call elections of KPCU whereas sections 27 (8) & (10), 93 and 93A (a) and (b) of the Co-operative Societies Act mandates him to convene a special general meeting of a society, call elections of a society, attend meetings of a society and require every society to send him notices of the agenda and minutes of its meetings.

Further, that Clause 1 of the Articles of Association of KPCU clearly provides that the Articles of Association together with the Memorandum of Association shall also constitute regulations for the purposes of the Co-operative Societies Act. Further, that the subject matter at hand was fully dealt with by Majanja, J in a judgement delivered on 20th December, 2012 in **Nairobi High Court Petition No. 343 of 2012**. That the current directors of KPCU led by Mr. William Gatei Muiruri were elected at a Special General Meeting called by the 1st Respondent on 20th July, 2012 pursuant to the provisions of Section 27(8) & (10) of the Co-operative Societies Act for a period of one year. The 1st Respondent asserts that the current directors failed to deliver on their terms of reference which included safeguarding the interests of the coffee farmers and facilitation of grassroots elections to elect a substantive board of 15 directors in accordance with sections 61 and 62 of the Articles of Association. The 1st Respondent denies that the current directors' term of office was extended for three years at an Annual General Meeting held on 31st July, 2014.

The 1st Respondent avers that with the impending end of term in office of the current directors, he invoked his powers under the Co-operative Societies Act and called a special general meeting in which elections were to be conducted to enable shareholders elect their own board of directors as the interim committee's term had lapsed. Acting on the said powers he issued a notice on 11th June, 2014 for a special general meeting of KPCU to be held on 31st July, 2014.

According to him, once the current directors learned of his notice they immediately thereafter called a meeting for 30th July, 2014 in which it was resolved that KPCU continues operating as a limited liability company with the notion and understanding that this will effectively dislodge KPCU from the operations of the Co-operative Societies Act and place it squarely and exclusively under the provision of the Companies Act. It is the 1st Respondent's case that the said meeting was held in bad faith with a view to scuttling and pre-empting the objectives and agenda of the meeting he had scheduled for 31st July, 2014.

The 1st Respondent contends that the current directors had failed to disclose that the court had refused to grant them leave to challenge the grassroots elections scheduled for 31st July, 2014. The 1st Respondent's case is that the grassroots elections were successfully held on 31st July, 2014 where the shareholders elected 15 directors in all electoral zones as stipulated under sections 61 and 62 of the Articles of Association and the said 15 directors were on 15th August, 2014 elected and confirmed as the duly elected board by the shareholders. That the 15 directors who were elected were eligible in accordance with Article 61 of KPCU's Articles of Association and the provisions of the Co-operative Societies Act and were genuine registered coffee farmers and shareholders.

The 1st Respondent denied that he schemed with other individuals and entities to ensure that KPCU was put under liquidation so that KCCE can take over its property. He asserts that KCCE was registered in

June 2009 and KPCU was put under receivership on 19th October, 2009 due to failure to service outstanding debts with KCB and hence KCCE is a stranger to these proceedings. The 1st Respondent asserts that he intervened in the matter due to the huge number of co-operative societies forming the shareholding of KPCU and in public interest. The 1st Respondent denied that he has made it difficult for the current directors to extricate KPCU from KCB's receivership.

It is the 1st Respondent's case that the purported resolution at the special general meeting held on 30th July, 2014 that KPCU continue to operate as a limited liability company is *prima facie* illegal and the issue was not listed as a substantive agenda for the purported meeting.

Further, that the current directors' attempts to nominate themselves as directors of KPCU is in breach of the Articles of Association which provides for a substantive board of 15 directors excluding the managing director. The 1st Respondent thrashes the submission that the Co-operative Societies Act does not apply to the Companies Act by pointing out that Section 64 of the Co-operative Societies Act provides that certain sections of the Companies Act relating to winding up of companies shall apply *mutatis mutandis* to the winding-up of a cooperative society. He pointed out that KPCU's exemption from the provisions of the Co-operative Societies Act was revoked vide Gazette Notice No. 3099 of 25th April, 2005 and it is therefore governed by the Co-operative Societies Act.

The 1st Respondent rebutted the current directors' claim that he has never assisted KPCU from the time it was put under receivership and points out that in June, 2009 the President of Kenya directed that a rescue package similar to the ones used to salvage New KCC and Uchumi Supermarkets be availed to KPCU. Further, that in May 2010 he put a caveat on KPCU's Wakulima House to save it from auction by the KCB receiver and manager in order to safeguard the interests of the coffee farmers. Still in September 2012 the 2nd Respondent presented a cabinet memorandum to the Treasury requesting for Kshs.1.2 billion as a rescue package for KPCU.

The interested parties' opposition to the application was presented to the Court through the replying affidavit sworn by Kiongo Wa Njuguna on 1st September, 2014. He started by introducing himself as KPCU member No. AA 0780. He confirmed that KPCU has dual registration under the Co-operative Societies Act and the Companies Act. He averred that this dual registration is indeed acknowledged by Clause 1 of the Articles of Association. It is the interested parties' case that the only way of disengaging KPCU from the operations and binding provisions of the Co-operative Societies Act is through a process that culminates in the dissolution of the institution as a co-operative society and the process has not been initiated or even contemplated in respect of KPCU which therefore remains a co-operative society. It is the interested parties' case that the institution of these proceedings, on behalf of KPCU is not in compliance with the law in that there is no evidence of the resolution of members or directors authorizing the filing of the case. Further, that the advocate on record has not been properly appointed and he has no authority to act for KPCU. The interested parties contend that the 1st Respondent is given the mandate by the Co-operative Societies Act to get involved in the affairs of co-operative societies.

The interested parties informed the Court that on 20th July, 2012 the 1st Respondent convened a meeting for KPCU's shareholders under the Co-operative Societies Act and among the items deliberated upon was a report by the 1st Respondent whose recommendations included the setting up of an interim committee since the term of the previous board had expired whilst KPCU was under receivership. The interim committee that was formed was, among other things, mandated to set up a new substantive board for KPCU. The tenure of the interim committee was one year from the date of establishment. Through letters dated 5th September, 2012 two other persons were appointed by the 1st Respondent to join the interim committee.

The interested parties assert that the purported resolution made in the meeting of 31st July, 2013 to confirm the current directors, who were the members of the interim committee, as substantive directors for KPCU for a period of three years was *ultra vires* the Articles of Association of KPCU and the interim committee's terms of reference. Further, that the decision did not have the blessings of the 1st

Respondent who was the originator of the interim committee in the first instance. That the action of converting the interim board into a substantive Board of KPCU is not in agreement with the terms of reference establishing the interim committee and does not therefore meet the legitimate expectation of the general membership of KPCU. It is the interested parties' case that the only legitimate board of directors of KPCU is one elected in compliance with its Articles of Association and that the current board is not the board contemplated by the Articles of Association. In support of this contention the interested parties point out that directors are supposed to represent electoral zones and they are supposed to be fifteen but the current board of directors do not meet these requirements. Further, that the 1st Respondent's letter dated 11th June, 2014 calling for elections of KPCU directors complied with the law as it indicated the electoral zones.

The interested parties also submit that the 1st Respondent separately wrote to the interim committee disbanding it and thanking its members for the service they had rendered to KPCU and also informed the members of the interim committee that they could participate in the grassroots elections if they so desired.

The interested parties disclosed that the 1st Respondent's decision to call for elections was necessitated by a memorandum by farmers complaining about non-representation in the interim committee and asking for grassroots elections. They state that they were elected as directors of KPCU. It is the interested parties' case that it is not known how Ziphora Wambua, Jacinta Njogu, Julius Kiago and Kamau Muiruri became directors of KPCU as they are not eligible for elections as per the Articles of Association.

The interested parties assert that the current directors are irregularly disposing the assets of KPCU and they cite the disposal of L. R. No. Kisumu Municipality /Block 3/118 as an example. Further, that the directors are disposing assets of KPCU by placing clandestine advertisements in the papers only giving the name of the contact person but without disclosing the vendor. In this regard the interested parties identified parcels of land in Nakuru and Nanyuki.

The interested parties assert that the 1st Respondent's action to call election was a legitimate exercise of power as part of the normal performance of duties including supervision as mandated by the Co-operative Societies Act. It is the interested parties' case that the current directors are the ones who have acted illegally, irregularly, arbitrarily and *ultra vires* the rules governing the management of KPCU.

The interested parties contend that the meeting held on 30th July, 2014 in which the interim committee was converted into the board of KPCU was tainted with irregularities as it was an invite only meeting and some of the members were locked out. The interested parties exhibited an invitation to one R. Bundi to a Special Annual General Meeting to be held on 31st July, 2013 at Dandora KPCU compound. The invitee was directed to carry the invitation card in order to gain entry into the meeting. Further, that at the meeting the interim committee asked for an extension of its term in office for one more year and the issue of conversion of the interim committee into a substantive board of KPCU was therefore not discussed at the meeting. They aver that elections were not on the agenda of the meeting convened by the interim committee and the purported conversion was irregular.

Mr. Joseph Kioko swore a further affidavit on 18th August, 2014. That affidavit is not relevant to the core issues in this application as it confines itself to the alleged violent takeover of office by the interested parties.

The said Managing Director also swore another affidavit on 10th September, 2014 in which he responded to the issues raised by the respondents and the interested parties. In this further affidavit he avers that the 1st Respondent has deliberately misled the Court by annexing a document showing that KPCU is only made up of co-operative societies from the regions of Kisii, South Nyanza, Central Nyanza and Kisumu. He avers that the 1st Respondent is merely a regulatory authority and not a manager or administrator of KPCU to assume management or control of its affairs at will and wish without following due process.

It is the current directors' case that the decision of Majanja, J in **Petition No. 343 of 2012** did not deal

with the issues raised in this application. Mr. Kioko avers that Mr. Kamau was co-opted to the board by the AGM on recommendation of the Office of the President as the said office was a stakeholder in the recovery process. He deposed that the minister for cooperatives was also mandated by the AGM of 2013 to co-opt two directors to represent gender and that is how Zipporah Wambua and Madam Njogu joined the board.

It is the case of the current directors that the advertised agenda included amendment to the Articles of Association and that took care of the removal of KPCU from the jurisdiction of the Co-operative Societies Act. The current directors assert that they were mandated by the supreme organ of KPCU and they did not nominate themselves as alleged by the 1st Respondent.

On the 1st Respondent's claim that he sought the intervention of the President, the current directors assert that it was them who reached out to the President and efforts to have the proposed rescue plan forwarded to the President were frustrated by the 2nd Respondent. The current directors deny the assertion that the Coffee Board of Kenya and Coffee Research Foundation are KPCU members, saying that the said organizations cannot be members since they are not growers, planters or members of a co-operative society.

The current directors insisted that Murata Sacco or any other savings and credit cooperative do not own any shares of KPCU and that the interested parties are not members of KPCU and were therefore not eligible to stand for elections. It is the current directors' case that the purported meeting convened by the 1st Respondent on 14th August, 2014 was in clear contravention of the order issued by Mumbi Ngugi, J in these proceedings. The current directors denied that they have sold KPCU's property.

In my view this matter boils down to the following issues:

1. Whether this Court has jurisdiction;
2. Whether the 1st Respondent had jurisdiction to call a special general meeting and elections for KPCU
3. If the answer to Issue No. 2 is in the affirmative, whether the 1st Respondent exercised his powers properly;
4. Who should meet the costs of these proceedings?

The interested parties argued that this Court has no jurisdiction to hear this dispute. It was claimed that the issues raised by the current directors had been dealt with by Majanja, J in **KENYA PLANTERS CO-OPERATIVE UNION LTD (IN RECEIVERSHIP) & 2 OTHERS v MINISTER FOR CO-OPERATIVE DEVELOPMENT & MARKETING & 4 OTHERS [2012] eKLR**.

I have looked at the said decision and I do not see any correlation between it and the current proceedings. The only ironical thing to note is that the current directors were the interested parties in that case and the previous directors were objecting to their installation as directors following the resolution made on 20th July, 2012 by a special general meeting of KPCU. Majanja, J concluded that:

“In my view, the issues raised concerning the elections of a cooperative society are better resolved by the Tribunal and in the circumstances, I decline to exercise my jurisdiction and grant relief under Article 23 of the Constitution. The petition is dismissed with no order as to costs.”

I will in due course demonstrate why the matter before me attracts the supervisory jurisdiction of this Court.

An issue was raised about the propriety of this application. The interested parties contended that the current directors had not established that they had the authority to file this matter on behalf of KPCU. The answer to this argument is that these are judicial review proceedings and the rules governing the ordinary civil matters are not strictly applicable.

It was submitted by the current directors that the 1st Respondent has no jurisdiction over the affairs of KPCU since by a resolution made in the meeting of 30th July, 2014 KPCU was removed from the jurisdiction of the Co-operative Societies Act and placed under the sole jurisdiction of the Companies Act.

It is not disputed by the parties herein that KPCU enjoyed dual registration prior to the purported resolution of 30th July, 2014. It is also clear that any exemption that had been granted to KPCU was revoked vide Gazette Notice No. 3099 of 29th April, 2005. Therefore as at the time the 1st Respondent called the elections of KPCU on 11th June, 2014, he had full jurisdiction over KPCU.

The general jurisdiction is found in Section 3 of the Co-operative Societies Act. Under the Co-operative Societies Act, the 1st Respondent is also given special jurisdiction to call for a special general meeting of a co-operative society. The power extends to calling for elections and even attending meetings. Sections 27 (8), 27 (10) and 93A are very clear on the powers of the 1st Respondent to that effect.

The only question is whether the 1st Respondent exercised his powers in good faith. Before addressing this question, I propose to deal with another reason given by the current directors as to why the 1st Respondent had no jurisdiction to call the special general meeting and elections.

The current directors contend that the shareholders resolved in a meeting held on 30th July, 2014 that KPCU be removed from the provisions of the Co-operative Societies Act. First and foremost, it must be noted that the resolution came after the 1st Respondent had called the special general meeting through his letter of 11th June, 2014. At the time he called the meeting, he had jurisdiction to do so.

Secondly, and for purposes of putting the record straight, it must be stated that the Co-operative Societies Act provides for the dissolution or winding up of a co-operative society and Section 61(5) firmly states that **“no co-operative society shall be dissolved or wound up save by an order of the commissioner.”**

The 1st Respondent is empowered by Section 62 of the Co-operative Societies Act to cancel the registration of a co-operative society. Section 64 provides that the liquidation of a co-operative society is to be done using the provisions of the Companies Act. No evidence was adduced by the current directors to show that the Co-operative Societies Act was complied with. In essence the purported resolution to remove KPCU from the jurisdiction of the Co-operative Societies Act does not amount to anything.

There is also the issue of the legitimacy of the purported resolution. It is clear from the evidence on record that the elections of the KPCU have not been held since 2006. A big decision like the one purportedly made by the current directors cannot be made by people riding on the goodwill of the 1st Respondent. The current directors are in office on interim basis and the only way they could have legitimized their leadership was by facing the electorate in the electoral zones. It must always be remembered that leadership of a co-operative society is gained through democratic elections. Those elections have to be held annually. There is no evidence that the current directors have been subjected to an open democratic process as required by the Co-operative Societies Act.

Further still, the interested parties demonstrated that the meeting which purported to endorse the removal of KPCU from the provisions of the Co-operative Societies Act was an-invite-only affair. Such a meeting does not have the hallmarks of democracy. The current directors cannot therefore hide behind that resolution in order to avoid supervision of KPCU by the 1st Respondent.

One must also take note of the fact that the membership of KPCU is purely sourced from the co-operative movement. Why should an apex co-operative society like KPCU opt to operate outside the law governing co-operative societies?

The only issue that remains for the determination of the Court is whether the 1st Respondent's power to

call special general meetings and elections of co-operative societies was exercised in accordance with the law. In calling elections, the 1st Respondent must comply with the law for calling elections. He must also comply with the law for convening meetings when he decides to convene a meeting. Of concern to this Court is whether the elections of 31st July, 2014 in which the interested parties were elected complied with the provisions of the Co-operative Societies Act.

KPCU is an apex society. Its elections are two-tier in nature. The first election is the grassroots election where members in a given electoral zone meet to elect delegates. A director for the zone is elected by the delegates. The directors will then move to the national office where they will be confirmed. For KPCU elections to have a semblance of democracy, genuine members should participate in the zonal elections.

In accordance with Section 27(5) of the Co-operative Societies Act, “[a] **general meeting of a co-operative society shall be convened by giving at least fifteen days written notice to the members.**” Election of a co-operative society’s office bearers can only be done during a general meeting or a special general meeting. In order for KPCU’s members to participate in elections in their zones, 15 days’ notice ought to have been issued. The venue of the elections ought to have been specifically stated. The notice to the members should be in writing. The 1st Respondent has not shown that he did all these. He only exhibited the letter dated 11th June, 2014 which was addressed to the County Co-operative Commissioners. There is no evidence that the County Co-operative Commissioners in turn issued notices to all the members of KPCU in the 15 electoral zones. The purported election of the interested parties on 31st July, 2014 therefore fell short of the requirements of the Co-operative Societies Act. The 1st Respondent is therefore guilty of acting contrary to the provisions of the law governing elections in co-operative societies.

This Court has been asked to review the exercise of power by public bodies. In judicial review, the court looks at the process leading to the making of a decision and not the merits of the decision. A judicial review court is not a court of plaudits and accolades. It is neither a court of rebukes and reprimands. It does not issue bouquets or barbs. The key question asked by a judicial review court is whether the process provided by the law was followed in doing a certain act.

The parties herein traded accusations and counteraccusations about the management of KPCU. How a co-operative society is run is not within the province of this Court. Election of office bearers of a co-operative society is the preserve of the members of the given society. If members decide to remove an effective team and replace it with an inept one, the court has no say.

It is however imperative that the genuine members of KPCU step forward and take charge of their organization. They need to elect leaders and mandate them to revitalize their society or perform the last rites on it. The respondents and this Court cannot help them in making that decision.

On the other hand, the management of KPCU must wake up to the realities of the current times. Times have changed and competition is stiff. Blaming KCCE for its woes will not get KPCU out of the rut. In fact I have not found it fit to comment on the current directors’ allegations against KCCE as they did not make KCCE a party to these proceedings.

The interested parties asked this Court to take the route taken by Justice Majanja in **Nairobi High Court Petition No. 343 of 2012** and find that election disputes are the preserve of the Co-operative Tribunal created by the Co-operative Societies Act. The current directors who were the beneficiaries of that judgement feebly attempted to distinguish the said decision from this case. The reasons why the learned Judge arrived at the said decision are self-explanatory and I need not comment on them.

What I only need to state is that where judicial review is the most efficacious remedy, an applicant need not exhaust the statutory process or file an appeal. This reasoning receives support from H.W.R Wade and C.F. Forsyth the authors of **Administrative Law, 9th Edition, 2008** at Page 703 where they state that:

“In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal.”

The availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. Judicial review proceedings are more often than not aimed at correcting defects in the decision-making process whereas an appeal is directed at the merits of a decision.

In **Civil Appeal No. 234 of 1995, THE COMMISSIONER OF LANDS v KUNSTE HOTEL LIMITED**, the Court of Appeal defined the scope of judicial review thus:

“But it must be remembered that judicial review is concerned not with private rights or the 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 which he has been subjected.”

In the case before me, the current directors have successfully demonstrated that the 1st Respondent failed to comply with the law when calling for KPCU’s elections. Judicial review therefore comes into play.

In conclusion, I find that the application before this Court partly succeeds. The decision of the 1st Respondent calling for a special general meeting and elections for KPCU is called into this Court and quashed. Any action or decision arising therefrom is also quashed. For avoidance of doubt, I find that the election of the interested parties was an outcome of an unlawful and improper process and their election is therefore nullified. That means the current directors will remain in office pending elections. The current directors have asked for orders of prohibition. I find that the orders of prohibition cannot issue as couched as this would amount to curtailing the 1st Respondent’s statutory powers.

Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 30th day of October, 2014

W. KORIR,

JUDGE OF THE HIGH COURT