



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 267 OF 2004

REPUBLICAPPLICANT

VERSUS

THE MINISTER CO-OPERATIVE DEVELOPMENT & MARKETING.....RESPONDENT

EX-PARTE

- 1. JOHN WAWERU KAIRUNGI**
- 2. HARRISON NGARI NDUMA**
- 3. BONIFACE MWANGI MACHARIA**
- 4. JESSE MWANGI NORMAN**
- 5. GEORGE WAMAI**
- 6. JOHN WAMWEA KIMARU**
- 7. JOHN MWANGI MAINA**
- 8. BENSON M NGIRIA**
- 9. FRANCIS MURIMI**
- 10. BENSON NJERU**
- 11. JOHNSON WAMAI MACHERE**
- 12. CAXTON MWANGI KARURI**
- 13. PAUL WACHIURI MUHORO**
- 14. JOHN MBUGUA MANJI**
- 15. GEOFFREY MURIITHI MURAGE**

16. FRANCIS MURIITHI KOIGI

17. JULIUS KARIUKI

JUDGEMENT

The seventeen ex-parte applicants, led by John Waweru Kairungi, have through the notice of motion dated 16th March, 2004 prayed for an order of certiorari directed at the respondent (the Minister for Co-operative Development & Marketing) quashing the proceedings and judgement/ruling/order dated 12th January, 2004 in Appeal No. 1B of 2002. The ex-parte applicants also seek an order of mandamus compelling the respondent to consider the said appeal on merit. Mainly, the application is based on the ground that the applicants were condemned unheard contrary to the rules of natural justice.

Briefly, the applicants were officials and/or committee members of a co-operative society known as Kibirigwi Farmers' Co-operative Society Ltd, hereinafter simply referred to as the society. On 28th November, 2001 the Registrar of Co-operative Societies issued surcharge orders against the applicants, and other members of the society, to the tune of kshs.11,178,885.60 following the findings and recommendations of an inquiry. The applicants were aggrieved by the findings and recommendations in the inquiry report and the surcharge orders and they in accordance with Section 74 of the Co-operative Societies Act, 1997 filed Appeal No. 1B of 2002 with the respondent hereinafter simply referred to as the Minister. The appeal was filed against the Registrar of Co-operative Societies and the society. Thereafter the advocates on record filed and exchanged the necessary papers.

It is the applicants' case that on 12th January, 2004 the Minister dismissed their appeal at the behest of the advocate for the society. The applicants argue that they were never informed about the appeal having been set down for hearing and the dismissal of the appeal breached their right to a fair hearing. They accuse the Minister of not acting judiciously since he exercised his discretion of unilaterally fixing the hearing date without informing them.

The society is an interested party in these proceedings. It opposed the application through a replying affidavit sworn on 25th October, 2004 by its Secretary/Manager. Through the said affidavit the society gives a background of the matter and accuses the applicants of trying to delay payment of the surcharged amount since the society had already filed cases before the Co-operative Tribunal with a view to recovering the surcharged amount.

The Minister opposed the application by way of grounds of opposition dated 15th August, 2012. It is the Minister's case that the applicants had not exhausted the procedures for appeal provided by the Co-operative Societies Act, 1997 and that there has been inordinate delay in the prosecution of this matter by the applicants.

On 12th January, 2004 the Minister delivered a ruling in respect of Appeal No. 1B of 2002 in the following words:-

“The Appeal is against the surcharge orders issued by the Registrar of Co-operative Societies under Section 73 of the Co-operative Societies Act No. 12 of 1997. The orders were issued after the adoption of the inquiry report by the members of Kibirigwi F.C.S Ltd in a Special General Meeting held on 20th December, 2010.

This appeal was filed on 28th January, 2002, since then, the appeal has been scheduled for hearing several times but the appellants have failed to turn up. The Respondent Counsel has argued that since this is appellants' case, they are required to appear and prove their case. I totally agree with the Respondent's Counsel.

I hereby dismiss this appeal with costs.”

The applicants argue that they were not aware of the hearing date. The Minister did not address this argument but chose to pursue the line that the application is defective and an abuse of the court process. I will in due course address the grounds raised in support of the arguments that the application is defective.

The society clearly responded to the application. Through the replying affidavit the society informed the court that it was served with a notice of proceedings and cause list for the matters scheduled for hearing on 14th and 15th October, 2003 but on 14th October, 2003 the applicants and their counsel failed to attend and the matter was stood over generally. The society was again served with a notice of proceedings and cause list for matters scheduled for hearing on 2nd and 3rd December, 2003. On 2nd December, 2003 the applicants and their counsel again failed to appear. After the appeal was dismissed, the society filed statements of claim before the Co-operative Tribunal at Nairobi against each of the applicants as per the surcharge orders. It is only after service of summons that the applicants took action.

The response of the society does not however answer the question as to whether the applicants or their counsel was aware about the hearing of the appeal. It is clear that the applicants' counsel did not take the date for the hearing of the appeal. No material has been placed before the court to confirm that the applicants' counsel was indeed aware of the hearing date. The Minister in his ruling did not indicate whether the applicants had been served with a hearing notice.

According to the material placed before the court by the society, it was only the second time that the appeal was coming up for hearing. The Minister did not consider the appeal but simply dismissed it for want of prosecution.

The right to a hearing is a fundamental principle of natural justice. The Minister had a duty to establish that the applicants' counsel was aware of the hearing date before proceeding to dismiss the appeal. There is no evidence before this court to show that the applicants' counsel was aware of the hearing date but decided not to attend. The Minister did not attach the proceedings before him to the replying affidavit. The proceedings would have assisted this court in knowing exactly what happened on the material date. The society cannot be heard to say that since it was served with notice of proceedings and cause list then that would mean that the applicants' counsel was also served.

The respondent argued that the applicants approached this court before exhausting the mechanism for settlement of disputes involving co-operative societies. The applicants responded that the availability of an alternative remedy is not of itself a bar to the commencement of judicial review proceedings. In my view, this is one case in which the mechanism of judicial review is appropriate. One of the instances in which judicial review remedies are available is where a tribunal or a body subject to the supervisory jurisdiction of the court has acted in breach of the rules of natural justice. In the case before me, the Minister clearly breached the rules of natural justice by dismissing the applicants' appeal without satisfying himself that their counsel on record was aware of the hearing date.

The respondent also accuses the applicants of inordinate delay in prosecuting this matter. That is indeed correct but the respondent has not explained the delayed in filing his response. It is noted that the respondent actually filed grounds of opposition on 15th August, 2012 which was over eight years from the date of filing this application. The grounds of opposition filed by the Minister does not answer the pertinent question i.e. were the applicants condemned unheard?

The net result is that this application succeeds and an order of certiorari is issued quashing the decision made by the Minister on 12th January, 2004. An order of mandamus is also issued but the same is amended so that the applicants' Appeal No. 1B of 2002 will be heard by the Co-operative Tribunal. There is no order as to costs.

Dated, signed and delivered at Nairobi this 19th day of April , 2013

W.K. KORIR,

JUDGE