



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

JR MISCELLANEOUS APPLICATION NO. 93 OF 2007

BETWEEN

REPUBLIC

VERSUS

THE COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....RESPONDENT

AND

EX-PARTE

THIKA COFFEE MILLS LIMITED.....1ST APPLICANT

JUDGMENT

Introduction

1. This case deals with the powers of the office of the Commissioner of Co-operatives under the ***Co-operative Societies Act, 2007*** and the extent to which it can regulate the marketing of coffee and related services offered to coffee producing cooperatives.

The Ex-parte Applicant's Case

2. The *ex-parte* applicants are associated companies involved in the business of milling and marketing coffee. The 1st applicant is a licensed coffee miller while the 2nd applicant is a licensed marketing agent.

3. Pursuant to leave granted on 14th February 2006, the *ex-parte* applicant filed a Notice of Motion dated 20th February 2006 seeking the following reliefs;

(a) *That an order of prohibition do issue to prohibit the respondent whether by himself or through his subordinate officers including provincial and district co-operative officers from issuing any orders, directives or guidelines that all or any co-operative societies should deliver all their coffee to a specific coffee miller, marketing agent or any other licensed service provider in the coffee industry.*

(b) *That an order of certiorari do issue to quash such portion of circular Reference Number MCDM/5/1 dated 14th August 2006 as purports to guide or direct coffee co-operative societies that henceforth the appointment of coffee millers and marketing agents shall be made by the members of the management committee of coffee co-operative societies.*

(c) *That costs of this Motion be provided for.*

4. The motion was supported by the statutory statement dated 13th February 2007 and the verifying affidavit of John Kaburu sworn on 12th February 2007 which set out the facts giving rise to these proceedings. I have set out the facts as are necessary and material for determination of the matter.

5. In 1992, the Government embarked on the process of liberalizing the coffee industry. Prior to this,

all coffee was marketed by the Coffee Board of Kenya while all coffee grown by members of co-operative societies was milled by the Kenya Planters Co-operative Union (KPCU).

6. With the advent of liberalization, other millers were licensed to compete with KPCU and in 2001, the monopoly enjoyed by the Coffee Board of Kenya in coffee marketing was brought to an end when other companies were appointed as interim marketing agents; these included the 1st *ex-parte* applicant, KPCU and Socfinaf Limited

7. On 17th June 1996, the Coffee Board of Kenya, which was and still is the industry regulator, issued **Circular No. 451** titled, **“Further Liberalisation of the Coffee Industry,”** which *inter alia* stated that where a co-operative society had more than one coffee factory each factory would be at liberty to decide on the commercial miller who should mill its coffee. At the pertinent part of the circular, clause 3.0, stated as follows;

3.0 Decisions on Milling

3.1 *Where a Co-operative Society has more than one coffee factory, each factory would be at liberty to decide on the Commercial Miller who would mill its coffee.*

8. In tandem with the liberalization initiatives, the respondent issued a circular **Ref No. MCD/ORG/7 Vol.111/(83)** (**“1996 circular”**) on 2nd July 1996. The circular informed co-operative societies that the liberalization in the coffee industry had made it necessary for him to make modifications to the mechanisms then in place for choosing a miller. Cooperative societies would be required to convene an annual general meeting where members would choose which miller would mill the society’s coffee for a given year. The Commissioner stated, **“A number of Coffee Commercial Millers have been licenced since the liberalization of the Milling Sector. This calls for new procedures in milling Coffee. Under the new arrangements a Society with more than one coffee factory will allow members of the factory to decide on the commercial miller who will mill their coffee. To enhance decision making by members[the] Society will be required to convene a Special General Meeting and/or factory meeting before commencement of the coffee year where each factory will resolve which mill will mill its coffee for that season. The Factory decision as to where to mill its coffee will in effect remain in force for one coffee year and members may review their decision if they so wish after the end of the season.....”**

9. Despite initial difficulties, the **1996 circular** issued was immediately implemented by the respondent and effectively guided the co-operative and the coffee industry. Based on this liberalized regime, the 1st *ex-parte* applicant invested heavily in the cooperative sector and managed to win over a considerable number of milling contracts from all parts of the country.

10. Thereafter the government began to backtrack from its stated objective of liberalizing the milling and marketing of coffee. The respondent through its officers began instructing co-operative societies to deliver their coffee to KPCU for milling. This affected the *ex-parte* applicants as the milling and marketing functions are intimately connected.

11. In October 2005, it became apparent to the *ex-parte* applicants that a decision had indeed been made by the respondent to sideline them in the industry. According to them when the issue came up in the National Assembly on 19th and 25th October 2005, the Minister for Co-operative Development is recorded as stating that the respondent has written to co-operative societies indebted to the KPCU to deliver their coffee to it. The government felt that the co-operative societies were not honouring their obligation to KPCU and the ability of these societies to mill and market their coffee through other millers and agents denied KPCU the ability to collect debts due to it.

12. On 14th August 2006, the respondent issued circular **Reference No. MCDM/5/1** (“**the 2006 circular**”) where he directed all co-operative societies to comply with a new decision reversing the circular **1996 circular**. The Commissioner directed all co-operative societies to appoint millers and marketing agents through their management committees rather than through the members at general meetings. The circular stated, at the material part that, “**The appointment of coffee millers and marketing agents shall be made annually by members of the management committees of coffee societies in their capacity as the governing authority under the Co-operative Societies Act.**”

13. The *ex-parte* applicants contend that the **2006 circular** was issued for a collateral purpose and with the ulterior motive to coerce the members of the management committees of the cooperative societies to deliver their coffee to a pre-determined miller to the exclusion of the 1st *ex-parte* applicant. According to them, the circular was intended to help the respondent achieve a collateral purpose not sanctioned by law namely to restrict and suppress the applicants business prospects in co-operative sector.

14. To support this aspect of the *ex-parte* applicants’ case, Mr Macharia, counsel for the *ex-parte* applicants, drew the court’s attention to a letter dated 10th August 2004 from the District Co-operative Officer, Maragua to the Chairman, Kahati Farmers Co-operative Society. The letter stated as follows;

RE: COFFEE MILLING

During your special general meeting held on 4th August 2004, your members discussed of the millers of your coffee as an agenda. You were advices by the officer who was present Mr. Githinji that the government directive is that coffee should be taken for milling at K.P.C.U LTD and not otherwise, but instead you made a deliberate campaign and convinced members to pass a resolution to take their coffee to Thika coffee mills. Please note that as much as you made this, unwarranted move, it was against government policy.

You are now therefore advised not to take your coffee to any other miller apart from K.P.C.U.

Take this issue with the seriousness it deserves.

C.W. MUIRURI

DISTRICT CO-OPERATIVE OFFICER

MARAGUA

15. According to Mr Karuru, the management committees of Co-operative Societies that did not follow stated government policy or directives were subjected to inquiries. The consequences of this policy is captured in an “***Inquiry Report into the Affairs of Gakuyu Farmers Co-operative Society Limited***” compiled between December 2004 and May 2005. The reports states at page 55 that, “***The Government policies on poverty eradication is working well through co-operative societies and therefore those who are bent on frustrating Government policies and efforts must be dealt with within the law. Any management committee which does not accept advice from the District Co-operative Officer should not be allowed in office as the ministerial policies, Act, by-laws are enforced by the District Co-operative Officer and therefore in a case where he is not allowed to carry out his duties by a defiant chairman and his committee, such committee should not be allowed to be involved in the running of the society. The District Security Team and to enforce law and order where necessary***”

16. The *ex-parte* applicants also contend that the ***Cooperative Societies Act 1997*** does not authorise the respondent to issue guidelines or directives that contravene the provisions of the Act or override the decisions made at a society’s general meeting or is in accordance with co-operative by-laws. Mr Macharia, counsel for the *ex-parte* applicants, argued that the directive by the respondent that the appointment of millers and marketing agents shall be the sole preserve of management committees of coffee societies is *ultra vires* **sections 4 and 27** of the ***Cooperative Societies Act 1997***. He emphasized that the circular denies individual cooperative society members the right to choose the most competitive service providers as oppressive, capricious, arbitrary and high handed.

17. The *ex-parte* applicants’ case against the ***2006 circular*** is that the respondent has no power or authority to direct cooperative societies to deliver their members coffee to a particular commercial miller, marketing or management agent or any class of service provider. In this respect the act of the respondent was an abuse of his powers and he exceeded his authority by directing cooperative societies to directly select a commercial miller or marketing agent.

18. The *ex-parte* applicants impugn the respondent's decisions on the ground that the decision directly frustrates the legislative purpose codified in the **Coffee Act, 2001** which was enacted to liberalise the coffee industry and empower coffee growers to determine the future of the country. The circular violates the cardinal rule of fairness and impartiality and the applicant's legitimate expectation that the respondent will respect the law and statutory mechanisms established to facilitate a level playing field in the coffee industry.

19. Mr Macharia relied on written submissions dated 28th July 2009 and supplementary submissions dated 8th February 2012 where he urged the court to allow the motion.

Respondent Case

20. The application was opposed by the respondent. It's counsel, Mr Abuta, relied on the skeleton submissions dated 14th August 2009 and the affidavit sworn by the Commissioner of Cooperative Fredrick Fanuel Odhiambo on 5th March 2007. The respondent did not contest the facts set out by the petitioner in the verifying affidavit.

21. The response and arguments is based on two broad grounds. The first is that the Commissioner of Cooperatives has the statutory responsibility to ensure growth and development of cooperative societies. In this capacity, he is entitled to issue circulars from time to time as long as the circulars conform to the cooperative principles and are within provisions of the law.

22. Secondly, the Commissioner contends that the circulars are directed at cooperative societies which are registered under the **Cooperative Societies Act**. He contends that the *ex-parte* applicants are companies and do not have *locus standi* and hence cannot seek to quash a decision that was never directed at them.

23. Ms Barasa, counsel for the Attorney General, also supported the position taken by the respondent. She submitted that the **2006 circular** must be read in light of the Kshs. 5.4 billion debt relief programme initiated by the government to relieve the co-operativesectorfrom crushing debts. To prevent the coffee and co-operative sector from being affected adversely, the Commissioner was entitled to issue directives.

Locus Standi

24. I will deal with the issue of **locus standi** which is a preliminary issue. The respondent argues that the

ex-parte applicants as limited liability companies' lack *locus standi* to impugn the circulars or directives issued to cooperative societies.

25. While a limited liability company incorporated under the ***Companies Act (Chapter 486 of the Laws of Kenya)*** is outside the purview of regulation by the ***Co-operative Societies Act***, the regulation or otherwise of co-operative societies that deal with companies may affect the legal interest of a limited liability company. Companies and co-operative societies do not exist in splendid isolation; they are both vehicles for economic activity and the regulation of activity conducted by one body may affect the interests of the other.

26. For purposes of judicial review, a person has *locus standi* to challenge a decision made by an authority when that person can demonstrate that it has sufficient interest in the matter. What is sufficient interest is a question of fact. In the case of ***R v Inland Revenue Commissioners exp National Federation of Self Employed Small Business Ltd (1982) AC 67***, Lord Diplock observed that the Court is left with discretion to decide what in its own judgment it considers to be a sufficient interest in the particular circumstances of the case.

27. The **2006 circular** directly impacts on the interests of the *ex-parte* applicants. Although it is directed to co-operative societies, in the circumstances, I have no doubt that the *ex-parte* applicants are affected by it, they have a sufficient interested entitling them to apply for orders of judicial review as will be demonstrated in the judgment.

The Powers of the Commissioner of Cooperatives

28. **Section 3(1)** of the ***Co-operative Societies Act*** establishes the office of the Commissioner for Cooperative Development. **Section 3(3)** spell out the functions and powers of the office of the Commissioner as follows;

“The Commissioner shall be responsible for the growth and development of Co-operative Societies by providing such services as may be required by the cooperative societies for their organisation, registration, operation, advancement and dissolution and for administration of the provisions of the Act.”

29. According to Mr Abuta, the wording of **section 3(3)** imports full statutory power to issue directives for the organisation of cooperative societies including directions which enable the management decisions concerning the identification of coffee millers. Counsel contended that during the liberalisation phase of the coffee industry, the Commissioner of Cooperative Development and Marketing was mandated to give

guidance and advice on matters touching on coffee cooperatives.

30. The powers of the Commissioner are indeed wide in relation to the activities of the co-operative society but they are not limitless. The office of the Commissioner of Co-operatives is a creature of statute and as such its powers must be construed within the four corners of the statute (see ***Kenya National Examinations Council v Republic ex-parte Geoffrey Gathenji Njoroge Nairobi Civil Appeal No. 266 of 1996 (Unreported)***).

31. Although the co-operative societies are major players in the coffee industry, the coffee industry is regulated by the ***Coffee Act, 2001***. In accordance with the said Act, the Coffee Board of Kenya issues regulations and circulars from time to time to regulate aspects of the coffee industry. The ***Coffee Act*** is an act of parliament to provide for the development, regulation and promotion of the coffee industry and for connected purposes. The Coffee Board is established under ***section 7*** of the Act to promote competition in the coffee industry, production, processing and branding of Kenya coffee locally and internationally and generally to regulate the coffee industry in the public interest.

32. Under ***section 13*** of the Act, the Board shall act in accordance with the general or special directions as may be given by the minister.

33. A reading of the ***Coffee Act*** has no role for the Commissioner of Co-operatives. He is not authorized to make rules for the licensing of millers and marketers, regulations for buying and selling coffee or for any other purpose. At any rate, the respondent did not show any basis of its authority to issue regulations for the coffee sector. In so far as coffee co-operative societies are concerned, the Commissioner's power is limited to ensure that co-operatives properly are managed and governed.

34. The guidelines set in the ***1996 circular*** are consistent with the Commissioner's powers. As concerns, the decision on commercial millers, the Commissioner properly observed that the decision is one for the members of the individual co-operative societies. In fact this decision was augmented by one of the Commissioner's subordinates, who in a letter dated 16th August 1996, to all Coffee Societies in Kirinyaga District stated, "***Let the members know that coffee milling is fully liberalized and the issue of causing unrest among the farmers should not be there, LET THE PEOPLE DECIDE.***"

35. The ***2006 circular*** purports to remove the decisions of appointment of coffee millers and marketing agents from the members of the co-operative society and hand it over to the management committees. At once this is at variance with the provisions of ***section 27*** of the ***Co-operative Societies Act*** which provides, "***The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters.***"

36. **Section 27** must be read in light of **section 4** which sets out the following co-operative principles which are as follows;

Subject to the provisions of this Act, a society which has its object

a) The promotion of the welfare and economic interest of its members; and

b) Has incorporated in its by laws the following co-operative principles:

(i) Voluntary and open membership

(ii) Democratic member control

(iii) Economic participation by members

(iv) Autonomy and independence

(v) Education, training and information

(vi) Co-operation among co-operatives, and

(vii) Concern for community in general

May be registered by the commissioner as a co-operative society under this act without limited liability.

37. While the Commissioner has wide powers to regulate co-operative societies, he cannot remove the decision making of the society from the supreme and principal organ, that is the membership and impose it on the management committee. Such an act would undermine the democratic principles which form part of the bedrock principles of the co-operative movement.

38. I therefore conclude that the **2006 circular** is *ultra vires* **section 4** and **27** the **Co-operative Societies Act** in so far as it purports to direct co-operative societies to appoint coffee millers and marketing agents through management committees.

39. Furthermore, the Commissioner of Co-operatives has no power under the **Coffee Act, 2001** and the **Co-operative Societies Act** to regulate the marketing of coffee. Its powers are restricted to matters concerning organization, registration, operation, advancement and dissolution of the society.

40. I agree with Ms Barasa, that the state has a substantial interest in the coffee industry as evidenced by the debt relief program initiated by the government. But the state protects its interest not by breaching the law or acting in excess of statutory mandates but by adhering to the statutory instruments that give the Commissioner sufficient tools for the proper management of the co-operative societies and providing an environment which fosters enforcement of legal obligations.

41. Further the lending and recovery of money is covered by a whole legal regime which the *ex-parte* applicants have taken advantage of in securing contracts as a result of liberalized coffee sector. It is on this basis that it has invested substantially in these contractual obligations with the co-operative societies. The **2006 circular** has the direct effect of interfering with the interests of the *ex-parte* applicants' business interests.

42. In issuing regulations governing the conduct of co-operative societies, the rules may well have an effect on the marketing of coffee. The concern in this case though, is that apart from the fact that the guideline issued in the **2006 circular** is *ultra vires*, it was intended to ensure coffee co-operative societies mill and market their coffee through one miller; the KPCU. This would directly conflict with the stated objective of the Coffee Board in liberalizing the coffee market as evidenced by **circular No. 451**. In short the Commissioner was meandering into an area which he has no authority to regulate.

43. The letter dated 10th August 2004 and which I have reproduced at paragraph 14 above makes it crystal clear that the government policy was that all coffee co-operatives would mill and therefore market their coffee through KPCU. That policy is underpinned by the state's coercive power and was to be achieved not through an amendment of the **Coffee Act, 2001** or by issue of regulations or a circulars by the Coffee Board, which in any case must act in accordance with the specific and general direction of the Minister but by undermining the principle of democracy in the management of co-operatives.

44. I am constrained to hold that the **2006 circular** was intended to achieve an ulterior collateral purpose

not sanctioned by the law. Its implementation was to undercut the democratic nature of co-operative societies contrary to the ***Co-operative Societies Act, 2007*** with the aim of coercing co-operative societies to mill and market their coffee through the KPCU to the detriment of the *ex-parte* applicants. The *ex-parte* applicants are effectively denied the ability to sell and market their services in a level playing field. This undermines the statutory objective expressed in **section 7(1)** of the ***Coffee Act*** which empowers the Coffee Board to promote competition in the coffee sector.

45. Finally, I would add the continued existence of the ***2006 Circular*** to the extent that it undermines the co-operative principles is an affront to the values of democracy, participation of the people, transparency, accountability and good governance enshrined in **Article 10** of the Constitution. These values I hold, are applicable to the respondent and must be adhered to in the discharge of its functions.

Disposition

46. In view of the conclusions I have reached now make the following orders;

(a) An order of certiorari be and is hereby issued bringing into this court for purposes of quashing the circular reference no. MCDM/5/1 dated 14th August 2006 in so far as it purports to guide or direct coffee co-operative societies that henceforth the appointment of coffee millers and marketing agents shall be made by members of the management committees of the co-operative societies.

(b) An order of prohibition be and is hereby issued prohibiting the Commissioner of Co-operatives or his agents from issuing any orders, directives or guidelines that exclude the members of any co-operative society from making a decision as to the choice of coffee miller, marketing agent or any licenced service provider in the coffee industry.

(c) The respondent shall bear the costs of these proceedings.

DATED and DELIVERED at NAIROBI this 30th day of April 2012

D.S. MAJANJA

JUDGE

Mr T. Macharia instructed by Mbugwa, Atudo and Macharia Advocates for the ex-parte applicant.

Mr T Abuta, Senior State Counsel, instructed by the Commissioner for Co-operatives.

Ms Barasa, Litigation Counsel, instructed by the State Law Office for the Attorney General.