



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 343 of 2012

KENYA PLANTERS CO-OPERATIVE

UNION LTD (In Receivership) 1ST PETITIONER

WATSOM KIMATHI.....2ND PETITIONER

JOHN MOKAYA..... 3RD PETITIONER

MOSES MUASYA.....4TH PETITIONER

PETER KIMANI.....5TH PETITIONER

JOHN MBATURE.....6TH PETITIONER

FREDRICK KIBATHI.....7TH PETITIONER

GIBSON KIMAKIA.....8TH PETITIONER

JOHN NYAGA.....9TH PETITIONER

FREDRICK KIRUBI.....10TH PETITIONER

ELIAS WAMITA.....11TH PETITIONER

SIMON NJOROGE.....12TH PETITIONER

MARY GATHECA.....13TH PETITIONER

AND

THE MINISTER FOR CO-OPERATIVE

DEVELOPMENT AND MARKETING..... 1ST RESPONDENT

COMMISSIONER OF

CO-OPERATIVE DEVELOPMENT..... 2ND RESPONDENT

HARVEN GADHOKE 3RD RESPONDENT

DANIEL MUTISYA NDONYE 4TH RESPONDENT

THE HON. ATTORNEY GENERAL..... 7TH RESPONDENT

AND

ANTHONY MWANGI 1ST INTERESTED PARTY

DAVID GIKUNDA 2ND INTERESTED PARTY

HABEL MAINA 3RD INTERESTED PARTY

ISAAC YATOR 4TH INTERESTED PARTY

GEORGE MANYONGE 5TH INTERESTED PARTY

WILLIAM GITEI 6TH INTERESTED PARTY

CHRISOINUS SINOKHO 7TH INTERESTED PARTY

JUDGMENT

Introduction and background

1. This matter concerns the Kenya Planters Cooperative Union Limited (“KPCU”). KPCU was incorporated as a Company in 1945 under the provisions of the ***Companies Ordinance, 1933*** (now the ***Companies Act, Chapter 486 of the Laws of Kenya***). It is also a Co-operative Society incorporated under the ***Co-operative Societies Act*** (“the ***CSA***”).
2. The membership of KPCU is drawn from small, medium and large plantation coffee growers as well as small holder farmers groups which are mainly incorporated co-operative societies. The principle object of KPCU is to mill and market coffee on behalf of its members. It is also involved in providing farm inputs to farmers.
3. The petition before the Court is a culmination of a series of events connected with the liberalisation of the coffee industry. These matters are well documented in the ***“Report on the Inquiry into the Receivership at the Kenya Planters Cooperative Union (KPCU) Ltd”*** prepared by the National Assembly Departmental Committee on Agriculture, Livestock and Cooperatives in September 2011.
4. Due to indebtedness, KPCU was placed in receivership by Kenya Commercial Bank (“KCB”) on 19th October 2009 pursuant to debentures held by the bank over the assets of KPCU. The receivership remains in place and is the subject of litigation in Nairobi ***HCCC No. 779 of 2009, KPCU v KCB and Others***.

The Petitioners’ Case

5. This case is not about the receivership but about the management of the KPCU. The filing of the petition was triggered by a Notice issued by the 2nd respondent, the Commissioner of Co-operative Development (“the Commissioner”) calling for a Special General Meeting of KPCU on 20th July 2012. The principal item on the agenda was discussion on the Commissioners Report on KPCU, matters arising from the Report and resolutions.
6. The result of the meeting is that the petitioners, who were the directors of KPCU were removed from office and the seven interested parties were duly elected as directors of KPCU.
7. The petitioners’ case is that the notice calling for the meeting was unlawful as KPCU is a company governed by its Articles of Association and neither Directors nor Shareholders of KPCU were consulted or made aware of the report subject of the special general meeting. Consequently, the election of the interested parties, as directors of KPCU to replace the petitioners, was flawed and not in accordance in the KPCU’s rules for the election of directors.
8. The petitioners aver that the manner of interference by the Commissioner into the affairs of KPCU is contrary to the National values and principles of governance set out in **Article 10**. The petitioners also claim that their right to equal protection of the law and freedom from discrimination protected under **Article 27** has been violated by the 1st and 2nd respondents. The petitioners contend that their property rights protected under **Article 40** are violated as the State has interfered with rights of shareholders and stakeholders to participate in the affairs of KPCU without interference.
9. Finally, the petitioners contend that the 1st and 2nd respondents’ actions violated the right to expeditious, efficient, lawful reasonable and procedurally fair administrative action protected by **Article 47**. The petitioners contend that the petitioners’ legitimate expectations were breached, that the 1st and 2nd respondents actions were in *ultra vires* the ***Companies Act*** and the ***CSA***, that the petitioners rights to natural justice were violated and the actions of the respondents were irrational, in breach of the Wednesbury principle, unlawful and illegal.
10. In the circumstances, the petitioners pray for the following declarations and other reliefs as follows;

- (1) Pending the hearing and determination of this petition, conservatory orders be issued in terms of the Chamber Summons filed herewith.
- (2) A declaration that the 1st and 2nd respondents' conduct breached their duties and infringed the petitioners' rights under Articles 10 of the Constitution of the Republic of Kenya.
- (3) A declaration that the 1st and 2nd respondents conduct breached their duties and infringed the petitioners' rights under Article 40 of the Constitution of the Republic of Kenya.
- (4) A declaration that the 1st and 2nd respondents conduct infringed the petitioners' rights under Article 40 of the Constitution of the Republic of Kenya.
- (5) A declaration that the 2nd respondent breached its duties to the petitioners and ingrained the petitioners' rights under Article 47 of the Constitution of the Republic of Kenya.
- (6) An order of certiorari do issue to bring into this Court and quash the decision of the 2nd respondent dated 27th June 2012 purporting to call a Special General Meeting of KPCU.
- (7) A declaration that the meeting of KPCU purported to be held on 20th July 2012 was unprocedural and unlawful.
- (8) A declaration that the proceedings, resolutions and elections purported to be held on 20th July 2012 were unprocedural, illegal and therefore null and void.
- (9) An order of injunction directed at the 1st and 2nd respondents and the interested parties either jointly or severally, their agents, officers or employees or any person acting on their authority restraining them from holding the interested parties out as Directors or Officers of KPCU and from purporting to enter into any compromises on behalf of KPCU or being KPCU in any manner whatsoever.
- (10) An order of injunction directed at the 1st and 2nd respondents and the interested parties either jointly or severally their agents, officers or employees or any person acting on their authority restraining them either jointly or severally from interfering in any manner whatsoever, with the affairs and assets of KPCU including its bank accounts, real and moveable properties or purporting to dispose of or offer any such assets for sale and or alienating the same in any manner whatsoever.
- (11) An order of injunction directed at the 1st and 2nd respondents and the interested parties either jointly or severally restraining them from releasing any funds held by, injected into and received on behalf of KPCU to the 3rd respondent and or their principals.
- (12) An order of injunction directed at the interested parties restraining them from holding themselves out as Directors of KPCU and or continuing to hold themselves out as Directors of KPCU in any manner whatsoever.
- (13) An order of injunction directed at the interested parties restraining them from interfering or purporting to interfere and or take over the management of the affairs of KPCU.
- (14) An injunction directed at the interested parties restraining them from compromising or purporting to compromise any law suits filed by KPCU or entering into any scheme of arrangement or in any way whatsoever from binding KPCU to any obligations.
- (15) An order of injunction directed at the 1st, 2nd, 3rd and 4th respondents and the interested parties to account for any monies received by them on behalf of or from KPCU together with a report of any compromises purported to be entered into prior to the filing of this petition,.

(16) *An order of injunction directed at the State acting by itself, through the respondents, its agents and or officers or persons acting on its authority restraining it from interfering in any manner whatsoever in the management of the affairs of KPCU.*

(17) *This Honourable Court do issue such orders and give such Directions as it may deem mete, just and appropriate in the circumstances of this matter.*

(18) *That costs of the petition be awarded to the petitioners.*

11. The facts outlined in the petition are set out in the affidavit filed in support of the petition sworn on 9th August 2012 by Watson Kimathi and a supplementary affidavit sworn on 29th August 2012. The petitioner also relied on skeleton submissions dated 16th October 2012 which counsel for the petitioner, Mr Kariuki, adopted.

Respondents' and interested parties case

12. The petition is opposed by the respondents and interested parties on various grounds.

13. The 1st, 2nd and 5th respondents have opposed the petition and the basis of the affidavit of Fredrick Odhiambo, the Commissioner, sworn on 28th February 2012. The thrust of the respondent's contention, that the Commission is empowered by the provisions of **section 27** of the **CSA** under to call for a Special General Meeting and that he did so in the interests of KPCU. The Commissioner contends that the meeting that took place on 27th July 2012 at the Dandora KPCU was accordingly underpinned by the law and that the election of the interested parties was free and fair and in accordance with the wishes of the shareholders who attended the meeting. Counsel for the respondents, Mr Maina, adopted the written submissions dated 4th December 2012.

14. The interested parties are the interim directors elected at the meeting that took place on 27th July 2012. They rely on the affidavit of William Gatei sworn on 24th August 2012. They have also filed a preliminary objection dated 18th September 2012 impugning the petition on the ground that the issues raised by the petitioners concerned the election of directors of a Co-operative Society which is a matter within the jurisdiction of the Co-operative Tribunal ("the Tribunal"). The interested parties pointed to the provisions of **section 95(1)** of the **CSA** which exclude operation the provisions of the **Companies Act** to the extent of matters concerning co-operative societies except as permitted in the **CSA**. Mr Muriithi, counsel for the interested parties, relied on the written submission dated 22nd November 2012.

15. The 3rd and 4th respondents, who are the receivers appointed on behalf of KPCU, deny any liability in the matter as they state that they are appointed by KCB and all issues concerning the receivership are the subject of **HCCC No.779 of 2009**. In the circumstances, they urge the court to strike out the petition against them.

Analysis and determination

16. Having heard the parties, considered the submissions and pleadings, I think the principal issue for consideration is whether I should intervene in the matters concerning the elections of the interested parties as directors of the KPCU. Whether the respondents' actions were in breach of the Constitution as alleged by the petitioners must be determined in reference to statutory provisions applicable to the case.

17. I will dispose of the issues concerning the 3rd and 4th respondent first. It is common ground that the 3rd and 4th respondents are the receivers appointed by KCB and the issue of receivership is the subject of **HCCC No. 779 of 2009**. It follows that this Court cannot deal with the issues in that they are the subject of the pending suit and any matters concerning receivership ought to be raised in that suit. The receivers they are appointed by KCB and as such it improper to sue them without joining the bank. Consequently, I find and hold that the suit against KCB is incompetent.

18. At the heart of this matter is the exercise of the Commissioner's power under **section 27(8)** of the **CSA** to call for a Special General Meeting. It 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.***" This power is to be read with the power of the Commissioner under **Section 3(3)** of the Act which grants the Commissioner overall supervisory control over co-operative societies. It provides that, "***The Commissioner shall be responsible for the growth and development of Cooperative Societies by providing such services as may be required by Co-operative Societies for their organisation, registration, operation, advancement and dissolution and for administration of the provisions of this Act.***" The power of the Commissioner to call elections is also emphasised in **section 93A** of the **CSA**.

19. It is not in dispute that KPCU is a registered cooperative and in this respect, the provisions of the **CSA** apply to it. **Article 1** of the Memorandum of Objects and Articles of Association of KPCU provide as follows;

These presents shall constitute the Articles of Association of the Company for the purposes of the Companies Act and together with the Memorandum of Association of the Company shall also constitute the Regulations of the Company for the purpose of the Co-operatives Societies Act and every member of the Company shall so long as he shall continue to be a member of the company be bound by these presents and any additional modifications which may hereafter lawfully be made hereto and any by laws for the time being in force hereunder, subject nevertheless upon resignation or disqualification to the provisions hereinafter contained. [Emphasis Mine]

20. The article by reference to deeming the articles as regulations of the Company for purpose of the **CSA** is specific recognition that the company is regulated under that Act. Furthermore **section 95(1)** of **CSA** provides that, "***The provisions of the Companies Act (Cap 486) other than those referred to in sections 64 and 71 of this Act and the Registration the Business names Act (Cap 499) shall not apply to a Cooperative Society.***" This provision emphasises the primacy of the **CSA** over the **Companies Act** in matters concerning regulation of cooperative societies.

21. I do not see any conflict in these provisions and I therefore find and hold that although KPCU is incorporated under two Acts, the **Companies Act** and the **CSA**, by dint of **section 95(1)** of the **CSA**, the said Act applies fully and the Commissioner is empowered to exercise powers under statute in relation to its affairs.

22. Although the petitioner has moved the Court under **Article 22** to enforce fundamental rights and freedoms, the petitioner and the Court cannot ignore the provisions of the existing legal framework to resolve disputes arising from the management of cooperative societies. **Section 76** of the **CSA** provides as follows;

(1) If any dispute concerning the business of a Co-operative Society arises:-

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee, or any officer of the society; or

(c) between the society and any other co-operative society;

It shall be referred to the Tribunal.

23. I agree with the submission of the interested parties that the subject of the petitioners' case is the election of the interested parties as directors of KPCU and removal of the petitioners from office. A determination of the legality of the elections and attendant issues will no doubt involve a determination whether the respondents acted in accordance with the provisions of the **CSA**. In my view, the dispute being one about the election falls squarely within the purview of **section 76** of the Act.

24. The fact that the power of the Commissioner is challenged does not remove the matter outside the Tribunal. **Section 78(2)** of the **CSA** gives the Tribunal authority to deal with matters concerning the Act on application of a party including the exercise of the Commissioner's authority, which is an integral part of the conduct of the elections that are impugned. The **section 78(2)** provides as follows;

(2) The Tribunal shall, upon an application made to in writing by any party or a reference made to it by the Commissioner or any Committee or officer of a co-operative society on any matter relating to this Act, the rules made thereunder or the by-laws of the society, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned.

25. The petitioners' position is that the court has jurisdiction to determine violation of their fundamental rights and freedoms protected under the Bill of Rights. The right of an aggrieved party to move the High Court for the enforcement of fundamental rights and freedoms is itself a fundamental right and must not be impeded lightly (See **Church Road Development Company Ltd v Barclays Bank of Kenya Limited [2007] 1 EA 48**). But these rights and fundamental freedoms are not exercised or enjoyed in a vacuum. In a case such as the present one, the rights to property, association, fair and administrative action, which the petitioner's seek to enforce, are realised and fulfilled within the framework of the **CSA** and any person who becomes a member of a cooperative society, agrees by his or her own consent, to be bound by the legal structures imposed by the legislative framework. It is not the petitioners' case that any part or provision of the **CSA** is unconstitutional, what they seek is resolution of a dispute concerning the powers exercised by the Commissioner in accordance with statute in a manner that affects the rights of the members of the KPCU *inter-se* through an election. The **CSA** provides a means of settlement of such a dispute.

26. The use of alternative dispute resolution is not necessarily inconsistent with the enforcement of fundamental rights and freedoms and the Court is entitled to address itself to whether alternative dispute resolutions mechanisms are available to deal with the matter. **Article 159 (2)** imposes on this Court the obligation to promote alternative dispute settlement. The Tribunal exists to resolve the kind of dispute tabled before the Court for settlement. Such a tribunal also enhances the right of parties to access justice which is enshrined in **Article 48**. The Tribunal has appreciated this fact and I agree with its decision in **CTC No. 230 of 2006** delivered on 19th June 2008, where it observed as follows, "*The Co-operative Tribunal exists in order to provide simpler, speedier, cheaper and more accessible justice in the co-operative disputes than do the ordinary courts. The process of the courts of law is elaborate, slow and costly. The object here is not the best article at any price but the best article consistent with administration. Disputes will be disposed of quickly and cheaply, for the benefit of the public as well as that of the parties. We note, however, that the Constitution accords the three attributes of the courts: independence, impartiality and openness. See section 77(9) and 77(10) of the Constitution. We must also observe the standards set by the courts, and accordingly case law from the courts must be observed subject nevertheless to the provisions of the Act which established the Tribunal.*"

27. The petitioners' case is largely a complaint against the manner in which the election of interested parties as directors was carried out and in view of the statutory provisions I have set out above, it is proper that Tribunal process be utilised. The principle that where the legislature has provided a mechanism to resolve a dispute, that process should be invoked, has been established in a long line of cases; **Thande v Montgomery and Others [1970] EA 341**, **The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)**, **Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291**, **Wanyoike v Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43**. More recently in the case of **Bernard Kasingu v Attorney General and Others Nairobi Petition No. 4012 of 2012 (Unreported)**, commenting on the cases I have cited, I stated, "*Although the cases concern the electoral process, the principle that where the Constitution or a statute has established a dispute resolution procedure then that process must be used, is of universal application. The mere fact that the Constitution is cited or invoked is not enough to elevate the matter to a Constitutional matter and confer a licence to the High Court to inquire, investigate, arbitrate, surcharge or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by statute.*"

Disposition

28. 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 **Articles 23** of the Constitution. The petition is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 20th day of December 2012.

D.S. MAJANJA

JUDGE

Mr S. Kariuki instructed by Gichuki King'ara and Company Advocates for the petitioners

Mr Maina, State Counsel, instructed by the 1st and 2nd and 5th respondents.

Mr Karungo, instructed by Walker Kontos Advocates for the 3rd and 4th respondents.

Mr Muriithi instructed by Muriithi Kireria and Associates Advocates for the interested parties.