



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 444 of 2010

**IN THE MATTER OF: AN APPLICATION BY JULIUS MUIA MWATU FOR LEAVE TO
APPLY FOR AN ORDER OF CERTIORARI AND
MANDAMUS**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA SECTIONS 47 AND 50
AND**

**IN THE MATTER OF: THE CO-OPERATIVE SOCIETIES ACT CAP. 490, THE LAW
REFORM ACT CAP. 26 LAWS OF KENYA**

AND

**IN THE MATTER OF: THE AKAMBA HANDICRAFT INDUSTRY CO- OPERATIVE
SOCIETY LIMITED BY-LAWS
AND**

**IN THE MATTER OF: A DECISION MADE BY THE MANAGEMENT COMMITTEE OF
THE AKAMBA HANDICRAFT INDUSTRY CO-OPERATIVE SOCIETY
LIMITED TO SUSPEND THE EX PARTE APPLICANT**

AND

**IN THE MATTER OF: THE LETTER OF SUSPENSION DATED 21ST SEPTEMBER, 2010
ISSUED BY THE MANAGEMENT COMMITTEE OF
AKAMBA HANDICRAFT INDUSTRY CO-OPERATIVE SOCIETY LIMITED**

BETWEEN

REPUBLIC APPLICANT

VERSUS

MATHEKA KITHOME 1ST RESPONDENT

THOMAS MUTUA 2ND RESPONDENT

PAUL MUKUTHU 3RD RESPONDENT

SAMUEL KIMEU 4TH RESPONDENT

(Sued on their own behalf and as officials of the Akamba Handicraft Industry Co-Operative Society Limited)

AKAMBA HANDICRAFT INDUSTRY

CO-OPERATIVE SOCIETY LIMITED 5TH RESPONDENT

JUDGMENT

(1) The Applicant who is a member of the 5th Respondent Co-operative Society has sued the Society and its officials, the 1st – 4th Respondents, seeking an order of certiorari to quash his suspension from the Society by the decision of the Management Committee made on 20th September 2010 and an order of Mandamus to compel his reinstatement into the Society.

(2) A Preliminary Objection on jurisdiction of the court raised by the Respondent was on 27th October 2011 declined by this court, reasoning that:

“The discipline of a member of co-operative society for any reason including the performance of the member's duties is outside the provision of section 76 of the Co-operative Societies Act [Cap. 490 Laws of Kenya]. The dispute arising therefrom is not one “concerning the business of a Co-operative Society” as Co-operative Societies do not have as their business the quasi-judicial determination of discipline claims. When the Co-operative Society constitutes itself as a disciplinary mechanism it moves out of its ordinary business contemplated under section 76 of the Act and it becomes the proper subject of the constitutional supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution.”

(3) The Applicant's complaint as set out in paragraphs 7-13 of the Statement under Order 53 rule 1 of the Civil Procedure Rules is as follows:

“7. THAT the Respondents issued a letter dated 20th September, 2010 summoning the Ex parte Applicant to appear before the management committee on the 21st September, 2010 but the said letter did not disclose the agenda or the reason for the meeting.

8. THAT upon receipt of the said letter the ex parte Applicant immediately did a response whereby he indicated that he was not ready for the meeting because the notice was too short since he got the letter at 4.00 pm on the 20th September, 2010 and still the agenda was not disclosed, he did ask for more time to prepare himself and for the agenda to be disclosed.

9. THAT since there was no response from the respondents, the ex parte Applicant attended the meeting on the 21st September, 2010 with the sole intention of applying for an adjournment based on the aforesaid reasons, however his application was refused and the Respondents proceeded to level accusations against him including that he had forced security staff to let in 3 suspended members to get into the societies compound.

10. THAT the Ex parte Applicant denied the accusations but was not accorded a chance to make his defence and the Respondents appeared to have already made up their minds and proceeded to pass judgment.

11. THAT on the 21st September, 2010 the Ex parte Applicant was served with a letter stating that since he had admitted all the charges leveled against him on the 20th September, 2010, the board had resolved to suspend [him] from the society as from 22nd September, 2010, to April, 2011 when the Annual General Meeting would deliberate on further directions.

12. THAT the decision to suspend the Ex parte Applicant from the society was unreasonable, arbitrary and contravenes principles of natural justice as he was neither accorded a chance to prepare his defence nor given a chance to be heard.

13. THAT the decision contravenes the Ex parte Applicant's rights as enshrined under section 50 of the Constitution of Kenya in that:

- **He was not informed of the charges and not given sufficient detail despite requesting for the same**
- **He was not given adequate time and facilities to prepare a defense**
- **He appeared before a partial body which acted as the judge in their own cause.**

The Applicant further alleged that one of the committee members who confirmed in writing that the Applicant was not given a fair hearing was also suspended by the Committee. See Applicant's further affidavit of 15th February 2011.

(4) The Respondents' case is that the management committee of the 5th Respondent was mandated by section 15 of the society's By-Laws to suspend any member who acts in any way against the interest of the society and that because of the serious nature of the Applicant's misconduct which affected the normal running of the society's business, the notice summoning him to appear before the committee was reasonable in the circumstances. The Respondents gave their perspective on the factual position in paragraphs 8-15 of the Replying Affidavit of the 1st Respondent as follows:

“8. THAT [on] 20th September, 2010, the gate keeper reported to the society's manager, one Augustin Mutisya, that the Applicant herein permitted some suspended members of the society to return to the society and allowed them into the society's premises.

9. THAT on the same day at around 3 pm, the Applicant was issued with a letter summoning him to appear before us on 21st September, 2010 where the agenda of the meeting was to be read out to him. A copy of the said letter is annexed hereto and marked “MK-2”

10. THAT it is not true that the Applicant wrote to us a letter informing us that the notice of the meeting was too short and that he wanted to know the agenda of the meeting. The letter annexed to the verifying affidavit as exhibit marked “JMM-2” is a mere afterthought prepared by the applicant in order to misrepresent to this honourable court.

11. THAT the alleged letter by the Applicant was never served upon us as alleged and that is why it does not bear the society's stamp which is always embossed on all incoming mail received at the society manager's office.

12. THAT in any case when the Applicant appeared before us on 21st September, 2010, he was informed of the charges facing him as they were duly read out to him; and he admitted he made a mistake as evidenced in the minutes. A copy of the relevant minutes are annexed hereto and marked “MK-3”.

13. THAT it is clear from the said minutes that after the said charges were read out to the Applicant, he neither applied for an adjournment alleged nor was he prevented from applying for an adjournment by us nor prevented from calling witnesses.

14. THAT in addition, during the said meeting, the applicant never referred to the alleged letter by himself dated 20th September, 2010 the reason being that it was never there in the first place.

15. THAT the alleged breach by us of the rules of natural justice and contravention of the Applicant's

constitutional rights are denied vehemently since the Applicant was given an oral hearing and upon hearing the charges facing him he chose to go straight to the hearing of the case and there is nothing to show that he applied for an adjournment that was declined.”

(5) Against that background of alleged facts, the counsel for the parties made oral submissions and judgment was reserved. Regrettably, owing to overload of court business and official assignments outside the court, it has not been possible to deliver judgment earlier.

(6) Counsel for the Applicant, Mr. Jumbale, submitted that:

“The Ex parte Applicant was summoned to appear before the Board. The agenda was not disclosed. The notice was for one day. Allegations were made at the Board meeting and he denied. He was later suspended. He contends that he was not afforded a fair hearing. His right to a fair procedure was infringed. He was suspended and obtained reprieve through the court. The further affidavit attaches JMM 1 letter of Daniel Mutinda Maingi of 25th September 2010 confirming that the Applicant denied the charge. JMM 2 in the further affidavit shows that the said Daniel Mutinda was suspended from the management committee. I pray that the Applicant be reinstated to the society as well as an order to quash the suspension.”

(7) For the Respondent, Miss Ngigi, contended that the issue was one of procedure for the hearing of discipline cases for the co-operative societies. Citing a passage from Judicial Review: Procedure and Practice by Peter Kaluma at p. 142, counsel submitted that procedures before the quasi-judicial tribunals are not formal as court proceedings and that all that the court needs to be satisfied on is that the Applicant was accorded a hearing; that the Applicant was heard on the charges facing him. Counsel said:

“The notice [of the meeting] was given and depending on the circumstances of the case. The allegation of permitting members of the society into the office. It was urgent matter and the one-day notice was sufficient. The notice did not require to set out the agenda as the Applicant was already aware of the issue. I refer to the minutes attached to the replying affidavit as “MK 3” Min. J 12/09/2010. The Applicant already had notice of the what was to transpire at the meeting. The Applicant did not seek an adjournment as per the minutes. The letter of request of adjournment was not discussed.”

Counsel also argued that as the Applicant had been suspended until the AGM of April 2011 the matter was overtaken by events.

(8) The issue before the court is therefore whether the Applicant was afforded a reasonable opportunity to be heard on the charges that he faced before the management committee of the 5th Respondent Co-operative Society. It is an issue that is governed by authority. The locus classicus on the issue of fair hearing by quasi-judicial tribunals in East Africa is the decision of **De Souza v. Tanga Town Council (1961) EA 377** where the Court of Appeal for Eastern Africa considered the principles of natural justice on fair hearing. Sir Kenneth O'Connor, P. with whom Forbes V-P and Gould JA agreed set out the principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. Of these, the following are relevant to the present application: (See pp. 386-7)

(a) If no procedure is laid down [as is contended by counsel for the Respondent] there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue.

(b) The tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial; it need not examine witnesses; and it can obtain information in any way it thinks best.

(c) The person accused must know the nature of the accusation made.

(d) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view.

(e) The tribunal should see that matter which comes into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party it should give the other party an opportunity of commenting on it.

(9) The Constitution of Kenya 2010 has entrenched the right to a fair hearing under its Articles 47 and 50 which respectively provide, so far as material, that:

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

(10) Applying the law to the facts of this proceedings, the 5th Respondent Co-operative Society was bound in the exercise of its power to suspend members under section 15 of its By-Laws to ensure compliance with the principles of fair hearing under the rules of natural justice and as recognized by the Constitution.

(11) Upon evaluating the affidavit evidence presented, it is established that:

(a) The Applicant was served with a notice of the meeting of 21st September 2010 at 3.00 pm on the eve of the meeting;

(b) The charges or agenda of the meeting were not communicated prior to the meeting;

(c) The Applicant lamented the management's failure to indicate the agenda when at p. 3 of the Minutes it is recorded:

“Mr. Mwatu as well advised the management to always indicate the agenda of the meeting to any invitation letter since it is lawfully.” sic

(d) At some point in the deliberations, the Applicant was asked to leave the room purportedly for the Committee to deliberate a decision but in his absence a new charge by the Chairman of lack of respect for the management was made. The Minutes show at pp. 3-4:

“The chairman released Mr. Mwatu to leave the boardroom. After Mr. Mwatu left, the chairman welcomed the Board Members to come out with suggestions to conclude the issue of Mr. Mwatu... The chairman said that Mr. Mwatu had not respected the management as well as the society By-Laws.”

(e) There is no record in the Minutes of the meeting, which were prepared by the 5th Respondent, that the Applicant sought any adjournment of the meeting.

(12) I find that in inviting the Applicant on 20th September 2010 at 3.00 pm to a disciplinary meeting scheduled for the following day the 21st September 2010 without communicating the agenda of the meeting or the charges that the Applicant would eventually face at the meeting, and requiring the Applicant to leave the meeting when other charges are levied against him in his absence, the 5th Respondent was in breach of the principles of natural justice on Applicant's right of fair hearing regardless of whether the Applicant had an idea as to “what was to transpire at the meeting.” The duty is on the accuser to communicate the charges that the person charged is required to face to enable him to prepare his response to correct or contradict the charges.

(13) It is no answer for a Respondent who breaches an Applicant's right for fair hearing to say that the action has been overtaken by events because the suspension period is over. The period of suspension may be relevant in the computation of benefits of the Applicant from the Respondent so that if the suspension remains unchallenged, the Applicant has no basis to pursue such benefits as he may be wrongly be deprived on the strength of the suspension. Indeed, the Applicant herein seeks in addition to the order of certiorari an order for mandamus to reinstate him **“to the society with his full benefits without [loss] of his privileges and rights as a member of the society being interfered with.”** In such circumstances, an unlawful administrative action must be quashed even if the matter comes up for deliberation and decision in court after the expiry of the suspension period.

(14) Accordingly, for the reasons set out above, the Applicant's Notice of Motion dated 2nd December 2010 is granted as prayed with costs to the Applicant.

Dated and delivered this 11th day of December 2012.

EDWARD M. MURIITHI

JUDGE

In the presence of:

No appearance for the Applicant

Miss Mbulika for Mwangi Njenga & Co. for the Respondent

Mr. Buoro - Court Clerk