



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 18 OF 2009

**IN THE MATTER OF AN APPLICATION BY EDWARD K. BIRGEN FOR JUDICIAL
REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT NO. 12 OF 1997 AS
AMMENDED BY THE C-OPERATIVE SOCIETIES**

**(AMMENDMENT) ACT 2004 AND NANDI HEKIMA AND CREDIT CO-OPERATIVE
SOCIETY LIMITED RULES AND BY-LAWS**

AND

**IN THE MATTER OF THE DECISION/NOTICE OF THE DISTRICT CO-
OPERATIVE OFFICER NANDI CENRAL AND**

NORTH DISTRICT CONTAINED IN A LETTER DATED 23/12/2008

BETWEEN

**REPUBLIC.....APPLI
CANT**

AND

**THE DISTRICT CO-OPERATIVE OFFICER, NANDI CENTRAL DISTRICT.....1ST
RESPONDENT**

THE DISTRICT CO-OPERATIVE OFFICER, NANDI NORTH DISTRICT.....2ND
RESPNDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

EX-PARTE: EDWARD K. BIRGEN

RULING

The applicant, **Edward K. Birgen**, by virtue of Order LIII Rules 3 (1) 3 (2) and 4 (1) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, moved the court, by Notice of Motion of 13th February, 2009, to issue an order of Certiorari removing into court for the purpose of being quashed the decision/notice of the District Co-operative Officer, Nandi Central and Nandi North Districts (hereinafter, “the Respondents”) embodied in a letter dated 23rd December,2008 terminating the tenure of office of the Management Committee, Nandi Hekima Sacco Ltd. The applicant also sought an order of prohibition restraining the respondents by themselves or their agents from calling elections or constituting a new Management Committee of Nandi Hekima Sacco Ltd.

The applicant stated as grounds in support of the application that:-

- (i) On 23rd February, 2008, the 1st and 2nd respondents issued a letter to notify the duly elected Management Committee Members to vacate office by 20th January,2009;
- (ii) The said letter was issued in violation of the provisions of by-laws No. 37 (a), (b) and (c) of the Society and section 23 (5) of the Co-operative Societies Act;
- (iii) The said notice was issued without calling a special general meeting of all the stakeholders;
- (iv) The notice violates the issues agreed upon by the members and the 1st and 2nd respondents in a Special General Meeting held on 19th September, 2008 wherein the shareholders elected the current office bearers;
- (v) The notice is *ultra vires* and arbitrary as it purports to interfere with the tenure of the Management Committee and the same violates the Constitutional right of the applicant of electing leaders of his choice to run the Society;
- (vi) The respondents have no jurisdiction to disband the tenure of a validly elected Management Team.

The notice complained of reads as follows:-

“ RE: TENURE OF OFFICE

Following the stepping aside of the Management Committee on 18th September, 2008 and the Constitution of the Interim Committee, it was agreed that you be in office for one month to facilitate further investigations as raised by the inspection report of June 2008 done by this office. It is worth noting that you have been in office for more than one month and due to apparent misunderstanding among yourselves, you have not proceeded as agreed. This office therefore gives you upto 20th January, 2009 as the latest date to be in office and to have the investigations completed.

NB. As requested by the members during the general meeting on the 16/12/2009.

**D.K. Kerich
District Co-operative Officer
Nandi Central.**

”

The above letter/notice was addressed to the Chairman, Interim Committee – Nandi, Hekima Sacco Ltd.

The applicant's pleadings are set out in the Statutory statement dated 27th January, 2009 which was verified by an affidavit of even date. The two documents are in compliance with Order LIII Rule 1 (2) of the Civil Procedure Rules.

The applicant is a shareholder/ordinary member of the said society: Nandi Hekima Growers Saco Ltd (formerly Nandi Tea Growers Sacco Ltd) and deponed that he was duly authorized by the current Management Committee of the said society. He averred, *inter alia*, as follows:- that at the society's Special General Meeting held on 19th September, 2008, members resolved that the management committee be and was dissolved; that on 15th January, 2009 as he made a routine call at the society's offices, he learnt that the said notice had been served requiring the Management Committee to vacate office by 20th January 2009; that the Chairman of the said society had informed him that the said notice had been issued to pre-empt any move to recover debts owed to two officers of the District Co-operative Office; that as a shareholder of the said society, he should have been given an opportunity to make representations as to the disbanding of the Management Committee; that the said notice was therefore illegal, bad in law and defective and that the applicant has been deprived of his right.

David K. Kerich, the District Co-operative Officer – Nandi Central District, swore a replying affidavit on 14th April, 2009, which he filed the following day. He deponed, *inter alia*, that the said society held a Special General Meeting on 19th September, 2008 which meeting voted out the then existing Management Committee and elected an Interim Committee; that the said Interim Committee was to serve for 90 days as provided in section 23(5) of the Act; that the letter complained of was not an order, directive and/or judgment but merely communicated to the Interim committee what had earlier been decided upon by members in their Special Meeting of 16th December, 2008; that the deponent in sending the said letter exercised due diligence, observed the laid down procedures and was guided by the provisions of the Act, particularly Rule 23(5), and that, on advice of counsel, the applicant has no *locus standi* to bring these proceedings.

When the application came up for hearing before me on 29th March, 2011, counsel agreed to file written submissions which were in place by 17th May, 2011. Counsel for the applicant submitted that the letter complained of was indeed a directive as the same was not backed by a resolution of the members. In his view, the author of the letter had acted oppressively and the decision therein infringed upon the applicant's rights.

In his submissions in response counsel for the respondents argued that under Rule 23(5) of the Co-

operative Societies Rules, an Interim Management Committee should be in office for not more than 90 days and the Commissioner of Co-operatives is mandated by the same Act to make sure that the provisions of the Law are adhered to which role he has delegated to the District Co-operative Officer, in this case it was in that capacity that the impugned letter was written. In those premises, no rights of the applicant were violated. Counsel also submitted that it is doubtful that these proceedings were instituted with the authority of the society or its Management Committee.

Counsel also challenged the competence of the Notice of Motion on the ground that it contravened the provisions of Order 53 since the motion was not served together with a Statutory Statement and a verifying affidavit. What was served, according to counsel, was the Notice of Motion and a Supporting Affidavit which was irregular.

I have considered the application, the pleadings and counsels' submissions. Having done so, I take the following view of this matter. It is now settled that an order of certiorari can issue to quash a decision already made and it is issued if the decision is made without or in excess of jurisdiction or where the rules of natural justice have not been complied with or where the decision is clearly contrary to the law.

I will first consider what, in my view, are preliminary issues raised by counsel for the respondents. The 1st such issue is whether the motion on notice is competent. It was argued for the respondents that the notice of motion was served with only a supporting affidavit and not the requisite Statutory Statement duly verified by an affidavit. If indeed that omission had been demonstrated, I would have struck out the notice of motion for being incompetent. However, I have seen a Statutory Statement and a verifying affidavit in this record. Indeed, in his replying affidavit, **Mr. David Kerich**, the Nandi Central District Co-operative Officer responded to both statement and verifying affidavit. In the premises, I cannot strike out the motion for want of a Statutory Statement and a verifying affidavit.

The respondents have further challenged the *locus standi* of the applicant. They contend that the impugned letter was addressed to the Chairman of the Interim Committee, Nandi Hekima Sacco Ltd and not to the applicant or members of the Nandi Hekima Sacco Ltd. The applicant, in the view of the respondents, had therefore no basis to complain. Related to the foregoing challenge, is the contention that the applicant has commenced these proceedings without the authority of the Interim Management Committee or the society. The twin challenges were initially raised in the replying affidavit. I have not been able to trace the applicant's response to the same in a further affidavit and when the same challenges were made in the respondents' submissions, they remained unanswered. In those premises, I think the challenge is legitimate. The impugned letter was not addressed to him nor was a copy served upon him. He is not a member of the Interim Committee to whom the letter was addressed. His only connection with the letter was his membership of Nandi Hekima Sacco Ltd. Is membership of the said society sufficient to found a cause of action with respect to the impugned letter? I do not think so, otherwise all members of Nandi Hekima Sacco Ltd would swamp the courts with judicial review applications. The applicant however, swore that, he was duly authorized by the current Management Committee Members of the said society. He did not however annex the authority. In my view, written authority to commence these proceedings should have been given and exhibited. The applicant is not an agent of the said committee nor is he an advocate duly qualified to represent the committee or any one for that matter. He is also not acting on the authority of a power of attorney donated by the committee.

In the premises, I agree with the respondents that the applicant had no *locus standi* to commence these proceedings on behalf of the Interim Committee of Nandi Hekima Sacco Ltd.

In my view, even if he had *locus standi*, his application would have been for dismissal. I say so, because the applicant moved the court when the deadline for vacating office of the Interim Committee had lapsed. Since none of the members of the committee have complained, I am not certain whether they complied with the contents of the impugned letter. If they did, the efficacy of the orders sought would be brought into doubt.

I have also perused the pleadings herein. It is not in dispute that on 19th September, 2008, the entire

management committee of the society was dissolved and a new Interim Committee was constituted. The applicant expressly says so in paragraph 8 of his verifying affidavit. Being an Interim Committee, the tenure of its members was governed by Rule 23 (5) of the Rules made under the Co-operative Societies Act. The Rule reads as follows:-

“ 23 (5); If a general meeting removes a member of a committee, it shall forthwith elect a new member who shall hold office for the remainder of the term of the member so removed and where the entire committee is removed from office the general meeting may decide to elect or fix a day for election of an Interim Committee of not more than five members to hold office for a period not exceeding ninety days.”

So, under the above Sub-rule, the life of an Interim Committee cannot exceed ninety (90) days. Given that the Interim Committee of the Society was dissolved on 19th September, 2008, the Interim Committee elected then could not, under the above Sub-Rule, be in the office beyond 18th December, 2008. The impugned letter demanded that the Interim Committee of the said Society leaves office on or before 20th January, 2009. The letter is dated 23rd December, 2008, a mere five (5) days after the Statutory period, Under the Law. Therefore, the Interim Committee should not have been in the office on the said 20th January, 2009.

In view of the provisions of the said Sub-Rule, I am unable to find that the impugned letter was written without or in excess of jurisdiction. I also do not detect any breach of the rules of natural justice. The letter does not also disclose a clear breach of the law.

The respondents by their said letter were interested in compliance with the Law by the Interim Management Committee of the said Society.

The upshot is that this application is without merit and is dismissed with costs to be paid by the applicant.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE 2011.

F. AZANGALALA

JUDGE.

Read in the presence of:-

- (1) Mr. **Wanyonyi Martin**, holding brief for **Wanyonyi John** and
- (2) Mr. **Muiruri**, holding brief for Mr. **Abuta** for the respondents.

F. AZANGALALA

JUDGE

28/6/2011