



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 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 SECTION 47 & 50

BETWEEN

REPUBLICAPPLICANT

VERSUS

1. MATHEKA KITHOME
2. THOMAS MUTUA
3. PAUL MUTHUKUTHU
4. SAMUEL KIMEU
5. AKAMBA HANDCRAFT INDUSTRY COOPERATIVE

SOCIETY..RESPONDENTS

RULING

1. Before the Notice of Motion dated 21/12/2010 herein could be heard as scheduled on the 16/2/2011, the Hon. Justice Ibrahim directed that the parties submit on a preliminary point whether the High Court has jurisdiction to hear this dispute and not the Cooperative Societies Tribunal. Hearing was set for the 21/3/2011 but it did not take off.

2. The parties made their submissions before me on the 12/10/2011 and ruling was reserved for the 27/10/2011.

3. For the Respondent, it was contended that the dispute between the applicant, who described himself as a member of Akamba Handicraft Industries Cooperative Society Ltd, and the respondents whom he described as officials of the said society has a dispute concerning the business of the Cooperative Societies which according to S. 76 of the Cooperative Societies Act Cap 490 should be referred to the Cooperative Tribunal. It was argued that the suspension of the applicant as a member of the respondent society, which gives rise to the court proceedings, was the result of a finding by the respondents that the applicant had let in suspended members into the society compound an internal management matter which is properly within the competence of the Cooperative Tribunal. In addition, it was observed that the applicant had another remedy by way of an appeal to the General Meeting of the cooperative society under clause 15 of the Society's By-laws and that therefore, an order for certiorari and mandamus should not be granted where there are alternative remedies.

4. Counsel for the applicant replied that the orders of certiorari and mandamus sought in the Notice of Motion can only be issued by the High Court and that therefore the High Court is the proper forum. **HC. Misc. Appl. No. 247 of 2001 R-VS KUNZA RANCHING AND FARMING COOPERATIVE SOCIETY & ANO per R. Nambuye, J** was cited for that proposition. The applicant also cited the Public Officer Ethics Act Cap 183 which defines a member of a cooperative society as a public officer to emphasize the public nature of the proceedings and justify the judicial review proceedings, a position which was adopted in **R V- REGISTRAR OF COOP SOCIETIES & ANO EXPARTE EPHANTUS MUURIA KAREGI & SONS (2005) e. KLR per Ang'awa, J.** It was argued that By-law 15 did not exclude the right of the applicant to move to court for judicial review to address his complaint against the procedure adopted in his removal as a member of the respondent society. Counsel contended that the High Court has a supervisory jurisdiction over all *quasi-judicial* Tribunals and urged that the preliminary objection be rejected.

5. The point for determination in this preliminary objection is whether the dispute between the parties is a dispute concerning the business of a cooperative society which should be referred to the Cooperatives Tribunal as provided for under Section 76 of the cooperatives Act Cap 490. The two authorities cited by the applicant did not directly deal with that issue and I am not able to take much benefit from them. The **EXPARTE KWENJA** decision held that any aggrieved party may come to court to question or challenge the decision making process as a simultaneous right to a right of appeal to a minister and then to a Tribunal. The **KONZA RANCHING** decision is to the effect “that this court agrees that disputes dealing with purely cooperative affairs under the cooperative societies Act are outside the jurisdiction of this court saves for purposes of appeal under the relevant Act. However, as submitted by the applicant’s counsel the reliefs sought herein are by way of judicial review for orders of certiorari and mandamus. Then it is only the High Court which is vested with jurisdiction to entertain this application”.

6. In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws and rules. Such dispute must be referred to the Cooperatives Tribunal which under section 77 of the Act is required to be composed of a majority (4 of 7 members) of persons with experience in cooperative law and cooperative management and practice. See **GATONYE COFFEE GUARDS V. GITAU [1970] E.A. 361; R.VS- COMM OF COOP DEVELOPMENT EXP KABUTHI & ORG, 1969) EA 168.**

7. For disputes between members and the cooperative society or among members or between societies, which are outside the area delineated above in paragraph 6, the ordinary court system must be used. For instance a member who misappropriates society’s funds cannot avoid the criminal prosecution which may be preferred against him; a member who willfully destroys society’s property or commits torts against the society or its officers or members must be taken through court process; and so also the society when it fails to pay salaries (if any) to its members as employees or takes disciplinary action against its members or officers. In such cases the disputes are outside the restricted purview or the provisions of section 76 of the Act. See **LUKENYA RANCHING V. KAVOLOTO 1970) E.A. 414** and **WAKIRO V- COMM. OF BUGISU COOP 1968) EA 523.**

8. I find that the discipline of a member by a cooperative society for any reason including the performance of the member’s duties is outside the purview of section 76 of the Act. The dispute arising therefrom is not one “concerning the business of a cooperative society” as cooperative societies do not have as their business the quasi-judicial determination of discipline claims. When the cooperative society constitutes itself as disciplining 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.

9. Accordingly, I hold that the applicant's Notice of Motion dated 2/12/2010 is properly before the court and I reject the preliminary point taken by the Respondents.

10. As the preliminary point was argued at the invitation of the court, (Hon. Mr. Justice Ibrahim) there will be no order as to costs of the preliminary objection. The Notice of Motion shall be heard on a date to be fixed by the court in consultation with the parties.

Dated and delivered this 26th day of October 2011

**EDWARD M. MURIITHI
JUDGE**

In the presence of

..... **For Applicant**
.....**For the Respondent**
.....**Court clerk**

**EDWARD M. MURIITHI
JUDGE**