



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Appli 12 of 2006

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 READ WITH ORDERS 53
OF THE CIVIL PROCEDURE RULES**

AND IN THE MATTER OF: CO-OPERATIVE SOCIETIES ACT NO. 12 OF 1997

**AND IN THE MATTER OF: BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LTD
AND THE COMMISSIONER OF CO-OPERATIVE SOCIETIES**

BETWEEN

REPUBLIC APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE SOCIETIES.....1ST RESPONDENT

DISTRICT CO-OPERATIVE OFFICE NAKURU 2ND RESPONDENT

BOROP MULTIPURPOSE CO-OPERATIVE

SOCIETY LIMITED INTERESTED PARTY

RULING

According to the notice of motion filled here in the applicant in this Judicial Review Application dated 13th January 2006 is **Borop Multipurpose Co-operative Society Ltd**. [note the same applicant is also named as the interested party. They have sought for orders of *certiorari* to be moved to the High Court and quash the decision and findings of an Inquiry report by the **Commissioner of Co-operatives** dated 30th November 2005. The applicants have also sought for orders of **mandamus** and directed to the **Commissioner of the Co-operatives Societies** to release the inquiry report on **Borop Multipurpose Co-operative Societies Ltd** which was read on 30th November 2005. They also sought for a permanent stay of implementation of the findings of the recommendations of the enquiry report.

The grounds giving rise to the reliefs sought by the applicants are stated in the body of the application and more specifically explained in the supporting affidavit. The facts of the matter may be stated briefly as follows: -

According to the supporting affidavit of **John Rotich** who claims to be the chairman and the former chairman of **Borop Multipurpose Co-operative Society Ltd**, there was an order from the **Co-operative**

Tribunal Case No. 36 of 2002 whereby the society was ordered to hold elections and to be supervised by the Provincial Co-operative Officer Rift Valley Province. The elections were held on *8th June 2002* and the deponent contends that he and other members were elected as officials. However, the books of accounts and the properties of the society were not handed over to the deponent and his committee. There were also various court cases against the society to wit: - **H.C.C.C NO. 86 of 2002 - Doune Farm Limited –vs- Richard Soi & 4 others** and **Borop Multipurpose Co-operative Society Ltd**, at Nakuru, **HCCC No.102 of 2004 - Borop Multipurpose Co-operative Society –vs- Sonaiya Arap Serser & 3 others**, **HCCC No. 1561** at Nairobi – **Borop Multipurpose co-operative society –vs- Doune Farms Limited and 8 others** all pending in various courts. The applicant contends that the committee carried out their mandates of running the society with the committee members contributing money to meet the advocate’s fees for the pending cases and they have always been elected in the office.

On *14th June 2005*, the Minister of the Co-operative Society directed all the co-operative societies to file their returns and to amend their by-laws. The society was not able to comply with the directives because they claim not to have had the books of account and the audit reports were not carried out and they therefore sought for the extension of the deadline which was extended to *30th June 2005*. Although the applicant claims that they struggled to comply with the deadline, he alleges that the District Co-operative Officer refused to sign the books of accounts and by-laws. It is for that reason that the **Commissioner of the Co-operative Societies** ordered an inquiry to be conducted into the affairs of the applicant’s society. While conducting the inquiry the applicant contends that the Rules of Natural Justice were not followed. The inquiry was done in bad faith and actuated by malice and meant to embarrass and intimidate the office bearers from conducting the affairs of the societies effectively.

The applicant also accused the **Commissioner of Co-operative Societies** of acting capriciously in view of the pending court cases and the sole motive of conducting the inquiry was to replace the office bearers who were democratically elected. According to the applicant, no proper or complete inquiry could have been conducted when no books of accounts were handed to the committee. And lastly, the **Commissioner of Co-operatives** who is the 1st respondent failed or neglected to avail a copy of the inquiry report to the applicant.

This application was opposed by the 3rd respondent, **Borop Multipurpose Co-operative Society Ltd** through the firm of Kiplenge, Ogola and Mugambi Advocates. The 3rd respondent claims to be the interested party who would be affected by the orders sought herein and although they claim they were not served with the application, they obtained copies of the application from the court file and proceeded to file the grounds of opposition and a replying affidavit dated *14th March 2006*. According to the 3rd respondent, the **Commissioner of Co-operatives Societies** is mandated to hold an inquiry on the activities of a co-operative society. Upon holding an inquiry under **Section 61**, the Commission is further mandated to dissolve the society and if any member is aggrieved by the order of dissolution, they can appeal within sixty (60) days. Thus Counsel for the 3rd respondent urged that the first step the applicant ought to have taken was to file an appeal. The orders of *certiorari* can not be issued in this case for reasons that the applicant has not demonstrated that the 1st respondent lacked jurisdiction, acted in excess of jurisdiction or there was abuse of power.

Secondly, according to the supporting affidavit, the applicants clearly depone that they were interviewed by the inquiry committee and therefore they can not claim that there was breached of natural justice as they were heard.

Thirdly and more fundamentally, the applicants have not exhibited a copy of the report so that this court can be able to find out whether the allegations regarding the report have any merit. The application was also faulted for failure to comply with the provisions of **Order 53** of the **Civil Procedure Rules**. The application ought to have been issue tender against the republic and the respondents and the parties complaint against and the applicants are the subject not the interested parties. On this same point counsel for the 3rd respondent/applicant the application is also fatally defective for failure to include the statement of facts.

“Order 53(4) copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

In addition to the above provisions of the law, counsel for the 3rd respondent put forward the authority in the case of **Saleh Kiplangat Chebii –Vs- The University of Nairobi** in **HC Misc. Civil Case No. 925 of 2004** where the principles for granting orders of certiorari are articulated and procedure of applying for orders of Judicial review. In regard to the notice of motion filed herein which is accompanied by a document described “**Supporting affidavit**” there is no requirement for such document under **Order 53 (3) (1)** of the **Civil Procedure Rules**. In that case it was held that:

“It is not merely bad practice, it renders the Notice of Motion herein incompetent. The matters purportedly set out in the Supporting Affidavit ought to have been covered under the application for leave under rule 1(2) of the said order LIII, and not the Motion filed subsequent to the leave so granted.”

It is for the above reasons that counsel for the respondent urged this court to dismiss the notice of motion as lacking merit and being incompetent.

On the part of the 1st and 2nd respondent they did not attend court during the hearing but on the record I see a Notice filed by one **S. R. Orina** – the State Counsel for the 1st and 2nd respondent. The following points by way of notice of preliminary objection are listed

- 1. The application is misconceived premature.**
- 2. The applicants have not disclosed any reasonable cause of action.**
- 3. The applicants have not exhausted available machinery provided in settlement of disputes concerning business of a co-operative society under the provisions of Section 76 of the Co-operative Societies Act.**

In considering the remedies sought, I have taken into consideration that these are discretionary remedies which must be granted only on the basis of evidence and sound legal principles. See the case of **Weda & 14 Others –Vs- The Council of Legal Education Hc Misc. Appl. NO. 5 OF 1993 (unreported)**. Relevant considerations to bear in mind is that the discretionary powers must always be exercised in good faith, for the purpose for which they were granted and within their limits of the Act or other Instrument confirming the power. Discretion must also be exercised fairly, not capriciously, and in accordance with proper legal principles and these standards imply that all relevant considerations must be taken into account and that extraneous consideration be disregarded by the person or body exercising the power. (See **Halsbury’s Laws of England 4th Edition Vol. 1 Page 70**).

In this case the applicants complaint is that the 1st respondent set up an inquiry. Although they allege that it was actuated by malice and was in excess of jurisdiction among other allegations, there is no material that was presented before this court to show how the 1st respondent acted in bad faith or in excess of jurisdiction or without jurisdiction. The Provisions of the Co-operative Societies Act mandate the **Commissioner of Co-operatives** to hold and inquiry and the applicant has not shown how that inquiry was in breach of the law.

If the report was made to the Society Members the contents are not disclosed and a definitive demand for the report by the applicant is not clearly shown in these pleadings.

Secondly, the applicant has not exhibited a copy of the inquiry report or even the outcome of the said report which they say was read to the members of the society. And therefore this court cannot comprehend what is in the report which is said to be ultra-vires. The application by way of Notice of Motion is also defective for failure to comply with the provisions of **Order 53 Rule 4** of the **Civil**

Procedure Rules which clearly sets out a statement of facts should accompany the Notice of Motion. Due to this glaring defect I think I need not say more about this application but to dismiss it at this stage as lacking in merit and for being incompetent. The respondents shall have the costs.

It is so ordered.

Ruling read and signed on 3rd November, 2006.

MARTHA KOOME

JUDGE