



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Civ Appli 1614 of 2003

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
AND
IN THE MATTER OF: THE CO-OPERATIVE ACT NO.12 OF 1997
IN THE MATTER OF:-

1. REPUBLICAPPLICANT

AND

2. THE REGISTRAR OF CO-OPERATIVE SOCIETY1ST RESPONDENT

3. GAKUNDU FARMERS CO-OPERATIVE

SOCIETY LTD..... INTERESTED PARTIES/ 2ND RESPONDENT

EX PARTE APPLICANT

1. EPHANTUS MVURIA KWENJA

2. STEPHEN N.N. KAMURI

3. NYAGAH REUBEN NJERU

4. NDWIGA CHIETIA

5. ELIAKIM NTHIGA

6. JOSEPHAT NJERU KUBUTA

7. GEORGE NJERU ANDREW MVUNGU

8. JESEPHAT MUTO

9. IRERI NGURU CHIGINAH

NOTE: Andrew Mvungu –Named in chamber summons for leave but

not in main pleadings.

RULING

ON A PRELLIMINARY OBJECTION I PROCEDURE

I PROCEDURE

1. The Preliminary Objection arises as a result of a Judicial Review filed to this court by the exparte applicants in connection with the Co-operative Societies Act, 1997.
2. All the exparte applicant were committee members or employees of the Gakuru Farmers Co-operative Society which society deals with coffee, one of the best in Kenya. By powers given under the said Act, the Registrar of Co-operatives appointed two officers to make inquiries into the said Co-operative as a result of complaints received from members.
3. Two inquiry officers compiled a report (subject matter of the Judicial Review) and made recommendation that inter alia the committee members be surcharged Kshs.9,521,901/20 and the staff members Kshs.1,987,298/10 – a total of Kshs.11,509,199.30. That the findings of the inquiry be placed before a full meeting of the members for deliberation and discussions.
4. A meeting was held on 2.12.2003 and new office bearers were elected on 3.12.2003. During the court vacation the exparte applicants filed the Judicial Review before this High Court of Kenya at Nairobi and prayed that
 - b) Leave be granted to apply for orders of prohibition prohibiting the Registrar of Co-operative Societies and or his representative from implementing the recommendation of Gakundu Farmers Co-operative Society Ltd inquiry report read on 2nd December 2003 or any general members resolution in that meeting or any other meeting thereof.
 - c) An order of Certiorari to bring to this court and to have quashed the Registrar of Co-operatives inquiry report into the affairs of Gakundu Farmers Co-operative Society Ltd read to the members on 2nd December, 2003 recommending the removal, surcharge, dismissal and or warning and the ordering of elections for the management committee of Gakundu Farmers Co-operative Society Ltd be removed to this honourable court and be quashed.
 - d) That all persons elected on 3rd December 2003 be declared unlawful, illegal and irregular and that the same be nullified and proper election be held in accordance with the provision of the Co-operative Societies Act No. 12 of 1997.
 - e) That the granting of such leave do operate as a stay of the Inquiry Report delivered on 2nd December 2003 and all the subsequent recommendation of the Special General meeting.
 - f) That the cases of this application be provided for.
5. (As the matter came during the vacation there ought to have been two separate applications filed. The first application is for leave to be heard during the vacation under the Judicature Act Cap 8 rules 3 and the second separate application is the substantive application where, if leave is granted the court moves to hear the same). In this case prayer (1) sort to be heard during the vacation which in itself is irregular and should have been a separate application.
6. When the exparte applicants application came before Ojwang, Ag J (as he then was) leave was granted by him to bring an application for judicial review of prohibition and certiorari. The leave operated as a stay of implementing the inquiry report recommendation. The Hon. Judge declined to quash or declare that persons elected on 3.12.2003 were so elected irregularly.
7. The procedure thereafter leave has been granted, directing the exparte applicant to file a notice of motion within eight days, the file is placed before the Judge in charge of the Division on Constitution and Judicial Review application. Nyamu, J upon perusal of the file gave directions that the matter be heard by one Judge to be nominated by the Hon. The Chief Justice (18.1.2005).
8. On the 13.4.2005, the Hon. The Chief Justice set the date for hearing of the notice of motion dated

12.1.2003 (an error and should have read 12.1.2004) for the 5.7.2005. On the 1.7.2005 the Hon. The Chief Justice nominated me to hear the judicial review. This nomination was made outside the judges dealing with Judicial Review under the administrative powers given and or bestowed upon the Hon. The Chief Justice.

9. When the parties appeared before me on the 5.7.2005 the Attorney General was absent (1st respondent), the 2nd respondent was present and wished to raise a preliminary objection and the ex parte applicant wished to be heard. I directed that the main notice of motion and the preliminary objection be taken together. It was evident that as the ex parte applicants' advocate began to address this court his voluminous proceedings did not scincronize with those held by the 2nd respondent. An attempt to pagenate the same proved unworkable. The 2nd respondent sort to have his preliminary objection heard. When he addressed the court, it later transpired that the advocate for the 2nd respondent was in fact never on record. His pleadings was therefore struck out (7.7.05). There were 2 –3 advocates already on record for the 2nd respondent. The court allowed the ex parte applicants to peaganent their Notice of Motion and record. Instead they amended their records when the matters came for hearing on 12.7.2005, the 1st respondent was present, the 2nd respondent had by now regularize their position and served the former advocate on record under Order III r 7 Civil Procedure Rules, that they are now taking over the conduct of the case. Both the 1st and 2nd respondents advocate sort to raise preliminary objections to this court on the Judicial Review. This court granted them leave to do so up to 19.7.2005.

10. It is these Preliminary Objections that is the subject of this ruling.

II PRELIMINARY OBJECTION to the Judicial Review

11. The 1st respondent objections being

(a) The application is misconceived and premature had in law and an abuse of court process as the same is non suited,

(b) That the application is instituted against wrong party and discloses no cause of action as the action complained originated from members of Gakuru Farmers Co-operative Society in a general meeting held on 2nd December 2003.

c) That this Honourable Court does not have jurisdiction to hear and determine this matter and the orders the applicants are seeking are not obtained in this court and offered the provision of Section 73 and 74 of the Co-operatives Society Act Amendment of 2004.

d) That the applicants have not exhausted available machinery provided in settlement of disputes concerning the business of a Cooperative Society under the provisions of Section 76 of the Cooperative Societies Act Amendment of 2004.”

Accordingly this case should be struck out with costs to the 1st respondent.

12 The 2nd respondents objection being therefore:-

(a) That the application is fatally and incurably defective and ought to be struck out for failing to comply with the mandatory provision of Order 53 of the Civil procedure Rules as read together with Section 8 and 9 of the Law Reform Act Cap 26 – Laws of Kenya.

III ARGUMENTS BY RESPONDENT

13. The Attorney General for the Registrar of Co-operative Society argued that the application be dismissed as the orders sort was against the Co-operative Society which is a private body that is invested in the members. Judicial Review is only available to a public body. The Registrar of Co-operative Society is empowered under Section 58 of the Act (No. 12/1997) to inquire into the workings of the society and place the findings before a general meeting of the Society. It is the meeting which directs what steps to be

taken and not the Registrar. The effect of the Judicial review is to bring the members resolution and not the Registrar's findings into court for purpose of it being quashed. This cannot be as the Co-operative Society is a private body as such judicial review cannot be supported. He attempted to rely on case law to this effect which he later withdrew for other reasons. The state counsel further argued that the court procedure lies in Section 74 of the Act whereby a person who is aggrieved with a decision may appeal to the minister. If they are not satisfied they should appeal to the tribunal. Nonetheless if the dispute arises within its past members then the dispute must be referred to the Cooperative tribunal. Within 30 days of the tribunals decision the aggrieved party may appeal to the High Court. The exparte applicant came direct to the High Court, to his mind, this was wrong.

14. The advocate for the exparte applicant in reply to this brought to this courts attention to the Public Offices Ethics Act 2003 whereby the definition of a "public office" has been described to mean :-

".....any officer, employee or member, including an unpaid, part time or temporary officer, employee or member of any of the following

"a)

b).....

c).....

d).....

e) A Co-operative Society established under the Co-operative Society Act".

14. This means that the members of a Co-operative Society Act in their given capacity as public officers. An earlier decision (later withdrew by the 1st respondent) implying that this matter does not fall under judicial review by its private nature may have been so decided without these facts being given to the said judge.

16. At this stage, I wish to just bring out the point that

16(a) "Judicial Review" is concerned not with private rights or the merits of decision being challenged, but with the decision making processes"

Commissioner of Lands v Kunste Hotel Ltd

Nakuru CA 234/95 Akiwumi, Pall JJA Bosire Ag.JJA

16.(b) "The purpose of Judicial Review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court".

P.V Society of State for Education and Science ex parte Avon County Council (1991) 1 all er 292.

16.(c) "Judicial Review tackles errors of law and unlawfulness procedural, improperly, irrationality, abuse of power..... human rights (violation)" Nyamu, J.

16.(d) "Judicial Review is a process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and the bodies, a person who carry out quasi-judicial functions or who are charged with the performance of public acts and duties."

"This jurisdiction was originally derived from the common law and was exercised by the issue of the preagotive witness of mandamus, certiorari and prohibition but it is now confirmed and regulated by statute and rules of courts. Judicial Review is concerned with reviewing not the merits of the decision in

respect of which the application for judicial Review is made but the decision making process” Halsbury Laws of England.

17. I outline the above definition on Judicial Review to bring out the point that any aggrieved party may come to court to question and or challenge the decision making process. I give examples of a case, not necessarily similar to this one, whereby one magistrate in the subordinate court settled the issue of taxation/costs in several cases from several courts within the districts in one file which was duly consolidated without reference to the other side and or party. The correct procedure is to appeal against such decision but the aggrieved party has a right to also apply for a judicial review to stay the proceedings. The court in noting the irregularity in the procedure would grant leave to bring in an application for judicial review. If there is an appeal already filed, the court would await the finalization of the appeal. In this judicial review, the ex parte applicants have a right to come to court to challenge any irregularity in arriving at the decision against them either by the inquiry report and or decision of the general meetings. They have simultaneously the right to appeal against the inquiry report to the minister, then to the tribunal.

18. I decline to uphold the preliminary objection by the 1st respondent.

19. Sir Charles Nevebold P. (Mukisa Biscuit Co. v West End Distributors 1969 EA 699) stated that:- “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought the excise of judicial discretion”.

20. The 2nd respondent herein raised points of law. This was on the format of the pleadings before the court.

21. The second respondents advocate began his arguments by stating that judicial review proceedings are of a special nature. It has its roots in the Law Reform Act Cap 26 Section 8 and 9. The applicant (ex parte) when filing its statement included therein grounds that would normally be found in the verifying affidavit when this point was raised the exparte applicant proceeded to amend the pleadings. The effect of such amendments would go contrary to Section 9(1) (c) and Order 53 r 4(2) CPR. The law requires that any amendments that is to be made, a notice must first be given to the party and copies of the further affidavit be made. This had not been done in this case.

22. As the court, I wish to just comment on how these amendments came about. As stated earlier above (para 10), the ex parte applicants proceedings by way of notice of motion was voluminous and had not been paginated for ease of reference. It was expected during the next hearing date that this would be done. It was quite evident thereafter that major amendments had been undertaken to the statements and the verifying affidavits without notice to the other parties or to the court. This is contrary to the provisions of Order 53 r 4 Civil Procedure Rules. In his reply the advocate for the exparte applicant stated that this court permitted him to do amendments. The procedure though under Order 53 r 4 Civil Procedure Rules is that there must be a notice to this effect. No leave is sort but a procedure is followed. What was pointed out was the pagination of the document. Adequate time had been provided to the ex-parte applicants, which was not taken advantage of. I would accordingly agree with the 2nd respondent that the amended documents were indeed filed contrary to Order 53 r 4(2) Civil Procedure Rules and the same is accordingly struck out.

23. This leaves the original documents that was filed in December 2003. The said documents do not comply with the requirements of Order 53 Civil Procedure Rules. I am persuaded by the arguments of the 2nd respondent that the pleadings as they stand cannot be permitted in law to comply with what is termed to be a Judicial Review. It is the verifying affidavit which should be deponed to and contain all the facts relied upon and not the statement.

24. I accordingly uphold the preliminary objections by the 2nd respondent. I struck out this Judicial Review application with costs to the 2nd respondent. The 1st respondent to bear their own costs.

Dated this 25th day of July 2005 at Nairobi.

M. ANG'AWA

JUDGE

Gitonga Muriuki & Co. Advocates for the applicant

Attorney General the 1 respondent

Mohammed Muigai & Co. Advocates for the 2nd respondent