



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI
MISC. NO.302/02

IN THE MATTER OF AN APPLICATION BY KANDARA
FARMERS CO-OPERATIVE SOCIETY LIMITED

FOR ORDERS OF CERTIORARI AND MANDAMUS
IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT CAP 490
LAWS OF KENYA

AND

IN THE MATTER OF KANDARA FARMERS CO-OPERATIVE SOCIETY
LIMITED

AND THE REGISTRAR OF CO-OPERATIVES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR FOR CO-OPERATIVE SOCIETIES.....RESPONDENT

KANDARA FARMERS CO-OP. SOCIETY LIMITED

KANDARA HOUSING CO-OP SOCIETY LIMITED

KIANYINGI FARMERS CO-OP. SOCIETY LIMITED.....INTERESTED PARTIES

NDINGA FARMERS CO-OP. SOCIETY LIMITED

NEW GAKUI FARMERS CO-OP. SOCIETY LIMITED

R U L I N G

Kandara Farmers Co-operative Society Limited (hereinafter referred to as the Applicant) has moved this court under order LIII of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 8 of the Law Reform Act (Cap 26) seeking:

1.) *An order of Certiorari to remove to the High Court and quash the decision of the Registrar for Co-operative Societies (hereinafter referred to as Respondent) to liquidate the Applicant and to appoint a liquidator for the exercise.*

2.) *An order of mandamus directed to the Respondent to allow bona fide officials of the Applicant duly elected on 23rd August 2002 to operate without fetter and to confirm the status of the Applicant as legal and further to cancel and or recall any instructions given pursuant to the order of 6th September 2002.*

3.) *An order of Prohibition restraining the Respondents from issuing any order for liquidation of the Applicant for as long as the Applicant satisfies the requirements of the law.*

The requisite leave for the application was granted on 6th November 2002 by Hon. Juma J. who also ordered that the leave should operate as a stay of the liquidation order pending the hearing of this application.

In support of the application Fredrick Muturi who purports to be the secretary of the Applicant has sworn an affidavit in which He depones that the former management committee of the Applicant was voted out at a meeting held on 1st March 2002 and that pursuant to a notice issued on 1st August 2002 a meeting was held on 23rd August 2002 during which meeting new officials (including himself) were elected. He maintained that no resolution was arrived at to dissolve the Applicant and that the officials were surprised when served by an order of the Respondent for dissolution of the Applicant on the grounds that it has less than ten members when in actual fact the applicant had about 9,000 members in their register. He maintained that the order for dissolution was motivated by corruption and was illegal, null and void.

On 10th January 2003 a notice of motion was filed by Kandara Farmers Co-operative Society Limited, Kandara Housing Co-operative Society Limited, Ndinge Farmers Cooperative Society Limited and New Gakui Farmers Cooperative Society Limited as interested parties seeking orders:-

1.) *That the interested parties be made a party to this suit to enable the court effectively and competently adjudicate and settle all questions involved in this suit.*

2.) *That this Honourable Court be pleased to set aside or vary the order of stay issued on 6th September 2002.*

3.) *That the Honourable Court be pleased to direct That the Applicants do account to the following sums collected on behalf and in the names of Kandara Farmers Co-operative Limited: -*

(i) A sum of about Ksh.3.9 Million given as Advances by Thika Coffee Mills on 21st to 24th December 2002.

(ii) The rents collected from Kandara Housing Co-operative which has not been banked in any society's accounts.

(iii) To account the Society's vehicle which has been used for works other than the Society's work.

On the 16th January 2003 the suit came before Honourable Juma J. for Hearing He adjourned the application dated 17th November 2002 and granted leave to the parties to file further affidavits. Honourable Juma J. also granted the application dated 10th January 2003 as prayed. While it is not clear whether that meant that prayers (2) and (3) of that application were granted, it is obvious that the interested party were by virtue of the order made by Honourable Juma J. made a party to the suit.

On 13th January 2003, the Respondent filed grounds of opposition, objecting to the Notice of Motion dated 27th November 2003, inter alia on the grounds that the same was frivolous, vexatious and an abuse

of the court process, that the Applicant had no legal capacity to institute the proceedings; that the Applicant had withheld material facts and was not coming to the court with clean hands.

An affidavit sworn by Fredrick Odhiambo a Senior Deputy Registrar was filed in support of the stated grounds of objection. The gist of the Respondents contention is that the meetings purported to have been held on 23rd August 2002 and 4th October 2002 were illegal meetings as same were held in contravention of the Co-operative Societies Act and the Societies by-Laws, and the Management Committee of Kandara Farmers Co-operative Society therefore remained as reflected in the minutes of the society held on 1st March 2002, 22nd March 2002 and 21st June 2002 respectively during which meetings the society also resolved to split into seven new societies which societies were registered on 12th September 2002 under section 7 of the Co-operative Societies Act, and the liquidator was already in control of the affairs of Kandara Farmers Co-operative Society Limited and therefore proceedings in respect of Kandara Farmers Co-operative Society could only be done by the liquidator.

For the interested party a replying affidavit was sworn by John Ngugi Ndegwa who claims to have been the chairman of Kandara Farmers Co-operative Society Limited upto September 2002 when the Society split into 7 societies and Kandara Farmers Co-operative Society was no longer in existence its registration having been cancelled on 12th September 2002 and that the Applicants misled the court into granting interim orders pursuant to which the Applicants are looting and misusing the Societies' property with impunity.

Mr. Nzioka who appeared for the Applicants urged the court to grant the orders sought as the registration of the Societies other than Gakii was done illegally and in contravention of a court order and goes against the spirit of co-operation.

The Applicant herein has sought orders of Certiorari , mandamus and prohibition. The Court of Appeal decision cited by Mr. Muriuki, i.e. *Kenya National Examination Council and Republic Civil Application Number 266 of 1996* is quite instructive on when these orders will issue. The Honourable Judges of Appeal in considering each remedy had the following to state.

On prohibition:-

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.”

On Mandamus:-

“an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performedif the complaint is that the duty has been wrongly performed i.e. that the duty has not been performed according to the law then Mandamus is the wrong remedy to apply for because like an order of prohibition an order of Mandamus cannot quash what has already been done.”

On Certiorari:-

“only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

Having set out the circumstances under which these prerogative remedies may be granted, it now behoves me to consider the facts of this case and whether an appropriate case has been made out to justify

the granting of these remedies.

The issues raised in this application include the issue as to whether the Applicants have the locus standi to bring this suit. It was contended on behalf of the Applicant that its bona fide officials were the ones elected at the meeting held on 23rd August 2002.

This is denied by the Respondent and the interested parties on the grounds that the meeting held on 23rd August 2002 was not properly convened. It is further contended that Kandara Farmers Co-operative Society having been dissolved, it was no longer in existence and could not therefore maintain an action.

I have considered the affidavits and the annexures and do find that it is not true that the management committee of the Applicant was voted out at the meeting held on 1st March 2002, as minutes which have been exhibited do not have any minute to this effect. I find further that the meeting purported to have been held on 23rd August 2002 was not convened by the officials of Kandara Farmers Co-operative Society, nor was it convened in accordance with the Society's By-Laws. The meeting was therefore not a legal meeting and the purported election of officials not legal. That is to say that the officials allegedly elected on 23rd August 2002 were not bona fide officials of the society and have no right to institute any proceedings on behalf of the Applicant.

As to whether the Applicant was still in existence or had been dissolved. It is apparent from the minutes of the meeting held on 21st December 2001 that a preliminary resolution was passed for sub-division of the Applicant into two societies. A meeting was subsequently held after ninety days on 22/3/02 which meeting amended the preliminary resolution of 21/12/01 by resolving that the Applicant should be subdivided into seven companies. At a meeting held on 21st June 2002 a secondary resolution was passed re-affirming the resolution passed on 22/3/02 to divide the society into 7 societies.

This meant that the provisions of section 30 of the Cooperative Societies Act Number 12 of 1997 came into play Section 30 (9) states:-

“If the Registrar is satisfied within such time as He considers reasonable that the Provisions of the secondary resolution and the provisions of this section have been complied with. He may register the societies into which the existing society has been divided and the by laws of such societies and thereupon:

(a) the registration of the existing society shall stand dissolved.

(b) the registration of the new societies shall be sufficient to vest the assets and liabilities of the existing society in the new societies in the manner specified in the preliminary resolution as confirmed.

(c) the remaining members of the existing society shall become members of one or other of the new societies as is provided by the preliminary resolution as confirmed.....”

It is evident that the Respondent had a statutory duty to register the new societies once the relevant resolutions had been passed as provided in Section 30 (Act number 12 of 1997).

From the annexure F. O. 9 to the affidavit of Fredrick Odhiambo, it is evident that 6 of the new Societies were registered on 12th September 2002 while New Gakui Farmers Co-operative Society Limited was registered on 27th August 2002. The Respondent therefore effectively dissolved the applicant on 12th September 2002 when the registration of the new societies was completed. The dissolution was by operation of the law vide section 30 (9) (a) of Act Number 12 of 1997.

The Respondent however by his notice dated 6th September 2002 purported to dissolve the Applicant under Section 62 of Act 12 of 1997 which empowers the Respondent to dissolve a society which has less than the prescribed minimum of 10 members. It is evident that the Respondent acted in excess of his jurisdiction in dissolving the Applicant and appointing a liquidator on 6th September 2002 as the process

of registering the sub-division was not complete and the applicant was still in existence with its membership intact except for the split in respect of New Gakui Farmers Cooperative Society which had been registered. Moreover the Applicant had also discussed and resolved not to appoint a liquidator but to appoint an arbitrator to guide it on the distribution of its assets among the 7 societies. This was therefore an appropriate situation in respect of which an order of Certiorari ought to have issued to quash the order for dissolution and appointment of a liquidator which orders were made in excess of jurisdiction.

However it is apparent that this application has not been initiated by the Applicant who ceased to exist on 12th September 2002 by the registration of the new societies. It therefore has no capacity to maintain an action in its own name.

The prayer for an order of Mandamus fails first because the persons purported to have been elected on 23rd August 2002 are not bona fide officials of the Applicant and secondly because the order of Mandamus was sought to regularize an action already taken which cannot be done by way of Mandamus.

The remedy of prohibition cannot also be granted as the applicant does not exist and also because there is no justification under these circumstances for granting such an order in perpetuity.

The upshot of the above is that the application dated 27th November 2002 fails. Same is therefore dismissed with costs.

Orders accordingly.

Signed and delivered this 14 th day of January 2004.

H. M. OKWENGU

JUDGE