



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISC. APPLICATION NO. 176 OF 2003

KONZA RANCHING & FARMING

CO – OPERATIVE SOCIETY LTD ::::::::::: APPLICANT

VERSUS

REGISTRAR OF CO-OPERATIVES ::::::::::: RESPONDENT

RULING

The Notice of Motion dated 20.11.2003 is brought pursuant to Order 53 Rule 3 Civil Procedure Rules. The ex parte applicant is Konza Ranching and Farming Cooperative Society Limited. The respondent is the Registrar of Co-operative Societies.

The applicant seeks the following orders

1. That an order of Prohibition do issue directed to the respondent and or his agent prohibiting him from holding an inquiry into the by-laws, working and financial conditions or any other affairs or dealings of the applicant as ordered by the respondent vide his order of 10.9.2003 and gazetted on 9.10.2003 vide gazette Notice 7267.
2. That an order of certiorari do issue directed to the respondent to remove into the court for purpose of quashing the order of the Senior Deputy Registrar of Co-operative Societies dated 10.9.2003 and published in the Kenya Gazette on 9.10.2003 directing that an inquiry be made into the by laws, working , financial affairs of the applicant.
3. That an order of mandamus do issue directed at the respondent compelling him to officially release to the applicant the correct inquiry report of 1994 and the recommendations made there under and approved on 22.8.2003 by Commissioner of Cooperative for implementation before this enquiry can be done.

Leave was granted by this court on 12.11.2003 and the same was to operate as stay of the enquiry till this application is determined. The applicant filed the necessary notice to the Registrar, a statement of facts and verifying affidavits by one David Mutangili the chairman of the applicant. I do note that both the statement of facts and affidavit is quite lengthy but will try and sum up the facts of the applicants case.

The applicant is a co-operative society within the meaning of Section 4 and 5 of the CoOperative Societies Act No. 12 of 1997 and incorporates all the co-operative principles including autonomy and independence and democratic member control amongst others. On 13.8.2003 the applicant received a letter from the respondent which indicated that there were complaints of mismanagement by the management committee of the applicant and directed an Annual General Meeting be held to iron out the accusations. The applicant denies having been aware of the accusations levelled against the applicant

before. The Annual General Meeting was held on 13.9.2003 where views were aired in the presence of the respondent's representatives.

The membership voted against an enquiry being held. On 19.9.2003 the respondent wrote to the applicant endorsing an inquiry order dated 10.9.2003 from the Registrar. It is the applicants contention that the said order was not made in good faith as it was made after the respondent heard a few members of the society and did not hear the rest contrary to the rules of natural justice and further that the respondent is not impartial as they have always favoured the earlier management who were removed from office for alleged mismanagement who were expelled and they have several cases between the applicant and the former management. The cases are listed at para 16 of the statement of facts. two of the cases are finalised while 4 are still pending before the courts. The applicants believe the interested parties who are complaining about the management are instigated by the ousted management committee. The various complaints written by the interested parties are annexed (DM13,14 and 15). It is also the applicants contention that the inquiry will interfere with the cases pending before the court because the inquiry will touch on issues of finance and management which are still pending before the courts. The other issues raised by the applicants are that the inquiry report of 1994 has never been released to the Annual General Meeting of the applicant for purposes of implementation and that is why they seek order of mandamus so that the said report is released to the applicant before another inquiry is conducted.

The application was opposed. The State counsel filed grounds of opposition in which it is contended that the respondent intended action is to resolve the wrangling amongst the members of the society, diffuse tension and it is denied that the respondent has acted contrary to the provisions of section 58 of the Co-operative societies Act, has not acted in excess of his jurisdiction and the inquiry is for purposes of establishing the soundness of the applicants management policy and recommendations. A replying affidavit sworn by a Senior Deputy Registrar of Co-operative Societies Mr. Fredrick Odhiambo was also filed. The grounds as filed are reiterated the grounds and added that there is evidence that there has been tension and wrangling amongst the members evidenced by the numerous court cases and that there is no likelihood of the Registrar interfering with the pending cases. There is no evidence that they have been shielding former officials of the applicant. That the applicant has not shown that the Registrar has acted in excess of his powers or jurisdiction.

After considering the submissions of counsels the questions that seem to arise are as follows:-

1. By issuing the order of 9.9.2003 was the Registrar of Cooperatives acting in excess of his jurisdiction.
2. Did the Registrar act capriciously, maliciously or unreasonably in issuing the orders.
3. What would be the effect of the inquiry on the pending cases between the applicant and their former members.
4. Was the inquiry report of 1994 released to the applicants and if not should it be released before another inquiry can be conducted.
5. Can the orders sought issue.

I will start by considering the scope of the prerogative orders sought. I start by noting that Sections 8 and 9 of the Law Reform Act Cap 26 gives the High Court power to issue the orders of certiorari prohibition and mandamus. These provisions are derived from the English Legal System and Halsburys Laws of England 4th Edition Volume I page 102 paragraph 89 has this to say of the scope

“ In so far as the orders are concerned with jurisdictional control mandamus will be appropriate to compel a tribunal to exercise jurisdiction which it possess but declines to exercise; prohibition will be appropriate to restrain a tribunal which assumes or threatens to assume a jurisdiction which it does not possess provided that the proceedings have not terminated and certiorari will be appropriate to quash the decision of a tribunal which has

assumed a jurisdiction which it does not possess.”

Counsel for the applicant referred the court to Supreme Court Practices VI Part I 1997 and the court has also looked at Halisburys Law of England Volume 1 4th Edition which says that these orders lie against inferior courts, tribunals, or against any persons or bodies, having legal authority which perform public duties or functions. In the present case the Registrar was performing a public duty when he made the decision to carry out an enquiry on the applicant, he had legal authority to do so conferred by Section 58 of the Co-operative Societies Act. His decision affects the rights of the members of the applicant and he was required to act judiciously and is therefore subject to the control of these prerogative orders if the need arises.

Section 58 of the Co-operative Society Act No. 12 of 1997 under which the respondent issued the inquiry order provides as follows:-

“58(1) The registrar may, on of his own accord, and shall on the direction of the minister, as the case may be, or on the application of not less than one third of the members present and voting at a meeting of the society which has been duly advertised hold an inquiry or direct any person authorised by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.”

In the notice annexed to the statement of fact as DMM 13 the Registrar was specific that the decision to carry out the enquiry was of his own accord. Under the above quoted section the respondent could have carried out an inquiry on the order of the Minister of Co-operatives or on the application of not less than one third of the members voting at a meeting. Of course the respondent must have had reasons that moved him to make that decision. It is admitted in the grounds of opposition filed and his affidavit that he intended to resolve wranglings amongst the members of the society. It was submitted for the applicant that the respondent had on 13.6.2003 asked the applicant to hold an Annual General Meeting because of complaints of some members. The letter of complaint DMM15 addressed to the respondent is signed by 20 people and dated 5.2.2003 including the interested parties and another dated 4.4.2003. Both were complaining about mismanagement of the society. The 3rd is dated 28.5.2003 signed by the 1st interested party. There is also a letter dated 19.8.2003 written by the Permanent Secretary Ministry of Co-operatives to the three interested parties in which the Permanent Secretary promised to take appropriate action to address their grievances. I believe it is a result of the complaints by the interested parties and a few other people that the respondent decided to issue the inquiry order. The applicant denies that they had been served with the complaints.

There is no evidence that the respondent had given the applicant a chance to be heard with a view to resolving these grievances. It seems that the respondent listened to the grievances of a handful of the members and decided to carry out an inquiry. The applicant comprises about 1500 members. As earlier noted one of the principles incorporated in the ruling of the democratic member control. In considering the grievances of about 20 people the Registrar should have considered the interests of the majority who are the rest of the membership. I believe whatever decision the Registrar made should have taken into account the interests of the society at large.

The Registrar's decision was unfair in that the applicants were not given a hearing and there is no evidence that the applicants had been notified of the complaints and the Registrar was therefore in breach of rules of natural justice.

What I found curious about the Registrar's action is that on 18.6.2003 he directed the applicants to hold an Annual General Meeting which was held on 13.9.2003. This is the forum where issues like those raised in the letters of complainants should have been raised but it seems those complaining did not raise any. Even when the Annual General Meeting was taking place it seems the respondent had already made up his mind to hold an inquiry of the applicant because the inquiry order is dated 10.9.2003 though gazetted on 9.10.2003. Why would the Registrar want the applicant to hold an Annual General Meeting when in infact an inquiry was in the pipeline. There is a cost implication to all these ventures which the applicant bears. This cannot have been done in good faith. Under Section 58, the Registrar indeed has jurisdiction to carry out inquiry. His jurisdiction cannot be denied in this case. However, in the present

case all that this court is looking at is whether the process of ordering an inquiry was done in accordance with the law. This is what the Court of Appeal held in **REPUBLIC V. UNIVERSITY OF NAIROBI IN CIVIL APPEAL 73/01**. In my judgement, I do find that there has been breach of rules of natural justice and bad faith displayed by the respondent.

Can an order of mandamus issue as prayed? Counsel for applicant submitted that the respondent has never released the enquiry report of 1994 to the applicant and requests that it be released first before another enquiry can be held. The respondent never confirmed whether or not the said report was ever released. The applicant has annexed the reports DM6 and DM8. DM6 was signed but DM 8 was not signed and it is said to be false. I note that the recommendation in both reports are not similar and yet they are supposed to be one document, prepared by the same people in respect of the applicant. Mr. Orina for the respondent properly submitted that under Section 58 (3) of the Co-operative Societies Act, the Registrar only needs to table the report and its findings and it is upon the society to decide what to do with it. The unsigned report DM8 which was allegedly issued to the applicant can not be said to be the inquiry report. Besides there is a similar one DM6 but with different recommendations. It was only proper that the Registrar do issue the proper report to the applicants. The signed report made recommendation on the then management committee. May be if it had been presented some of the cases now pending could have been averted as they all revolve around mismanagement and expulsions. There would be no reason why the Registrar would carry out an inquiry which is at the expense of the members, then keeps the reports on the shelves. An inquiry report is supposed to be for the benefit of the society. The respondent should release the correct inquiry report of 1994 before another inquiry can be carried out.

There are pending cases between the applicant and former officials. In H.C.C. 33/00 the plaintiff claims damages against the applicant. The applicants has counterclaimed for damages resulting from negligence and general mismanagement of the applicant.

In S.P.M.C.C. 204/00 Machakos, the plaintiff sued the chairman of the applicant for defamation. It is the defence in that case that the alleged defamatory words were published during the discharge of his duties as chairman of the society. The allegations touch on mismanagement and theft of society property. All these issues are what the Registrar is likely to investigate during the inquiry. There is no way that the inquiry would not touch on these matters. They are sub judice.

The sum of this is that the prayers sought by the applicant in the Notice of Motion of 20.10.2002 are hereby granted. The order of 10.9.2003 and gazetted on 9.10.2003 is brought forth by order of certiorari for purposes of being quashed; the respondent is prohibited from going ahead with the inquiry into affairs of applicant and or order of mandamus being conducted. The respondent to release the inquiry report of 1994.

Dated, read and delivered at Machakos this 28th day of September 2004.

R. V. WENDOH

JUDGE