



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 179 OF 2002

1. RICHARD M. MWAMBURA
2. RASHID MUTETI
3. REUBEN WABOMBA
4. DAVID LENJO
5. CHARLES DUDU
6. FATUMA H. FAKI
7. ALI H. MZEE
8. KHAMIS KINIRINGO
9. MOHAMED OMAR APPLICANTS

AND

1. THE CHIEF MAGISTRATE, MOMBASA
2. SAIDI OMAR MWANAMCHUNGA
3. PHILIP TAIFA OMONDI
4. CHARLES OTIENO MAGANDA
5. WALTER ALLAN SIEF
6. OMAR JUMA TUNZA
7. JOSEPHINE KHAMETE CLEMENT
8. JUMA SALIM RESPONDENTS

RULING

Notice of Motion in this application bears the Courts rubber stamp dated 22nd May, 2002, but according to the Courts Receipt, it was filed on 31st May 2002. It is seeking mainly three orders which according to prayers 1, 2 and 3 are as follows:-

1. That an Order for Certiorari be issued thereby quashing the judgement or Order or decree entered and / or confirmed on 21 st May 2002 in respect of Mombasa Chief Magistrate's Court Civil Case No. 1479 of 2002 ("Mombasa CMCC No. 1479 of 2002").
2. That an Order for Prohibition be issued thereby prohibiting the Mombasa Chief Magistrate and 1 st Respondent herein or any other Magistrate from hearing or further hearing or adjudicating or determining or passing judgement in respect of Mombasa CMCC No. 1479 of 2002.
3. That an Order Mandamus be issued thereby directing or compelling the 2 nd to 8th Respondents to hand over to the applicants or Jitegemee Sacco Society Limited (the Society) and to endorse a resolution for "Change of Signatories" in order to enable applicants to operate Bank Accounts and conduct other financial affairs of the society and generally to hand over office to the applicants, as the Management Committee of the Society".

Together with the above, there were also prayers for costs and a prayer for further and / or other consequential orders to be made as part of the orders above.

The grounds upon which these prayers were sought are stated in the statement annexed to the application, the which statement has been verified in an Affidavit sworn by Richard Munga Wamburi whom I take to be the first Applicant, although there is a slight difference in names. There are also several annexures to the same statement.

The brief facts as can be discerned from the same statement are that the Applicants allege to be members of Jitegemee Sacco Society Limited. The same Society convened Annual General Meeting on 28th April, 2002. At that meeting, the present Applicants were elected as office bearers of the society.

The Respondents in this application were not satisfied and filed Civil Suit No. 1479 of 2002 against Mr. Joel Ruhu who was the Presiding Officer at that Annual General Meeting and the Registrar of Co-operative Societies. In that Complaint the present Respondents prayed for judgement for a declaration that Jitegemee Sacco Society Limited elections held on 28th April, 2002 were unprocedural, unlawful and illegally conducted and the results thereof were thus null and void and for an injunction restraining the Registrar of Co operative Societies from registering the present Applicants (not by name) elected on 28th April, 2002 or in any way permitting the said persons to take over office. There was together with that complaint an application by way of Chamber Summons which sought a temporary injunction against the Registrar of Co-operative Societies and also interestingly sought in its third prayer that the "Persons so elected be restrained from taking over the office" and I say this Order sought is interesting because clearly it was seeking an Order against persons who were not parties to that suit.

The application was heard ex parte under Certificate of Urgency on 3rd May 2002 and temporary interim orders were granted as prayed till 17th May 2002. The record I have does not show what happened thereafter, except I note that there was a Notice of Preliminary objection dated 15th May, 2002 filed by the 2nd Defendant in this case. Whatever happened, the Applicants have as a result come to this court seeking the orders which I have reproduced above.

The First Respondent has not entered appearance in this matter and was not present when this matter was heard. The 2nd to 8th Respondents opposed the application and filed Replying Affidavit in which they maintain that the elections that were held on 28th April were clogged with numerous irregularities and the same could not be said to have been valid. The same alleged irregularities were enumerated in the affidavit and the Respondents allege that they resulted in those who could not legally participate in the elections participating and being elected as office bearers of the Society. They named five of those who they claim were illegally elected at that meeting. They also gave their alleged reasons as to why the disputes concerning the elections had to be filed into the court and not to the Management Committee and could not be dealt with Under Clause 93 of the By-laws of the Society ending by contending that CMCC No. 1479 of 2002 was properly instituted in the Chief Magistrate's Court. They further stated that if the Applicants felt their interests were affected by the filing of CMCC No. 1479 of 2002, they should have applied to the court to be enjoined in that suit, and finally they maintain that there is no vacuum in the

Society since they are still legally in office and are ensuring that the Affairs of the Society are taken care of well.

I have carefully considered the application before me. I have perused all the annexures by both parties. I have considered the able submissions by the learned counsels.

The first prayer is seeking an Order of Certiorari to be issued quashing the judgment or Order or decree entered and / or confirmed on 21st May 2002 in respect of Mombasa Chief Magistrate's Court Civil Case No. 1479 of 2002. I have carefully perused all documents in the file but I have not seen, nor was I shown the Order of 21st May 2002. If such an Order was made by the subordinate court and duly extracted, it has not been annexed to the application before me. The only order annexed is an interim order issued on 3rd May 2002. That Order made it clear that the matter was to be heard inter partes on 17th May 2002 and it was thus only valid upto 17th May 2002. Thus by the time this application was validly filed on 31st May 2002 (date when receipt for filing was issued), that order of 3rd May 2002 had already expired. This application alleges that a judgment or Order or decree was entered and / or confirmed on 21st May 2002 in respect of Mombasa Chief Magistrate's Court Civil Suit No. 1479 of 2002. That may be so, or it may not be so but as a court I can only act on a judgment, Order or decree which is lawfully before me. This was not annexed and is not before me and I cannot act on it. It was in my humble opinion, the duty of the Applicants and their learned counsel to avail to the court the Judgment, or Order or decree they felt was offensive. They did not do that and that prayer cannot stand.

The next prayer I need to consider is the Second Prayer which is seeking that an order of prohibition be issued thereby prohibiting the Mombasa Chief Magistrate and 1st Respondent herein or any other Magistrate from or further hearing or adjudicating on or determining or passing judgment in respect of Mombasa CMCC No. 1479 of 2002. This is based on the ground that the Learned Magistrate has no jurisdiction to hear such a matter as it is a matter which is taken care of by Section 76 of the Co-operative Societies Act No. 12 of 1997. Section 76 (1) of the same Act states as follow:-

“76(1) if any dispute concerning the business of a Co -operative Society arises: -

(a) among members, past and present claiming through members, past members and deceased members; or (b) between members, past members or deceased members and the Society, its Committee or any officer of the Society; or

(c) between the Society and any other Co - operative Society; it shall be referred to the Tribunal”.

That Tribunal is established under Section 77(1) and is called Co-operative Tribunal. The Learned Counsel for the Applicants herein maintains that as the matter that was before the Senior Principal Magistrate, Mr. Mushelle was a matter concerning the business of a Co-operative Society and as the Applicants in this application were directly affected though not named as parties in that suit, the matter should have been taken to the Co-operative Tribunal and not to the Chief Magistrate's Court. The Respondents through their learned counsel Mr. Wameyo maintain that the matter before the Senior Principal Magistrate does not fall under Section 76(1) and the present Applicants are not parties in that suit. If however, they felt aggrieved by the non joinder of themselves whereas they were interested parties then they should have applied to be joined as parties in that suit. As matters stand, Mr. Wameyo submits, they are not parties and the Defendants in that suit are not members of the Co-operative Society, nor are they past members or members claiming through the deceased past members. That being the case, the Respondents maintain the learned Magistrate has not been shown to have no jurisdiction and the Orders of Prohibition are not available against First Respondent. I have not been told in what way other than as above is the learned Magistrate likely to act in excess of his jurisdiction. I have not been told that the learned Magistrate is already in excess or is likely to be in excess of his normal jurisdiction conferred by the Magistrate' Courts Act. All I have here is as I have stated above that under the Co-operative Societies Act this matter should have gone to the Co-operative Tribunal. I am aware that in his decision of 3rd May 2002, made ex parte the Magistrate granted prayer 3 of the application that was before him and restrained the present applicants from taking over the office. Elsewhere in this Ruling I have referred to the same as interesting, indeed that decision was not proper as it gave precipitating Orders against persons who were

not parties to the suit and who were not likely to defend themselves later unless allowed to be joined as parties. However, that order expired on 17th May 2002 and I have no any other orders that I could under certiorari application call up and quash. Under the prayer for prohibition the law cannot deal with what has happened, it looks into the future and I could only issue it if I am convinced that in one way or the other the subordinate court has no jurisdiction to entertain this matter and should therefore be forbidden from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. I was referred to the case of Kenya National Examinations Council Vs Republic (Ex parte Geoffrey Gathenji Njoroge & 9 Others) Civil Appeal No. 266 of 1996 which is ably cited in the Misc. Civil Application No. 317 of 1996 in the matter of Maina Edward Murori Vs The Senior Principal Shanzu Teachers Training College. The Court of Appeal stated as follows 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 the 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 proceedings Prohibition looks to the future where a decision has been made whether in excess or lack of jurisdiction an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision an order of prohibition is powerless against a decision which has already been made before such an order is issued.”

It is not in dispute that Joel Ruhu, and the Registrar of Cooperative Societies who were the only two Defendants in the Chief Magistrate’s Court Civil Suit No. 1479 of 2002 are not members of Jitegemee Co-operative Society. It is also clear that Section 76(1) of the Co-operative Societies Act 1997 Act No. 12 of 1997 which I have reproduced above only bars suits between members, part members and those claiming for deceased members or through members and past members as well as suits between the Society and other Societies from going to court in the first instance. It is silent and by implication does not bar suits between members of the society and non members from going to court, it seems to me that there would be nothing to stop a member of Jitegemee Co-operative Society from suing a non member in a court of law or for that matter, nothing would stop a non member of the society from suing the society or any of its members in a court of law. When this is done, then Section 76 (1) cannot be invoked and any person seeking to show that the court has no jurisdiction to hear such a matter must invoke either Magistrate’s court Act or any other law but not Co-operative Societies Act. That is why I stated earlier on that I was not shown that the Senior Principal Magistrate had no jurisdiction by virtue of the Magistrates Court Act or any other law.

In my view if the Applicants in this application wanted the Cooperative Societies Act to come to their aid and to have the matter beyond the learned Magistrate, then they should have applied to be joined as parties to that suit as in my humble opinion they are indeed interested parties as the decision made ex parte in the application in that case (made on 3rd May 2002) demonstrates. Once they are made parties in that suit, then that court can no longer proceed with this case as it will be a suit between members or past members of Jitegemee Society and this will be covered under Section 76(1).

However, as matters stand now, the suit is between members of the Society and non members and much as its outcome may affect the applicants, it is technically in law not a suit envisaged in Section 76(1).

In any case, if jurisdiction of the learned Magistrate was to be challenged, even on any other provisions of the Laws of Kenya, the same would have to be done by parties to that suit namely Joel Ruhu and the Registrar of Co-operative Societies. The sum total of all the above on prayer 2 is that I am unable to grant it.

The last order sought was an order of mandamus to issue thereby directing or compelling the 2nd – 8th Respondents to hand over to the applicants of Jitegemee Sacco Society Ltd and to endorse a resolution for change of signatories in order to enable the Applicants to operate bank accounts and conduct other financial affairs of the Society and generally to hand over office to the Applicants as the Management Committee of the Society.

In my humble opinion, this prayer is misconceived. I do not feel that such an order can issue against a person in his non public duty. This claim could have been made in a normal way and not by way of Judicial Review application. In the same case I have referred to herein above, ie Kenya National Examinations Council Vs Republic (Ex parte Geoffrey Gathenji Njoroge & 9 Others CA 266 of 1996) and quoting Halsbury's Laws of England 4th Edition Volume 1 page III the Court of Appeal said:-

“An order of Mandamus will compel the performance of a public duty which is imposed in 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 definent of a party who has a legal right to expect the duty to be performed.”

In my mind, the Respondents cannot be said to be performing a public duty imposed on them by statute in handing over to the Applicants or in endorsing a resolution for change of signatories. No statute imposes such duties upon them and I was not shown any.

The sum total of all the above is that I cannot grant any of the orders sought. This application is not granted on its entirety. It is dismissed with costs to the Respondents. Orders accordingly.

Dated and delivered at Mombasa this 11th day of July, 2002.

J. W. ONYANGO OTIENO

JUDGE