



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 1253 OF 2000

**RIAKANAU FARMERS CO-OP.
SOCIETY LIMITED
APPLICANT**

VERSUS

**1. THE MINISTER FOR LANDS
& SETTLEMENT**

**2. THE COMMISSIONER OF
LANDS
RESPONDENTS**

R U L I N G

This application by notice of motion was filed in court on 8th December, 2000 by way of Judicial Review for orders:-

(1)of prohibition directed to the second respondent, the Commissioner for lands prohibiting him from issuing any titles of land to the former chairman of the applicant, Riakanau Farmers Co-operative Society Limited, namely Mutisya Nguti and/or following, or using the list of shareholders presented by him to the said 2nd respondent after he, the said Mutisya Nguti, had been removed from office vis-avis the arbitration award delivered and dated 17th October, 1997 except the authentic list of shareholders presented to him, the said 2nd respondent by the duly elected chairman of the applicant Daniel M. Mutavi.

(2)prohibiting the 1st respondent who is the Minister of Lands and Settlement from confusing his personal rights and interests in the applicant as a shareholder as such with his ministerial powers and authority by interfering by way of duress or undue influence with the duties and responsibilities of the 2nd respondent by stopping him from issuing titles, to the applicant elected chairman Mr. Daniel M. Mutavi in accordance with the list of genuine shareholders, Members and/or in any way taking away the 2nd respondents official file containing the particulars thereof.

(3)of Mandamus directed at the 2nd respondent, his officers and agents to mandatorily issue within 14 days certificates of titles to the applicant shareholders as presented by the duly elected official bearers, executed and sealed with the applicant seal by sitting chairman Daniel M. Mutavi and certified by the District Commissioner Machakos and the District Co-operative Officer Machakos

pursuant to the 2nd respondents request vide their letter No. 47429/237 of 8th June, 2000.

The application was based on the following grounds; namely,

(1) That the Minister has no jurisdiction to interfere with the issuance to the applicant of titles to the bonafide shareholders as contained in the list of shareholders/members as presented by the applicant chairman David M. Mutavi to the 2nd respondent.

(2) That the Minister as a share holder in the applicant society in the event he feels oppressed in any manner by the elected committee/officials, should pursue the laid down procedural mechanism enshrined in the Cooperative Societies Act Cap 490 for redress, and not confuse or use his ministerial portfolio and position to abuse the due process thereof.

(3) The Commissioner of lands should defy any ministerial directive having coercion, intimidation, undue influence or duress or in anyway interfering with the process of issuance of titles to the applicant as presented to him by the bonafide Chairman Daniel Mutavi and not by the farmer Chairman Benjamin Mutisya Nguti.

(4) The fate of the elected committee officials has been permanently sealed by arbitration No. 16 of 1997 between the applicant and its former chairman Benjamin Mutisya Nguti whose appeal lapsed a natural death now that the old Act has been repealed by the new Act No. 12 of 1997 which commenced on 1st June, 1998 by legal notice number 42 of 1998 which does not provide for appeals to the commissioner for cooperatives or other.

(5) That the applicant former Chairman Benjamin Mutisya Nguti is no longer a bonafide elected chairman of the applicant and the commissioner of Lands should not transact with him at all and if any dealings have been done they should be declared null and void ab initio.

The same application is also grounded on the affidavit of Daniel M. Mutavi, the Chairman of the applicant society which is filed herein together with the said application.

Facts of this dispute are contained in the back ground information given in the arbitration report compiled by one S.M. Kabati who was the arbitrator in the dispute giving rise to this application and dated 17th October, 1997.

Riakanau, the farm subject to this dispute, comprises of parcel numbers 9442 R, 3516 R, and 1986 R.

It was bought in 1967 by a group comprising 44 members from a white farmer and it comprises 1500 acres.

The 44 members later formed and registered a cooperative society which is now the applicant.

At the time the dispute started the society chairman was Benjamin Mutisya Nguti. This dispute revolves around his chairmanship.

It would appear after the annual general meeting of 14th June, 1996 in which Benjamin Mutisya Nguti is shown as having been elected chairman things did not fair well between him and other members.

In subsequent meetings, he was suspected of having run the farm in a discreet manner and as if it was his personal property by increasing the number of shareholders from 49 to 54 without consulting other members, and on 6th November, 1996 shareholders passed a vote of no confidence in him and replaced him with Daniel Mutavi.

Then notice of a general meeting was given for 6th February, 1997 one of the agendas being the election of the management committee. This meeting was held and Daniel Mutavi was elected as Chairman.

However, inspite of this the said Benjamin Mutisya Nguti has continued to hold himself out as bonafide Chairman of the Society and even gone to the extend of handing to the Commissioner of Lands a list purporting to be of genuine shareholders of the applicant which the said applicant disputes and which, from the application and submission of counsel before me, the 1st respondent supports, hence this application before this court for consideration and final decision.

From annexures to this application, more particularly DM1, the applicant had sued Benjamin Mutisya Nguti to the court of the Senior Resident Magistrate (Sheria House) as it was then but the Presiding Magistrate, M. Muigai (Mrs), referred the dispute to the Commissioner for Cooperatives for arbitration. This is the arbitration report dated 17th October, 1997 to which I have already referred elsewhere in this ruling.

The arbitrator made the following orders; namely that:

(1) Benjamin Mutisya Nguti should immediately surrender titles of Riakanau Farm No. 9442, 3516 and 1986 to the legally elected society officials

(2) He should also surrender the following documents to the society officials:

(a) Members register,

(b) receipt books,

(c) survey maps

(d) surveyor receipt between society and surveyor

(e) Eviction order

(f) all other accountable documents.

(3) The Commissioner of lands should be prevailed upon not to issue land title deeds using the list of names presented and signed by Benjamin M. Nguti and J.M. Mbondo since the list contained names of non-members.

(4) Mr. Benjamin Mutisya Nguti should not transact any business on behalf of the society.

(5) Mr. Benjamin M. Nguti (pay) all the costs incurred by the complainant.

By this ruling it would appear it was declared the said Benjamin M. Nguti was no longer the Chairman of the applicant society and that he was not supposed to act in such capacity or to give a list of purported shareholders to the 2nd respondent for the issuance to them of title deeds.

However, from the supporting affidavit to the present application deponed to by Daniel M. Mutavi, the new Chairman, the said Benjamin Mutisya Nguti still poses as such chairman holding meetings with the 1st respondent who doubles up as one of the shareholders of the applicant society.

That the said 1st respondent has shown sympathy to the said Benjamin M. Nguti and that by virtue of his office as minister has interfered with the issuance of title deeds to bonafide members as listed by the applicant and even taken away the applicants file from the 2nd respondent without offering any reasons therefor.

Counsel for the applicant even wrote a letter to the 1st respondent on 4th October, 2000 (see DM5) requesting him to desist from interfering with this matter but such letter elicited no response from the said 1st respondent.

According to the supporting affidavit, the said 1st respondent has no jurisdiction to interfere with the powers of the 2nd respondent in the issuance of title deeds to the applicants/shareholders - hence the present application.

This application by way of Judicial Review is for orders of Prohibition and Mandamus directed at the two respondents to perform the duties entrusted upon them by law or prohibit them from doing what they are not supposed to do by law..

Mandamus and prohibition are two of the three remedies under the judicial review process. The other is certiorari. These remedies are only available against public bodies. In this application the orders for prohibition are to be directed at both the 1st and 2nd respondents while that of mandamus is to be directed at the second respondent.

What does an order of prohibition do and when will it issue? 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 or absence 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 departure from 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.

In the first place, the order of prohibition sought herein is meant to be directed at the 2nd respondent to prohibit him from issuing titles of land to former chairman of the applicant society or to use the list of shareholders presented by him.

In the second place, another order of prohibition is to be directed at the 1st respondent to prohibit him from confusing his personal rights and interest in the applicant as a shareholder with his ministerial powers and authority by interfering by way of duress or undue influence with the duties and responsibilities of the 2nd respondent by stopping him from issuing titles to the applicant's elected Chairman Daniel M. Mutavi in accordance with the list of genuine shareholders or members.

According to the application and submissions, the 1st respondent is one of the shareholders of the applicant society. He is number 52 on the list of shareholders. His father, Jeremiah Nyaga, is also a shareholder and is number 42 on the same list. Each of the two is supposed to get 10.5 Ha of the suit land.

Then the same 1st respondent happens to be the Minister of Lands and Settlement where the issue of issuing titles to the respective shareholders is being handled.

But the officer directly responsible for handling the matter is the 2nd respondent - who, by letter dated 8th June, 2000 sought from the District Commissioner Machakos submission of a correct list of shareholders of the suit farm to enable him issue title deeds and finalize the dispute.

This request must have caused submissions to him of two lists of shareholders, one by counsel for the applicant and the other by counsel for Benjamin M. Nguti - (see DM 6).

By letter dated 13th July, 2000 the District Commissioner forwarded to the 2nd respondent what he called a genuine list of members of the applicant as certified by the District Cooperative officer and himself and certified minutes of a meeting held on 6/3/1997 (see DM 7).

The list submitted by the District Commissioner is the same as that attached to the supporting affidavit to this application and the minutes which shows the management committee officials of the applicant elected on 6/3/1997 including David M. Mutavi, as Chairman.

And on 14/6/2000 the 2nd respondent had requested the applicant chairman to forward to his office certain money amounting to Kshs.171,720/- in order to facilitate the process of issuance of title deeds.

This money was remitted by counsel for present management committee by letter dated 29th August,

2000 (see DM 9 and 10)

In face of such submissions and information, it is clear that there are proceedings going on for the issuance of title deeds in respect to the subject matter in this dispute before the relevant authority, the 2nd respondent, acting in his official capacity as such. But there are no such proceedings before the 1st respondent in his official capacity.

In their official capacities the respondents are public bodies and where appropriate, the orders sought could be issued and directed at them.

From the submissions, there is no real complaint against the 2nd respondent. In the letter I have quoted addressed by him to the Machakos District Commissioner and to the Chairman of the applicant, he has instituted the process of issuing the title deeds.

But the complaint is really against the 1st respondent who is alleged to have allocated to himself the duties of handling this particular matter and even removed the file from the domain and access of the 2nd respondent either for the purpose of ensuring that no titles are issued to the applicant chairman or to direct that such titles are issued to Benjamin M. Nguti, his favourite.

In the circumstances of this case, the first respondent has no authority or requisite jurisdiction to do any of these. His action and conduct in the matter is a complete abuse of his office as Minister for Lands and Settlement.

In such official capacity, the 1st respondent is a public body and an order of prohibition sought in paragraph 2 of the application dated 8th December 2000 should and is hereby granted and directed at him as sought.

As regards the 2nd respondent, I am not convinced there is any tangible complaint against him. He has initiated the process of issuing titles and even requested from and been paid the requisite fees by the applicant.

The only stumbling block as far as I can read from the statement of facts and supporting affidavit has been the 1st respondent who has gone to the extent of removing the relevant file from his, the 2nd respondent's domain and access.

A letter addressed to him by counsel for the applicant and dated 4th October, 2000 particularly pointed this fact out to the said 1st respondent but he never thought it fit to respond to it.

But to me this is a very serious and demeaning allegation against the 1st respondent and if good counsel prevailed, he should have returned the file to the 2nd respondent to avoid this whole litigation.

I am quite sure if the file was returned to the 2nd respondent by the first respondent, I see no problem with the former proceeding with his work. Thus the order of prohibition sought herein and directed at him is not sustainable.

In my view, the 2nd respondent may not have abstained from performing his public duties in this case as conferred upon him by law.

However, the principal entailed in the order of mandamus is in the form of a command to simply compel the performance of a public duty which is imposed on a person or body of persons by statute and where that person or body of persons has failed to perform that duty to the detriment of a party who has a legal right to expect the duty to be performed; see Kenya National examination Council VR Exparte Geoffrey Gathenji Njoroge and 9 others Civil Appeal No. 266 of 1996 (Court of Appeal)

It does not matter how the failure has occurred. In this case the dispute is over the processing and issuance of title deeds to the applicant. But due to internal management misunderstanding between the

respondents over the matter nothing is moving. But this is causing prejudice and is detrimental to the applicant who is legally entitled to receive this service.

Land matters in this country are very sensitive and in a case like the present one where two groups are disputing over the issue of titles, it is compelling for the 2nd respondent to act promptly as required of him by statute and to process and issue titles to the chairman of the applicant particularly after the Machakos District Commissioner has informed him of the correct position regarding the officials and shareholders of the applicant.

In the result, I would as a matter of course, also issue an order of mandamus directed at the 2nd respondent commanding him to process and issue titles of the suit land to the chairman of the applicant without any further delay.

Costs of this application shall be paid by the 1st respondent to the applicant. I direct that typed copies of this ruling be supplied to the respondents. These shall be the orders of this court.

Delivered and dated this 29th day of January, 2001.

D.K.S. AGANYANYA

JUDGE