



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CONSTITUTIONAL PETITION NO. E014 OF 2021

IN THE MATTER OF ARTICLE 22 (1), 23 (1) AND 24 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF NULLIFICATION OF ELECTIONS OF CENTENARY SAC SOCIETY LTD BY THE DIRECTOR OF COOPERATIVES MERU COUNTY

BETWEEN

CENTENARY SACCO SOCIETY LTD.....PETITIONER

VERSUS

THE DIRECTOR OF COOPERATIVES MERU COUNTY.....1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT

RULING

PETITIONERS' CASE

1. The Petitioner case is that on 12th March 2021 CENTENARY SACCO SOCIETY LTD (*Sacco*) issued a notice of an annual general meeting that was to be held on 27th March 2021. Subsequently, *the Sacco* notified the 1st Respondent concerning the annual general meeting that was expected to be attended by about 100 members. The annual general meeting was held as scheduled and new Board members were elected in the presence of 1st respondent 2 officers.

2. By a letter dated 17th May 2021 the 1st respondent nullified the said elections allegedly held on 27th March 2021 but erroneously indicated as having been held on 27th May, 2021.

3. The letter prompted this Petition dated 2nd June 2021 and filed on the same date seeking the following reliefs: -

- a. **An order of judicial review of certiorari quashing the letter dated 17/5/2021 from the Director of Cooperative Meru County addressed to the chairman of Centenary Sacco.**
- b. **A declaration that the Petitioner's fundamental right to Fair Administrative Action enshrined in Article 47 of the Constitution has been violated.**
- c. **A declaration that the Petitioner's fundamental right to Fair Trial enshrined in Article 50 of the Constitution has been violated.**
- d. **A declaration that the Petitioner's right to basic rules of natural justice more particularly the right to be heard has been violated.**
- e. **Such other orders that the Court may deem just and expedient in the circumstances to grant in order to serve the ends of justice.**

4. The Petition is supported by an affidavit sworn by Michael Mbaabu Kirimania the chairman of *the Sacco* who reiterates the Petition and more particularly that by condemning the *Sacco* unheard, the decision of the Respondents Violated Articles 47 and 50 of the Constitution with regard to Fair Administrative Action and Fair Hearing.

RESPONDENT'S CASE

5. In response to the Petition, the Respondents filed a replying affidavit sworn on 01.07.2021 by the 1st Respondent the Sandi Mugambi. He avers that on 24.03.2021, he received a letter of complaint from the Petitioner's members who complained that the meeting held on 27th March 2021 was not a delegates meeting but an annual general meeting and that the members were denied an opportunity to participate in the elections of the Sacco. More particularly, the deponent avers that it was unfair for 100 members who attended meeting to represent 42,000/- members of *the Sacco*. The Respondents on also filed a Preliminary Objection dated 1st July 2021 on the grounds that: -

- a. **The Petition raises no constitutional issues.**
- b. **The Petitioner is not a person who can petition the High Court for violation of own fundamental rights and freedoms under Article 22 of the Constitution.**
- c. **The Petition offends the mandatory provisions of Section 102 of Meru County Cooperatives Societies Act 2014 and Section 76 of the Cooperatives Societies Act NO 12 of 1997.**
- d. **The Petition is otherwise an abuse of the court process.**

Analysis and Determination

6. I have considered Petition in the light of the Preliminary and written submissions filed on behalf of both parties and I will address the issues as hereunder starting with the Preliminary Objection.

1. Whether Petitioner is a person who can petition the High Court for violation of own fundamental rights and freedoms

7. Article 260 of the Constitution defines a "**Person**" to include a company, association or other body of persons whether incorporated or not. In that regard, the Petitioner is a person for purposes of Article 47 of the Constitution in that its right as an entity was adversely affected by the Respondents' impugned decision and was therefore entitled to an administrative action that was not only procedurally fair and lawful but also reasonable. It was equally entitled to a hearing before the adverse action was taken against it.

8. From the foregoing, I am persuaded that Petitioner is not a person who can petition the High Court for violation of own fundamental rights and freedoms.

2. Whether the Petition raises constitutional issues

9. Article 47(1) of the Constitution is in mandatory terms that **every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

10. The Constitution is the **Supreme law** of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of **Article `19(1)** of the **Constitution** which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies.

11. The fact that the right to Fair Administrative Action is a constitutional right was stated by the *Constitutional Court of South Africa* in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

12. And in the case of *Dry Associates Ltd v Capital Markets Authority and Another, [2012] eKLR* the Court observed;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

13. Taking the above jurisprudence into account, I have come to the conclusion that this Petition raises constitutional issues.

Whether the Petition contravenes Section 102 of Meru County Cooperatives Societies Act 2014 and Section 76 of the Cooperatives Societies Act No. 12 of 1997.

14. The instant petition is grounded on the allegation that the 1st respondent acted ultra vires the Constitution, that he denied the Petitioner the right to be heard, right to fair trial and disregarded the rules of natural justice. The grievance herein is not between the members, its committees or officers but it regards the decision making process by the 1st respondent.

15. I have considered the holding in *Gacheri David Mukindia V Charles Murugu Mukindia & 11 Others [2021] eKLR; Royal Media Services Limited v Attorney General [2018] eKLR* and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR* and I find that there distinguishable for the reason that the violation of Petitioner’s constitutional rights is not a dispute concerning the business of the co-operative society covered by Section 102 of Meru County Cooperatives Societies Act 2014 and Section 76 of the Cooperatives Societies Act No. 12 of 1997.

16. In conclusion, I find that the Preliminary Objection raised by the Respondents does not meet the test laid down in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696*, and the same is for the reasons given hereinabove overruled.

17. Back to the Petition, Parliament passed Fair Administrative Action Act, 2015 in accordance with Article 47 (3) of the Constitution.

18. Section 4 Fair Administrative Action Act, 2015 provides THAT:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

19. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized.

20. The Court of Appeal stated in the case of **Judicial Service Commission v Mbalu Mutava & another** [2014] eKLR that;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

21. Whereas the 1st Respondent has gone into great lengths to explain why he made the impugned decision, 1st Respondent failed to follow the procedures and steps laid down in law. The impugned decision fails the test of a fair administrative action and violates the Petitioner’s rights to a fair administrative action and fair trial enshrined in Articles 47 and 50 of the Constitution respectively.

22. The upshot is that the Petitioner’s Petition is meritorious and I proceed to make the following orders: -

a. A declaration be and is hereby issued the decision by the Director of Cooperatives Meru County contained in a letter dated 17.05.2021 addressed to the chairman of Centenary Sacco violated the Petitioner’s fundamental right to Fair Administrative Action enshrined in Article 47 of the Constitution.

b. A declaration be and is hereby issued the decision by the Director of Cooperatives Meru County contained in a letter dated 17.05.2021 addressed to the chairman of Centenary Sacco violated the Petitioner’s fundamental right to Fair Trial enshrined in Article 50 of the Constitution

c. A declaration that the Petitioner’s right to basic rules of natural justice more particularly the right to be heard has been violated.

d. An order of judicial review of certiorari is hereby issued quashing the letter dated 17.05.2021 from the Director of Cooperatives Meru County addressed to the chairman of Centenary Sacco.

e. Costs of the Petition to the Petitioner shall be borne by the 1st Respondent.

DATED AT MERU THIS 02ND DAY OF DECEMBER, 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Petitioner - N/A for G.M.Wanjohi, Mutuma & Co. Advocates

For the Respondents - Ms. Matiri for office of the Meru County Attorney