REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 5 OF 2020

JUMATATU FARMERS CO-OPERATIVE SOCIETY LIMITED ....APPLICANT

VERSUS

SUB-COUNTY CO-OPERATIVE OFFICER - SUBUKIA .....RESPONDENT

RULING

1. Joseph Thaara ("Mr. Thaara") is the Chairman of Jumatatu Farmers Cooperative Society Limited ("Applicant"). According to him, on 10/02/2020, he received a Notice dated 03/02/2020 signed by Xavier Lugaga, the Subukia Sub-County Cooperative Officer informing him that there would be a Special General Meeting of the Applicant on 26/02/2020 ("Impugned Notice").

The Impugned Notice stated that the SGM was being called pursuant to the provisions of section 27(8) of the Cooperative Society Act, Chapter 490 of the Laws of Kenya ("the Act").

2. The Impugned Notice further listed the agenda of the SGM as follows:

a. Amendment of Bylaws of Jumatatu Farmers Cooperative Society Ltd.

b. Management and operation of Jumatatu Farmers Cooperative Society Ltd.

c. A.O.B.

3. Mr. Thaara was aggrieved by the Impugned Notice. It would seem that some other members of the Applicant were too. It is not clear how many members felt aggrieved. A supposed resolution of the members in a meeting held on 18/02/2020 resolved to sue on account of the Impugned Notice. The resolution does not say how many members appointed or how the meeting was convened. In any event, the resolution is attached to the Affidavit of Mr. Thaara commencing the instant action.

4. Armed with that resolution, Mr. Thaara moved the Applicant's lawyers as appointed in the self-same resolution to embark this action. It is a Judicial Review Application dated 08/06/2020 with a single substantive prayer thus:

> That this Honourable Court be pleased to issue an order of certiorari to bring to this Court for purposes of being quashed and to effectively quash the Respondent's Notice of Motion dated 3rd *February, 2020*.

5. It is important to point out that the initial action commenced vide a Chamber Summons Application dated 24/02/2020 seeking leave to bring the Judicial Review proceedings. Leave was duly granted by this Court hence the present Application.

6. The action was defended by the County Attorney on behalf of the Subukia Sub-County Cooperative Officer ("Cooperative Officer") who issued the Impugned Notice. The County Attorney filed a Notice of Preliminary Objection, Grounds of Opposition and a Replying Affidavit. The Application was argued through Written Submissions.

7. The Applicant argues that the Impugned Notice should be quashed for the following reasons:

a. That by issuing the Impugned Notice the Cooperative Officer exceeded his powers granted under the Act.

b. That the Impugned Notice violates the Act because the notice period was shorter than fifteen days.

c. That the Impugned Notice violates the Act because it was not served on the members of the Applicant as required by Rule 8(1) of the Cooperative Societies Rules.

8. The Respondent resists the Application and raises the points in opposition:

a. That the suit is premature and should be dismissed under the Exhaustion doctrine.

b. That the Cooperative Officer has the requisite powers under the Act to issue the Impugned Notice and convene a Special General Meeting.

c. That the Impugned Notice complied with the time limitations prescribed in the Act.

d. That the suit is a deliberate attempt by the Applicant and other Committee members to circumvent the law and defeat the ends of justice.

e. That the suit has been overtaken by events, is frivolous and vexatious.

9. There is little factual controversy and the issues raised are fairly simple. I propose to delineate them with short analysis as below.

Is this suit debarred by the Exhaustion Doctrine?

10. The Respondent says that the suit is premature and should be dismissed for offending the doctrine of exhaustion.

11. In ***Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR***, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion in the following words:

> 42. This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in *the following oft-repeated words:-*
>
> > Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by *any law must be strictly adhered to since there are good reasons for such special procedures.*
>
> 43. While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is **Geoffrey Muthinja *Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR***, *where the Court of Appeal stated that:-*
>
> > *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts isinvoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*
>
> 45. We have read these cases carefully and considered the salutary decisional rule of law they *announce…..*

12. In the present case, against this jurisprudential policy, the Respondent urges the Court to preliminarily dismiss the suit for being premature. In making this argument, the Respondent makes two separate arguments.

13. First, the Respondent says that the suit is premature because Article 88 of the Constitution provides that citizens have a right to petition the County government on any matter under the responsibility of the county government. The Respondent says that since cooperatives development is a function of the County Government, the Applicant should have raised any concerns with the County Government of Nakuru first.

14. This is an utterly misplaced argument. The "petitions" referred to in section 88 of the County Governments Act are not petitions for dispute resolution as the Respondent characterizes them. The petitions referred to here are governance mechanisms aimed at influencing general County government policy. It is, of course, absurd to imagine that all persons with a dispute with the County government over any matter falling under its functions is required to raise a "petition" to the County government first.

15. The second argument raised by the Respondent is that the Applicant was required to file its grievance at the Cooperative Tribunal by virtue of sections 76 and 77 of the Cooperative Societies Act. That argument is similarly misplaced. Section

16. Section 76 of the Co-operatives Societies Act provides as follows:

> 76. Disputes
>
> 1. If any dispute concerning the business of a co-operative society arises—
>
> a. among members, past members and persons 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.*
>
> 2. A dispute for the purpose of this section shall include—
>
> d. a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
>
> e. a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
>
> f. a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority."

17. It appears fairly obvious that the controversy at hand is not one of the disputes over which the Tribunal established under section 77 of the Cooperative Societies Act has. The controversy here is about the outer limits of the powers of the Commissioner of Cooperatives to take certain actions respecting a cooperative society and whether those actions are faithful to the relevant laws.

Did the Cooperative Officer Act Ultra Vires?

18. The first salvo fired by the Applicant is that the Cooperative Officer acted illegally and outside the remit of his powers when he called for the Special General meeting. The Applicant argues that the scheme of the Act is that there is a preference for the Committee of a Cooperative society to call meetings as an incidence of the Committee's governing authority over the affairs of the Cooperative Society as stipulated in section 27(1) of the Act. The Applicant argues that the Act envisages that, first, the Committee shall call for a relevant meeting failing which the members may demand for the Committee to convene a meeting. If such a demand further fails, under section 27(7), the members themselves may call for such a meeting.

19. The Applicant implies that the Commissioner of Cooperatives can only act under section 27(8) once the other governance mechanisms fail.

20. The Applicant's interpretation of section 27(8) of the Act is a violently strained one. The relevant section reads as follows:

> The Commissioner may convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting.

21. The words are un-adorned and plain. They give the Cooperative Officer, acting as an agent of the Commissioner, the power to convene a Special General Meeting of any Cooperative Society. Indeed, section 27(10) goes ahead to provide that the Cooperative Officer who calls for a Special General Meeting is given the power to share the meeting.

22. These powers of the Cooperative Officer are not trammeled by any specific circumstances obtaining in a given Cooperative Society; they are exercisable at any time subject only to the principles of rationality and administrative fairness. There is, therefore, no basis whatsoever, for the Court to declare the Cooperative Officer's action to convene a Special General Meeting ultra vires. The Cooperative Officer acted within his powers under the Act. ***Republic ex parte Kenya Planters Co-operative Union v Commissioner for Co-operative Development & 2 Others [2019] eKLR*** is in accord.

Does the Notice Period in the Impugned Notice violate the Act?

23. The Applicant claims that the Notice Period appointed in the Impugned Notice violates Rule 8(1) of the Cooperative Societies Rules. That Rule reads as follows:

> Any amendment of the registered by-laws of a cooperative society under section 8 of the Act shall be made by a resolution of members at a general meeting inrespect of which at least fifteen clear days notice of the proposed amendment shall have been given to the members of the society.

24. The Applicant says that the Chairman of the Applicant was served with the Impugned Notice on 10/02/2020 by the OCPD.

He says that the Notice asked him to "mobilize" members to attend the Special General Meeting. The Applicant argues that the Impugned Notice was in violation of Rule 8(1) because if one counts the number of days starting with 10/02/2020, the day the Notice was served and

excluding "official non-working days, then there were only eleven (11) clear days between the service of the Impugned Notice and the date of the Special General Meeting.

25. The Applicant arrives at this conclusion by resorting to section 57 of the Interpretation and General Provisions Act to interpret what "clear days" means when used in a statute or regulations.

The section reads as follows:

In computing time for the purposes of a written law, unless the contrary intention appears –

> a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
>
> c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

26. Does this section exclude Sundays and official non-working days from the computation of the fifteen clear days prescribed in Rule 8(1) of the Cooperative Societies Rules? It most clearly does not. Section 57(b) applies only when the last day in the computation of time falls on a Sunday or an official non-working day. In that case, the period is extended to the next official working day. However, section 57(d) is quite clear that Sundays and official non-working days are "reckoned" in the computation of time exceeding six days. In other words, if a statute or other written law required an act to be done within six days or less, then Sundays and official non-working days are excluded. However, when the time stipulated by the law exceeds six days, Sundays and official non-working days are explicitly included in the computation of time.

27. This is plain read of the statute and requires no belaboring.

<u>Was the Impugned Notice Duly Served on the Members?</u>

28. The Applicant says that the Impugned Notice was not duly served on the members as required by Rule 8(1). The Applicant argues that there is no proof that the Notice was served on the Society's clerk, Mr. Peter Mureithi. The Applicant also takes issue with what is clearly a typographical error in the Replying Affidavit of Xavier Lugaga which states that the service was effected on "4th January, 2020". The correct date is, of course, "4th February, 2020." The Applicant further argues that service on the Chairman was not proper service as service is required on each and all the members of the Applicant.

29. On its part, the Respondent reproduces the Replying Affidavit of Xavier Lugaga which depones at paragraph 8(a):

> That in my capacity as the Sub-County Cooperative Officer of Subukia Sub-county, I called for a Special General Meeting for the ex parte Applicant's society pursuant to section 27(8) by giving a notice dated 3rd *January, 2020. As per the practice and procedure of serving notices and other correspondences to the society, the notice was served upon the society's clerk, Mr. Peter Mureithi, on the 4*th January, 2020 at 8:30am in the morning. The notice was delivered to the said clerk by one, Mr. Moriss Macharia Warama who is a member of the ex parte Applicant's society. And in any case, even if the notice was delivered on the 10th *February, 2020, as alleged by the ex parte Applicant it was well within the period of 15 days as provided by law. Therefore, the ex parte Applicant's claim that the Notice issued to the ex parte Applicant society did not comply with section 27(4) of the Act, is untrue and aimed at misleading the Honourable Court.*

30. As aforesaid, the Applicant's counsel says in his submissions that there is no proof that Mr. Warama delivered the Impugned Notice to the Applicant's Clerk. However, we need to note that the claim that it was so delivered was made under oath. It was not controverted by the Applicant. It is futile to demand "strict proof" at the submissions stage when the factual claim remained uncontested at the close of "pleadings." In any event, the Respondent is correct that the Chairman of the Applicant had the Impugned Notice at least by 10/02/2020 which, as analyzed above, gave ample statutory notice for the Special General Meeting.

<u>Should the Orders Requested Issue?</u>

31. It follows that the orders requested by the Applicant cannot issue. The Applicant has failed on the merits. In any event, even if the Applicant had succeeded on the merits, the matter has been firmly overtaken by events. It is fairly obvious that if another meeting is to be held, a proper notice will have to be issued. It would be advisable for the Cooperative Officer to act prudently to avoid the technical legal tussles witnessed here.

32. The upshot is that the Notice of Motion dated 20/06/2020 is without merit. It is dismissed with costs.

33. Orders accordingly.

Dated and Delivered in Nakuru this 15th day of October, 2020

…….

JOEL NGUGI

JUDGE