



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**MISC. CIVIL APP. NO.3 OF 2016**

**PRIDGEON MASAKE BARASA.....EX-PARTE APPLICANT**

**VERSUS**

**MINISTRY OF AGRICULTURE , LIVESTOCK, FISHERIES &**

**CO-OPERATIVES BUNGOMA COUNTY & ANOTHER.....RESPONDENT**

**AND**

**KITINDA DAIRY FARMERS CO-OPERATIVE SOCIETY LTD &**

**13 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

The Exparte Applicant, Pridgeon Masake Barasa filed this Notice of Motion dated 3<sup>rd</sup> August 2016 (Pursuant to Order 53 rules 3(1) of the Civil Procedure Rules, Sections 8 and 9 of Law Reform Act CAP 26 of Laws of Kenya, seeking orders;

***1. THAT an order of certiorari be used to remove into this honourable court and quash the proceedings,resolutions and decision of the meeting held on 30<sup>th</sup> June 2016 by the second Respondent,COUNTY CO-OPERATIVR COMMISIONER to elect the Board Members of KITINDA DAIRY FARMERS CO-OPERATIVE SOCIETY LTD.***

***2. An order to issue condemning the Respondents and interested parties to pay costs.***

The grounds upon which the application is premised are that;

*a) The notice of special General meeting issued by the county Commissioner had no agenda for elections nor removal of the current Board of Directors of the Kitinda Dairy Co-operative Society Ltd.*

*b) The venue used was contrary to the rules guiding procedure in meetings and it amounted to hijacking of the entire management of the society at the detriment of duly elected board of Directors in office.*

*c) That the current officials were not either afforded a chance to be heard nor given room to show cause or at all hence were condemned unheard contrary to the rules of natural justice.*

*d) That the adhoc or take over or alternative team of directors who were endorsed to take over the office were un-procedurally, unlawfully and improperly constituted.*

*e) That the decision was flagrant, oppressive, unjustified and ultra-vires.*

The application is supported by the supporting affidavit of the exparte applicant who reiterates the grounds of the application. The applicant further deponed that the respondent in total breach and disregard of their roles in the management of interested party Kitinda Dairy Ltd have now paralysed the operations of the society and threatened its existence. The applicant depones that there is managerial crisis that need urgent and immediate intervention of this Honourable court supervisory jurisdiction to help them stem the statement.

The 1<sup>st</sup> ,4<sup>th</sup> ,5<sup>th</sup> , 6<sup>th</sup> , 7<sup>th</sup>,8<sup>th</sup> , 9<sup>th</sup> , 10<sup>th</sup>,11<sup>th</sup>,12<sup>th</sup> and 13<sup>th</sup> interested parties filed a Replying Affidavit sworn by REV.JOHNSTONE NYONGESA a Chairman of Kitinda Dairy Farmers Co-operative Society Ltd deponed that the application is inept, misconceived and bad in law. He deponed that following complaints made to the county co-operative commissioner by farmers in or about 20<sup>th</sup> June 2016 against the

management of 1<sup>st</sup> Respondent that involved the applicant's incompetence to perform his duty as chairman of Kitinda Dairy Farmers Co-operative Society Ltd due to following issues; loss of milk supplied by farmers, late payment to the suppliers of milk, pursuing of cases against committee members among other reasons the Farmers did a petition and served the County Co-operative Commissioner raising the allegations and the management committee responded to the farmers' concern vide letter dated 13<sup>th</sup> June 2016 convening a special general meeting as required under section 27(8) of the Co-operative Societies Act Cap 490 Laws of Kenya. He deponed that the said letter stated date, venue and time of the meeting.

He deponed further that the agenda of the said meeting were

- a) To look at the petition served on County Co-operative Commissioner by the farmers/suppliers and
- b) To explore and see the way forward.

He deponed that due process was followed in calling the said meeting and the special general meeting arrived at removal of the committee and put up a new committee to work for 90 days to prepare the society for the annual general meeting in October 2016. He deponed that the issues raised in the application qualify as disputes under section 76 of the Co-operatives Tribunal for settlement.

By consent of the Counsel for the parties this application was canvassed by way of written Submission. Mr. Sichangi for the exparte applicant submitted that this application is premised on the action of the 2<sup>nd</sup> Respondent on the proceedings, resolutions and decisions of the meeting held on the 30<sup>th</sup> June 2016 on electing board officials or members of Kitinda Dairy Farmers Co-operative Society Limited.

He argued that while exparte applicant served and constituted the current Board Chairman of Kitinda, the co-operative issued notice on meeting to be held on 30<sup>th</sup> June 2016 and when applicant sought clarification on the said notice through letter dated 15<sup>th</sup> June 2016 it was ignored and when the meeting was held another substantive agenda was sneaked and substantially changed the cause of management in the interested party Co-operative society. The agenda sneaked during the meeting was election of officials purported to be interim to run affairs of the society and the sitting Board of management of Kitinda Dairy Co-operative Society stood disbanded and the caretaker committee was constituted without any input by members as those elected were handpicked by 1<sup>st</sup> and 2<sup>nd</sup> Respondent

He submitted that the applicant and the entire board of directors were not given a fair treatment that they were unprocedurally and irrationally thrown out of office.

He submitted that the Respondents decision was ultra vires because interim officials were elected without mention or determination of the sitting officials. He also argued that the action of Respondents was an abuse of power since the convener of meeting allowed those who attended the meeting discuss others not in the meeting and even agenda was not in the initial notice. He submitted that he humbly urges this Honourable Court to recall the decision made on 30<sup>th</sup> June 2016 meeting and quash the same.

Mr. Kituyi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the matter falls within the purview of Co-operative Tribunal pursuant to section 76 of Co-operative Society Act for reasons that the dispute is between farmers and members of the Co-operative Societies and it touches on election of office bearers thereof such decision is supposed to be settled by Co-operative tribunal hence this court lacks jurisdiction.

He submitted that the notices of the meeting held on the 30<sup>th</sup> Jun, 2016 were clearly issued and all members notified and that it is clear that the minutes annexed by the applicant were never signed indicating they were never genuine and the 2<sup>nd</sup> Respondent has annexed a copy of minutes of the meeting held on the 30<sup>th</sup> June 2016.

He also submitted that the minutes clearly indicate that the office bearer who were elected were to be in office for interim period of 90 days and it was thereof a decision pursuant to section 27(8) of Co-operative Society's Act CAP 490 to hold special meeting to deal with issue in the society and that there is no material facts raised by the applicant for the court to grant orders in this matter.

Having taken into account the parties respective parties' pleading and submissions, this court notes that the issues arising for From the for determination whether this court has jurisdiction to hear and determine and if so should this court grant the prayers sought by the exparte applicant.

The Respondent has raised an issue of jurisdiction but I will not review the same since the Respondent filed a Preliminary Objection dated 2<sup>nd</sup> March 2017 to the instant application and the Judge Ali. Aroni heard and determined the Preliminary Objection that this court has Jurisdiction through a ruling dated 4<sup>th</sup> May 2017. I am hereby left with one issue for determination on whether the 2<sup>nd</sup> Respondent acted in excess of his powers if any, in appointing new members of the board on the 30<sup>th</sup> June 2016 and whether applicant is entitled to orders sought.

The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. I wish to refer to the judicial review case of *Allan Waihumbu Njuguna v Kenya Revenue Authority & another [2019] eKLR* where Justice S.N. Riechi set out the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

It is applicant contention that a notice of a meeting to be held on 30<sup>th</sup> June 2016 was issued and when applicant sought clarification on the said notice through letter dated 15<sup>th</sup> June 2016 it was ignored and when the meeting was held another substantive agenda was sneaked and substantially changed the cause of management in the interested party Co-operative society. That the agenda sneaked during the meeting was election of new officials purported to be interim to run affairs of the society and the sitting Board of management of Kitinda Dairy Co-

operative Society stood disbanded and the caretaker committee was constituted without any input by members as those elected were handpicked by 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

The Respondent on the other hand stated that submitted that the minutes clearly indicate that the office bearer who were elected were to be in office for interim period of 90 days and it was thereof a decision pursuant to section 27(8) of Co-operative Society's Act CAP 490 to hold special meeting to deal with issue in the society since the applicant and other members were acting unprocedurally in violation of the by-laws of the co-operative.

The notice for special general meeting was issued by Stanslaus Wambani for the county cooperative commission. It is dated 13.6.2016 and it reads;

**RE: NOTICE FOR THE SPECIAL GENERAL MEETING**

*Under the powers conferred to this office under section 27 sub section 8 of the Co-operative Societies Act ON CONVENING OF General Meetings and following the petitions made by the farmers to this office on 8<sup>th</sup> June 2016 about governance problems in Kitinda Dairy Farmers Cooperative Society Limited, you are hereby notified that a Special General Meeting will be held on 30<sup>th</sup> June 2016 at Gospel Believers Church next to Huduma Center Bungoma starting at 10.00AM.*

**Agenda**

**1. Discuss the petitions against the management of Kitinda Dairy Farmers Cooperative Society Limited following the complaints raised by farmers on 8<sup>th</sup> June 2016**

**2. Get a way forward as per agenda number 1**

The meeting was stated to be conveyed under section 27 of the Co-operative Societies Act. *section 27(8) of the Co-operative Society Act and it provides;*

*A special general meeting of a co-operative society may be convened*

*a) by the Committee for the purpose of approving annual estimates or discussing any urgent matter which in the Committee's opinion is in the interest of the co-operative society; or*

*b) on receipt of a written notice for such meeting signed by such number of the members of the co-operative society as may be prescribed in the rules and stating the objects and reasons for calling the meeting.*

The powers of special General meeting are under **Section 27(8)** and it provides:-

**“The Commissioner may convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting”**

That from the minutes of the meeting held on 30<sup>th</sup> June 2016 there was discussion of petitions against the Board and minute 2 was resolution and minute 4 on elections. The purpose of the agenda in a meeting to inform members of meeting when it is set for discussion so that they may not only prepare to give meaningful deliberation but also be informed members of the meeting of the likely action that may be taken. In the agenda for 30.6.2016 there was no indication of election of interim officials. Any election of officials, interim or otherwise is a serious issue and notice should be issued to prepare members and even allow those who intend to elected volunteer themselves. It cannot be in my view be hidden under 'WAY FORWARD' as was done in the meeting. It must be specific agenda for discussion and election and not appointment by the co-operative commission. In as much as they exceeded the items notified for discussion, I find that the meeting held on 30.6.2016 did not follow due process.

Consequently, I am satisfied that the discussion to remove the exparte applicant and his committee and replace it with an interim one was unlawful. I therefore call for and quash the decision of the special meeting held on 30.6.2016.

Each party will meet own costs of these proceedings.

**Dated and Delivered at Bungoma this 22<sup>nd</sup> day of July, 2019.**

**S.N. RIECHI**

**JUDGE**