



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. APPLICATION (JR) NO.3 OF 2017

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF LAW REFORMS ACT, SECTION 8 AND 9

AND

IN THE MATTER OF CO-OPERATIVES SOCIETIES ACT CAP 490

BETWEEN

REPUBLIC.....APPLICANT

AND

THE BOARD OF MANAGEMENT ASILI

CREDIT AND SAVINGS COOPERATIVE.....1ST RESPONDENT

ASILI CREDIT AND

SAVINGS COOPERATIVE.....2ND RESPONDENT

HOMA BAY COUNTY COMMISSIONER

FOR COOPERATIVES.....3RD RESPONDENT

THE COMMISSIONER OF COOPERATIVES....4TH RESPONDENT

AND

ABUTO GEORGE OMOLLO.....EX-PARTE APPLICANT

RULING

1. The ex parte applicant is a delegate for **ASILI CREDIT AND SAVINGS COOPERATIVE** (Homa Bay County Sub Branch) and has contested the decision by **THE BOARD OF MANAGEMENT ASILI CREDIT & SAVINGS CO-OPERATIVE** to appoint another person to replace him without notifying or consulting members of Homa Bay Sub County Branch and without respecting the by-laws of the said sub branch. He has contested the legality of the decision as his term in office is expected to end in the year 2020 and says the 1st respondent acted ultra virus its powers.

2. The applicant thus sought orders quashing that decision until his term in office lapses or until sufficient grounds are addressed to warrant his removal.

3. He also prays for orders of mandamus to issue against 1st – 4th respondents to review the by-laws and practice of **ASILI SACCO** which are discriminative in nature and exempts without sufficient reasons, members of **ASILI** branches outside Nairobi from **ASILI SACCO**

Board of Management.

4. He further prays for orders of prohibition to issue against the Respondents to prevent them from initiating any proceedings, functions or conventions contrary to the will of **ASILI SACCO** Homa Bay Branch members with the intention of removing him from the position of the branch delegation.

5. He also prays that the 3rd and 4th respondents be directed to exercise their powers in a responsible manner and in tandem with the Sacco's by-laws by taking into account his interest and that of the Sacco members.

6. Before the hearing the 1st and 2nd respondents filed a notice of preliminary objection dated 23/09/2017 on ground that:-

a) **This court lacks jurisdiction to hear and determine the application in so far as the same relates to a Co-operative dispute under the provisions of the Co-operative Societies Act No.12 of 1997 as amended by Act No.2 of 2004.**

b) The 1st Respondent (**The Board of Management Asili Credit & Savings Co-operative**) is not a legal entity and as such cannot be sued as a party in the proceedings.

c) The application for Judicial Review is time barred and an abuse of the court process. The preliminary objection was canvassed by way of written submissions where the 1st and 2nd Respondents' counsel pointed out that the 2nd respondent's objections, operations and organizations is favoured by the registered by-laws which binds all the members equally as provided under **Section 13** of the **Co-operative Societies Act** which states:-

“The by-laws of a co-operative society shall, when registered bind the co-operative society and the members thereof to the same extent as if they were signed by each member and combined covenants on the part of each member for himself and his personal representatives to observe all the provisions of the by-laws.”

7. Further the power to amend the by-laws of a Co-operative Society is vested on the members; and on the instant case, it is done by delegates, which is the highest decision making organ of a Co-operative Society as provided under **Section 27 (1)** of the **Co-operative Societies Act**.

“27 (1) The supreme authority of a Cooperative Society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters.”

8. It is with this in mind that the respondents submit that the application herein revolves around Co-operative disputes and the appropriate forum is the Co-operatives Tribunals established under the **Act**.

9. In this regard he has referred to **Section 76** of the **Act** which provides:-

“76 (1) If any dispute concerning the business of a co-operative society arises –

a) **Among members, post members and persons claiming through members, past members and deceased members;**

b) **Between members, past members or deceased members and the society, its committee or any officer of the society;**

c) **.....**

It shall be referred to the Tribunal.

10. Counsel argues that the controlling phrase is **“business of the society”** and submits that it is not confined to the internal management but covers every activity of the society within the ambit of its by-laws and rules – he has relied on the decision in **GATANGA COFFEE GROWERS CO-OPERATIVE SOCIETY LTD –VS- GITAU Civil Appeal No.135 of 1967**. He points out that the dispute is between members of the society and the Board of Director and the actions such as elections, meetings, amendment of by-laws, qualification of membership, and expulsion of members are adequately addressed by the by-laws, and this fall within the business of the society and must be referred to the Co-operatives Tribunal.

11. Counsel urged the court to be guided by the decision in **NEW MURARANDIA FARMERS CO-OPERATIVE SOCIETY LTD –VS- DISTRICT CO-OPERATIVE OFFICER KAHUHO SUB COUNTY AND 7 OTHER INTERESTED PARTIES** as well as **JOHN RICHAH OUA NYAMAI –VS- THE CO-OPERATIVE TRIBUNAL & 2 OTHERS** in finding that the specialized tribunals have been set to deal with particular disputes.

12. On this limb, **MR. NYAUKE** on behalf of the ex-parte applicant argues that the attempts to get the Commissioner for Co-operatives (Homa Bay) and the Commissioner for Co-operatives to intervene in the matter yielded nothing and as far as he is concerned they acted in a discriminatory and unconstitutional manner in allowing the 2nd Respondent to use the by-laws.

13. Counsel insists that the dispute is not between a society and its members, nor is it between two societies but concerns the legality of the 1st Respondent's decision to amend the by-laws of the society without the authority of its members.

14. He urged the court to be guided by the case of **COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT and 3 OTHERS ex-parte ELISHA OTIENO and 22 OTHERS [2016] eKLR**, where Odero (J) held that although the Co-operatives Tribunal had power to determine the dispute, there were other aspects of the dispute concerning the legality of an inquiry team to recommend termination of employment of the ex-parte applicants and to bar them from holding office, which would only be determined by the High Court.

15. The issues for consideration on this limb are:-

- a) **What is the nature of the dispute – between the parties application;**
- b) **Who are the protagonists;**
- c) **Which would be the first port of call in the event of a dispute between them;**
- d) **Are the 3rd and 4th Respondents necessary parties or the dispute? What is their role?**
- e) **Are there certain aspects of the dispute which cannot be determined by the Co-operative Tribunal?**

16. The nature of the dispute concerns the decision made by the management board of the society against one of its member. Surely isn't that what **Section 76 (1) (b)** contemplates? What is the business of the society? I share the view held in *Gatangi Coffee Growers (Supra)* that **"Business of the Society"** is not confined to the internal management of the society but covers every activity of the society within the ambit of the by-laws and rules."

17. I can do no better than to echo the sentiments expressed in the case of **WAKIRO and ANOR. –vs- COMMITTEE OF BUGISU CO-OPERATIVE UNION (1968) EA by RUSSEL (J) and expanded by NGAAH (J) in NEW MURARANDIA FARMERS CO-OPERATIVE SOCIETY LTD –VS- DISTRICT CO-OPERATIVE OFFICER KAHUHO SUB COUNTY AND 7 OTHER INTERESTED PARTIES** (unreported) that the disputes concerning the business of a Co-operative Society would include issues such as when the elections should be conducted, how they should be conducted and whether persons so elected were validly elected and whether they are legitimate office bearers of a management committee.

18. This is precisely why in my view this dispute falls in under **Section 76** of the **Act**. In which case then the first port of call is the Co-operatives Tribunal and not the High Court.

But are there matters arising here which would not be within the jurisdiction of the tribunal so as to bring this matter.

19. The answer to this is intertwined with the question as to whether 3rd and 4th respondents are necessary parties in the whole matter. The respondents submit that the 3rd and 4th respondents have no power or authority over the members and they do not participate in the decision meeting process. Their role is merely to ensure that Co-operatives Societies operate within the confines of the law. Indeed **Section 3** of the **Co-operatives Act** provides that the role of the Commissioner for Co-operatives is for registration, organization and dissolution of Co-operative Societies.

20. The applicant's lament is that he complained about his disagreement with the 1st and 2nd respondents, yet the 3rd and 4th respondents did nothing. What should they have done – dissolve the Board or the Society? I think the answer is obvious – they did nothing because they were being dragged into unfamiliar waters yet there was a vessel available in the form of the Tribunal to address the issue. Once the role of 3rd and 4th respondents is remained, then this matter does not have other issues that would bring it into the jurisdiction of the High Court and the situation observed by Odero J in ex-parte **Elisha Otieno and 22 others** does not apply.

21. Indeed as Lenaola J (as he then was) held in the case of **JOHN RICHARD OUMA NYAMAI –VS- THE CO-OPERATIVE TRIBUNAL & 2 OTHERS PETITION NO.520 OF 2012:-**

"the constitution has thus donated power to the courts and tribunals to exercise judicial authority and the mechanisms of dispute resolution with regard to the Co-operative Societies are contained in the parent Act which is the Co-operative Societies Act which has established the 1st Respondent whose provisions are well articulated and defined in subsidiary legislation. The High Court should not be seen to be usurping the powers of tribunals and inferior courts without good reasons for doing so."

22. I could not put it any better and it is best that I let the matter rest here by stating that this limb of the preliminary objection has merit and is sustained.

23. But even if the applicant was aggrieved by the decision by an order of the Commissioner, then under **Section 73** of the **Act** the first part of call is an appeal to the tribunal.

24. The respondents have also argued that the 1st respondent does not have the legal capacity to be sued because a Board of Management has individual members who are elected for a term of office and upon completion they are removed or re-elected. They contend that the only legal entity is the 2nd respondent and counsel referred to **Section 12** of the **Act** which provides:-

"12 Upon registration, every society shall become a body corporate by the name which it is registered with perpetual succession and as common seal and with power to hold. Movable and immovable property of every description, to enter with

contracts, to sue and be sued and do all things necessary for the purpose of or in accordance with its by-laws.”

25. To this **MR. NYAUKE**'s response is that this is not strictly a point of law and it can be dealt with at the court's discretion.

26. Does a Board of Management have the legal capacity to sue and be sued? Is it a body corporate? On this issue I need not belabour the point. Nothing has been presented to confirm the Board's legal capacity but a reading of the **Co-operative Act Section 28 (3)** suggests that the management of a society's affairs is entrusted in the board and committee which has capacity to enter into contracts to sue and be sued and to do all things necessary for the society. In my view that settles the issue and that lib fails.

27. The respondent also submits that the application for Judicial Review is time barred as the considered by laws were amended on July 2016 and by the Commissioner of Co-operatives on 27th August 2016 and so the application offends **Order 53 rule 2** of the **Civil Procedure Rules** which provides that:-

“53 (2) Leave shall not be granted to apply for an order of certiorari to review any judgment, order, decree, conviction, or other proceedings for the purpose of its being quashed, under the application for leave made not late than six months after the date of the proceedings or such shorter period as may be prescribed by the Act ...”

28. Respondent's counsel points out that the issues arising in the application relate to by-laws which were amended way back in July 2016; and the six months period has lapsed.

29. Mr. Nyauke's response to this is that the court did not place a shorter time frame within which to file the motion and the same was filed within 21 days.

30. With the greatest of respect, counsel is mixing up issues – the six months lapse is with regard to the time the contested issue arose not the time directed by the court for filing a motion which is limited to 21 days which is contemplated by **Order 53 (3)**.

31. Time begins to run immediately the cause of action capitalizes.

32. As observed by Lumumba and Kaluma [eds] in *Judicial Review of Administrative Actions in Kenya: Law and Procedure* (Jomo Kenyatta Foundation page 46-48 applications for certiorari must be instituted within six months of the cause of action. In the case of **RE Application by Geden W. Gathunguri (1962) EA 520** a preliminary objection was sustained on the basis that the application for leave was time barred because six months had expired from the date of conviction.

33. Indeed I need not repeat what the 1st and 2nd respondents has stated, I concur with him.

34. In the light of these observations I hold and find that the preliminary objection has merit and is sustained.

35. The Judicial Review herein is struck out and dismissed.

36. Costs shall be borne by the ex-parte applicant.

Delivered and dated this 2nd day of February, 2018 at Homa Bay

H.A. OMONDI

JUDGE