



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CONSTITUTIONAL & HUMAN RIGHT DIVISION

PETITION NO. 2 OF 2018

ALLOYS JOSEPH ABUGA.....PETITIONER

VERSUS

1. COUNTY CO-OPERATIVE COMMISSIONER/RETURNING OFFICER

NYAMIRA COUNTY.....1ST RESPONDENT

2. CHAIRMAN NYABOMITE FARMERS

CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

JUDGEMENT

By the petition filed herein on 14th May 2018 the petitioner seeks orders that: -

“(a) A declaration that the elections scheduled for Tuesday the 15th of May, 2018 be postponed pending the hearing and determination of this petition.

(b) That if the elections are allowed to be conducted thereafter the County Commissioner for Co-operatives Societies Nyamira County be mandated to appoint an independent body to vet the applicants for the said post and oversee the actual electoral exercise in the light of the By-Laws and the Co-operatives Societies Act.

(c) Costs be awarded to the petitioner.”

The petition is expressed to be made under Articles 2, 3, 19, 20, 21, 23, 27, 28 and 165 of the Constitution of Kenya and the Co-operative Society's Rules 2014 and is premised mainly on grounds that the petitioner is a member of the 2nd respondent society his membership being No. 9164; that the impugned elections which were scheduled for 15th May 2018 at the societies factories had serious irregularities and if they were allowed to proceed they would not be free, merited, transparent and credible and neither would they reflect the will and democratic right of the members. Further that the qualifications required to vie in the notice dated 24th April 2018 differ from those set out in Section 29 of Nyabomite Farmers' Co-operative Society Ltd's amended By-laws 2007. Other irregularities alleged include bringing on board an imposter who has never been a member to contest the elections, declaring bonafide members as not members and setting delivery of coffee as a condition without indicating the amount and without indicating the provisions of the by-laws or the Law upon which the requirement is based. The petitioner contends that as a result of the respondent's action his rights have been infringed and violated and he will suffer loss and damage if the elections are allowed to proceed.

Contemporaneously with this petition the petitioner filed a Notice of Motion in which he sought orders for stoppage of the elections. Upon considering the same this court directed that the same be served for hearing interpartes on a date which this court fixed. The petitioner and his Advocate did not attend court on the date given and so the application was dismissed with costs to the two respondents. The court then fixed the petition for directions on 28th May 2018 and although the Advocates for the respondents expressed the view that the petition had been overtaken by events and implored the court to dismiss it, this court nevertheless gave the petitioner a chance to ventilate the petition and required the Advocates for the parties to file written submissions. The same were duly received. On 28th May 2018 Counsel for the 2nd respondent filed a preliminary objection that this court has no jurisdiction to determine the issues raised in the petition as the same should have been referred to the Co-operative Tribunal under Section 76 of the Co-operative Societies Act. I shall deal with that preliminary objection and the petition together. The issues for determination are: -

(a) Whether this court has jurisdiction to hear and determine this petition.

(b) *Whether the petition discloses a reasonable cause of action and if so whether the petition has merit.*

(c) *Who shall bear the costs of the petition.*

The dispute before this court involves elections of the Nyabomite Farmers' Co-operative Society Ltd Management Committee. Counsel for the respondents has cited several persuasive authorities where it was held that elections are an integral part of the business of a Co-operative Society and is therefore a dispute that falls under Section 76 of the Co-operative Societies Act and that therefore the dispute herein is not properly before this court. It is however apparent that opinion on this issue is divided. In **Alex Malikhe Wafubwa & 7 others v Nambakha Wamita & 4 others** [2012] eKLR Gikonyo J while determining a similar issue stated: -

“[54] The petition is substantially founded on three major grounds.

[55] One, the Petitioners allege that the term of office of the 1st-5th Respondents in the Management Committee of the Bungoma Cooperative Union Limited expired over one year ago, and therefore their continued holding of office is contrary to the law, null and void.

[56] Second, it is alleged that the Management Committee of the Bungoma Cooperative Union Limited has failed and or refused to convene a general meeting as by the law required in order for the members, including the Petitioners to elect their office bearers. Their claim is that the law and by-laws on election of office bearers for Bungoma Cooperative Union Limited have been totally violated thereby taking away their right to vote and elect their office bearers.

[57] Third, the Petitioners also allege that the 6th Respondent has also neglected, ignored and/or refused to convene a special meeting of the Bungoma District Cooperative Union Limited where the Management Committee for the said Union has failed to do so.

[58] Fourth, the petitioners further allege that the Respondents, instead of convening a meeting for purposes of elections, have deployed armed policeman at the venue for holding of elections.

[59] Now, are these grievances the types that are hemmed within section 76 as disputes within the jurisdiction of the Tribunal"

[60] In construing a statute where a category of some descriptors is provided in a manner that is not closed as is in section 76(2) of the Act, the canon to be applied is that of ejusdem generis. Accordingly, as far as possible, anything else that is to be included in that category must be of the same kinds, class, or nature. In this sense, an overly wide meaning of such prescription should be avoided, and be restricted within the overall objective of the Act. I think, this is the proper construction that should be applied in the interpretation of section 76(2) of the Act since the issue here is one of ouster of the jurisdiction of the court. The jurisdiction of any quasi-judicial tribunal is never unlimited but is always circumscribed by the law creating it. That is the reason why the Honourable Justice Makhandia J (as he then was) adopted a subtle craft in the case of Peter Ochara Anam when he said:

‘These acts ((sic) ...continue to apply and should be applied to resolve disputes akin to them’ [Emphasis supplied]

[61] This approach of construction of statutes, and which is expressed in the words of Honourable Justice Makhandia J (as he then was), does not allow an expansion of open ended provisions of the law to the extent of covering matters that are not akin to or are strange to or are incompatible with or outside the essential jurisdictional bounds circumscribed by the Act.

[62] Going back to the issue in dispute as I have framed it, these are grievances by members of primary co-operative societies against a Co-operative Union, of which these primary societies are members; on matters of elections, illegal holding of office, failure to convene a general meeting by the management committee, or special general meeting by the Cooperative Commissioner; which are not akin to the powers of the Tribunal under section 76, 77 and 80 of the Act.....

[65] I therefore find that the disputes herein relate to; elections, illegal holding of office, failure to convene a general meeting by the management committee, or special general meeting by the Cooperative Commissioner which are not akin to the powers of the Cooperative Tribunal under section 76, 77 and 80 of the Act. In particular, the Tribunal does not have jurisdiction to issue judicial review orders which is one of the jurisdictions the Petitioners are seeking orders from.”

On my part I am persuaded by the decision of Gikonyo J and therefore hold that elections is not one of the matters that would be included in the disputes referred to under Section 76 (2) of the Co-operative Societies Act. Be that as it may the Society (2nd respondent) has by clause 49 of its Bylaws clearly stipulated that **any dispute arising out of the bylaws or concerning the business of the society which cannot be settled by the committee or General Meeting shall be referred to the Co-operative Tribunal and any party can then appeal to the High Court whose decision shall be final.** The right to elect, suspend or remove members of the committee is provided for under By-law 29 and my finding therefore is that any dispute arising therefrom is subject to By-law 49 and that being the case it ought to have been referred to the Co-operative Tribunal before being brought to this court. That is what is expected under Article 159 (2) (c) of the Constitution which obligates this court to promote and encourage parties to explore alternative methods of dispute resolution. Accordingly I hold and find that this dispute is not properly before this court as it ought to have been litigated before the Co-operative Tribunal and come here only on appeal as provided under the 2nd Respondent's By-laws.

Secondly, even had the matter been properly before this court it would not have succeeded. On this I agree with Counsel for the 1st

respondent that the petitioner has not disclosed the rights under the Constitution which he alleges were violated. This is a requirement under Rule 10 (2) (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states: -

“10. (1)

(2) The petition shall disclose the following: -

(a)

(b)

(c) the Constitutional provision violated;

.....”

Further and more importantly the petition whose main prayer was to arrest the elections scheduled for Tuesday 15th of May 2018 is spent.

Accordingly the petition is dismissed with costs to the respondents.

It is so ordered.

Signed, dated and delivered at Nyamira this 4th day of October, 2018.

E. N. MAINA

JUDGE