



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO.7 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT, CAP 490 LAWS OF KENYA

SHADRACK MOGESI OBEBO.....1ST PETITIONER/1ST APPLICANT

LAWRENCE O. NYANGAGA.....2ND PETITIONER/2ND APPLICANT

-VERSUS-

THE COMMISSIONER FOR CO-OPERATIVE DEVELOPEMENT.....1ST RESPONDENT

THE CO-OPERATIVE COMMISSIONER KISII COUNTY.....2ND RESPONDENT

JEREMIAH OMWANSA OBWOMA.....3RD RESPONDENT

GEORGE MOMANYI MIRONGA.....4TH RESPONDENT

SAMULE OKIRIGITI MOKOBI.....5TH RESPONDENT

MBOTELA NELSON OPANGA.....6TH RESPONDENT

HENRY NYABUTO NGARANA.....7TH RESPONDENT

RULING

1. The petitioners filed the petition dated 14/06/2018 together with Notice of Motion dated 14/06/2018 simultaneously on the 14/06/2018. In the petition the petitioners described themselves as members of Mobamba Co-operative Society indicating their membership number as Nos.4315 and 2425. They aver that the said Society is a Co-operative Society registered under the Co-operative Societies Act Cap 490 of the Laws of Kenya. In their petition they indicate the legal basis of the petition citing Articles 22 & 47 of the Constitution of Kenya together with Section 2 of the Fair Administrative Act. They also cite the provisions of Sections 28 and 58 of Cap 490. In the petition they are contesting the administrative actions of the 1st and 2nd Respondents who have appointed an interim caretaker committee comprising of the 3rd to 7th Respondents, to manage their affairs and operations of the Applicant's Sacco in place of the current elected management Committee without following the due process of law. They therefore seek an injunction against the 3rd to 7th Respondents from assuming office or conducting any business or from conducting any transactions relating to the management or business of the Co-operative Society and a restoration of the duly elected member. They seek a declaration that the process followed in the constitution of the impugned interim committee was illegal, irregular, unconstitutional, mala fides and therefore invalid and void. They also seek a declaration that the current Elected Management Committee members of the Applicant Sacco Society herein are legally in office unless removed in accordance with the Society's by-laws or under the Provisions of the Cooperative Societies Act, Cap 490 laws of Kenya and are therefore entitled to transact all Business in relation to, for and on behalf of the Society.

2. The 1st and 2nd Respondents filed a preliminary objection on the 5/07/2018 stating that the court does not have the jurisdiction to hear and determine the matter since it involves a Co-operative Society and ought to be heard by the Co-operative Societies Tribunal. That the Notice of Motion application does not raise a reasonable cause of action that the Application is an abuse of the court process. A similar preliminary objection was filed by the 3rd to 7th Respondents.

3. The court gave directions that the preliminary objection be dealt with as it raised issues on the court's jurisdiction to hear the petition. Mr. Gichana Bosire for the 3rd to 7th Respondents submitted that this court has no jurisdiction to hear the matter as it falls within the ambits of the Cooperative Tribunal. That the provisions of Article 169(1) (d) of the Constitution deal with the subordinate courts and the tribunal. Parliament is given powers to enact laws on local tribunals which are to operate within the provisions of Article 169 (2) (e). That Section 76 of the Co-operative Societies Act Cap 490 deals with disputes arising within any Co-operative Society. The disputes are stipulated under section 76 (1) which gives the Tribunal powers to handle the disputes. That the disputes include all matters which could form matter of civil litigation and touching on the business of the society. It was submitted that the petition seeks to deal with an issue on the committee to run the affairs of the society and to investigate allegations of mismanagement. That this is clearly it is a dispute that falls within the provisions of Section 76 and thereafter ought to be dealt with by the Co-operative Tribunal. That filing this matter before this court is asking the court to usurp the Tribunals powers without good reason. The Respondents sought to have the petition dismissed. They relied on two cases of namely; Muranga HCC Miscellaneous Application No.1 of 2014 New Murandia Farmers' Co-operative Society –vs.- Machakos District Co-operative officer Kahuho Sub-County & 7 Others and Nairobi HCCC Constitutional Petition No. 520 of 2012 John Richard Ouma Nyamai – vs- the Co-operative Tribunal & 2 Other.

4. The Petitioners opposed the preliminary objection. Mr. Ochoki relied on the submissions filed in court on 3/07/2018. In the said submissions the petitioners indicate that Section 76 of the Co-operative Societies Act provides that any dispute relating to the business of a Cooperative Society shall be referred to the Co-operative Tribunal. That the provisions of Section 76 (1) & (2) are clear that not all matter relating to Co-operative Societies are within the Co-operative Tribunal. That to determine that their petition herein is a constitutional petition or not it is imperative to first decipher what the petition entails the nature, and character of the claim sought in the petition. That the petitioners being members of the Co-operative Society have brought the petition on their behalf. That at paragraphs 25, 26 and 27 of the Petition, the Petitioners aver that the exercise of the powers of the 2nd Respondent in as far as suspending the elected committee members without complying with all the necessary provisions of the law and/or by-laws of the society is ultra vires and goes contrary to the principles of democracy, good governance and co-corporate sovereignty of Sacco members. That the Petitioners, seek various orders inter alia; a declaration that the process followed in the constitution of the impugned interim committee was illegal, irregular, unconstitutional, mala fides and therefore invalid and void. That the nature of this Petition and more specifically the nature of the claims and/or prayers sought falls outside the realm of those specified under Section 76 of the Co-operative Act. The petition concerns the process followed in altering the management of the Co-operative society in which the 1st and 2nd Petitioners belong to as members and their right to be included in the making of decisions which have the effect and/or consequence of affecting such rights. The petitioners relied on the case of **Alex Malikhe Wafubwa and 7 Other v Elias Nambakha Wamita and 4 other Petition No.7 of 2012**, the court held that

“...On matter of elections, illegal holding of office, failure to convene a general meeting by the management committee, or special general meeting by the Co-operative commissioner are not akin to the powers of the tribunal under Section 76, 77 and 80 of the Act.”

5. It was further submitted the nature of the prayers sought by the 1st and 2nd Petitioners herein cannot be granted by the tribunal, but rather by this court. That at this stage the court is not determine the substantive issues in the case but rather it should only look at the nature of the claims sought in light of the Co-operative Societies Act in order to determine whether it is possessed of the requisite jurisdiction. That if the court finds the business relates to the business of Cooperative Society then the preliminary objection is merited. That the petition before the court is titled a constitutional petition. Under Article 165 of the constitution the court had original jurisdiction in criminal and civil matters. That the petitioner is challenging the 1st and 2nd Respondent exercise of authority which in infringe the petitioners constitutional rights. This dispute is brought under Article 165 (3) which gives the court powers to determine if a right in the Bill of Rights has been violated infringed or threatened. That the nature and character and claim is a dispute outside the ambit of section 76, of the Cooperative Societies Act. It seeks to challenge the illegal irregular and unconstitutional suspension of validity elected and officials of a Cooperative Society. The Cooperative Tribunal cannot hear a matter that relates to the violation of a citizen's rights.

6. Mr. Gichana Bosire in response submitted that Article 159 2(e)of the constitution has donated powers to the Tribunal and the courts. That mechanisms on disputes of Cooperatives are in the parent statute. There is a procedure to articulate the issues that arise in the course of the business of the Cooperative Society and the right place for them to be canvassed is the Cooperative Tribunal. That the petition should be dismissed.

7. I have considered the submission; cases referred to on the preliminary objection, section 76 the Cooperatives Societies Act and the Petition. In determining whether the court has jurisdiction to adjudicate the petition I must consider whether the dispute raised concerns the business of the co-operative society as provided under section 76 of the Co-operative Societies Act. Section 76 of the Act provides for the disputes which fall within the jurisdiction of the Co-operative Tribunal. It provides that;

(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—

(a) 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 demands admitted or not; or

(b) 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;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

I now turn to the petition. The petitioners seek the following prayers;

a) A declaration that the process followed in the constitution of the impugned interim committee was illegal, irregular, unconstitutional, mala fides and therefore invalid and void.

b) That the Honourable court be pleased to issue an order of injunction restraining the 3rd, 4th, 5th, 6th and 7th Respondents from assuming office in any capacity or from conducting any transaction relating to the management and /or business of the Petitioner/ Applicant Co-operative Society.

c) The Honourable Court be pleased to issue an order of Injunction restraining the Respondent herein , their agents, servants and /or representatives from blocking and /or preventing the Elected Management Committee members from accessing their offices and discharging their lawful mandates

d) A declaration that the current Elected Management Committee members of the Applicant Sacco Society herein are legally in office unless removed in accordance with the Society's by-laws or under the provisions of the Co-operative Societies Act, Cap 490 Laws of Kenya and are therefore entitled to transact all business in relation to, for and on behalf of the Society.

8. The issues in the petition are at paragraphs 9 to 32. The petition challenges the administrative actions of the respondents 1st and 2nd who have appointed an interim caretaker committee to manage the affairs and operations of the Applicant's Sacco. The 3rd to 7th Respondents are included in the petition as the Interim caretakers. The actions the 1st and 2nd petitioners are challenging are the administrative actions by the 1st and 2nd respondent. In my view this issue does not fall with the provisions of section 76 of the Co-operatives Societies Act Cap 490. The petitioners are seeking declaratory orders over the said action. If the issues were purely on the basis of the business of the co-operative as defined under section 76 then this court would not have hesitated to refer the Tribunal. What is before me is a constitutional petition, the petitioners argue that their rights have been violated the Tribunal has no powers to deal with issues concerning violation of rights, the said is handled by the High Court as envisaged in Article 165 (3) of the Constitution. I find that the objection raised has no merit and it's dismissed. Each party to bear its own costs.

Dated signed and delivered this 18th day of October 2018.

R.E. OUGO

JUDGE

In the presence of;

Ms Nyaenga h/b for Mr. Ochoki For the Applicants

Respondents **Absent**

Ms. Rael **Court clerk**