



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 360 OF 2016

ZAKAYO SANG

PAUL KOSKE

BENARD RONO

PAUL TOO

REUBER TERER

PHILIP BII

DANIEL MUTAI

SAMUEL TOWETT

RICHARD LANGAT

RICHARD KIRUI.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER FOR COOPERATIVE

DEVELOPMENT.....2ND RESPONDENT

AND

THE COUNCIL OF GOVERNORS.....1ST INTERESTED PARTY

STEGRO SACCO LIMITED2ND INTERESTED PARTY

THE COUNTY GOVERNMENT OF BOMET.....3RD INTERESTED PARTY

RULING

INTRODUCTION

1. This is a ruling on an interlocutory application for Conservatory Orders (and a Preliminary Objection thereto) pending hearing an determination of a Petition by the petitioners who describe themselves as “directors and members of the 2nd Interested Party” arising from the Recommendations of an Inquiry Report by the 2nd Respondent Commissioner of Cooperatives pursuant to provisions of the Cooperative Act, cap. 490 of the Laws of Kenya, and challenging the said Commissioner’s mandate in regulating the affairs of the 2nd Interested Party SACCO.

2. By the Petition dated 26th August 2016, the petitioners set out their cause of action as follows:

“BACKGROUND FACTS

On the 13th April 2016 the 1st respondent gazette an Inquiry Order pursuant contained in Kenya Gazette No 3686 dated 13th April 2016 directed to the 2nd Interested Party.

The cost of the inquiry was met by County government of Bomet a member of the 1st Interested Party as envisaged in Section 60 of the Cooperative Societies Act. The Inquiry against the 2nd interested Party was undertaken un-procedurally, without participation of the petitioners and County Government of Bomet and by an interim team of directors of the 2nd interested party who were un-procedurally elected into the office.

That the officers who were sent to undertake the inquiry on behalf of the 2nd respondent did not complete the inquiry as they left the premises of the 2nd Interested Party one week before the period of inquiry citing changes in the management committee of the 2nd Interested Party.

The inquiry report was read on the 1/7/2016 directly to the delegates in violation of Section 58 and 59 of the Cooperative societies Act, which was unlawful, unprocedural and offends and defeats the meaning and spirit of separation of functions espoused under Article 186 of the Constitution hence should be declared a nullity.

The 2nd respondent has and continues to interfere with the management of the 2nd interested party and has sanctioned the illegal stay in office of interim directors who were unprocedurally elected to the office prior to the purported inquiry report.

The petitioners and the 2nd interested party moved to the cooperative Tribunal to defend themselves in a matter filed by the interim directors but the 2nd respondent influenced the outcome of the cooperative Tribunal case by writing letters to the Tribunal seeking adjournment of hearing of the matter before it, which eventually influenced the Tribunal Ruling.

The letters were never produced in court by way of affidavits but it is abundantly clear that the Tribunal relied on them in arriving at its bias, misplaced and uninformed ruling done with the aim of assisting interim directors to continue meddling with the management of the 2nd interested party without consulting the County Government of Bomet.

The 2nd respondent has no powers to supervise and manage cooperative societies in exclusion of the petitioners and County government of Bomet that has a ministry and a department devoted to cooperative societies.

The purported inquiry on the petitioners and the 2nd interested party was done under the directive of the 2nd respondent in usurpation of the powers of the petitioners and County government of

Bomet as stated under the 4th Schedule being a devolved function.

The actions of the 1st and 2nd respondents amount to abuse of office and ought to be stayed in the interests of justice.

That the Inquiry Report as read did not establish any loss of funds by the 2nd Interested Party and or misuse of office and or improper conduct by the petitioner but it goes to decree that the lifetime investments and pride of the eighteen thousand members of the 2nd interested party, that is, the factory and the petrol station be sold doff and that the petitioners be barred from holding and or participating in activities of a Cooperative Society.

The petitioners are apprehensive that should the inquiry report be implemented eighteen thousand members of the 2nd interested party risk losses owing to the decreed sale of its investments in the factory and the petrol station and the petitioners will be unreasonably and unjustifiably barred from holding office in violation of their rights to fair Administrative Action, Freedom of Association as envisaged under Article 36 of the 2010 Constitution.”

3. On the basis of these facts, the Petitioners sought final reliefs as follows:

“PETITIONERS PRAYERS SOUGHT DATED 26TH AUGUST 2016 THAT

1. An order directed at the 1st and 2nd respondent barring them from implementing the Inquiry Order and Report made pursuant to Kenya Gazette No 3686 dated 13th April 2016.

2. An order directed at the 2nd respondent barring them from interfering with the management and operations of 2nd Interested Party to the detriment of its eighteen thousand members.

3. A declaration that the 2nd respondent overstepped his mandate in the regulation of 2nd interested party and that his actions are ultra vires Article 174, 175 of the Constitution and ought to be quashed.

4. A declaration that the 1st respondent failed to legally advise the 2nd respondent that their actions are unlawful and neglected to consult with the County Government of Bomet prior to taking action against a Cooperative society within County government of Bomet.

5. A Declaration that the office of 2nd respondent be dissolved with immediate effect for failing to meet the requirements of the constitution and duplicating the functions being undertaken by the Counties.

6. A declaration that inquiry report does not meet the threshold of report as envisaged under the cooperative Act hence incompetent to make the recommendation it made as they are unlawful and unconstitutional as petitioners and or the 2nd interested party did not breach any provisions of the cooperative Act and or was any improper conduct was established on the part of the petitioners to warrant them from being barred from holding office.

7. A declaration that the ruling delivered on the 26/7/2016 by the Cooperative Tribunal is of no effect, null and void ab initio and ought to be quashed in the interested of members of the 2nd interested party.

8. A declaration that the action of the 1st respondent failed to advise the 2nd respondent of the constitutional requirement of cooperation and consultation hence its action is unconstitutional.

9. A declaration that the constitutional rights of the petitioner have been infringed through the

reading of the inquiry report to the petitioners of the 2nd interested party.

10. An order of permanent injunction do issue restraining and prohibiting the Commissioner of Cooperative Development from any further unlawful and illegal directives not allowed by the constitution as regards to 4th Schedule of the Constitution and section 121 of the County Governments Act.

11. An Order do issue directing the 2nd respondent to de gazette the inquiry report with regard to the 2nd interested party.

12. The costs of this petition be borne by the respondents in any event.”

Notice of Motion

4. By a Notice of Motion in the Petition, the petitioners sought orders pending the hearing of the petition as follows:

“NOTICE OF MOTION EXPARTE DATED 26TH AUGUST 2016

1. That this application certified as urgent and thus be heard on priority basis and service be upon the 1st, 2nd respondents, 1st and 2nd interested party be dispensed with in the first instance.

2. That the 1st and 2nd respondents herein be restrained by means of an Interim Conservatory Order from implementing the Inquiry Order and Report made pursuant to Kenya Gazette No 3686 dated 13th April 2016 pending hearing and determination of this petition.

3. That an Interim Injunction do issue against the 2nd respondent barring them from interfering with the management and operations of Stegro Sacco Limited to the detriment of its members pending hearing and determination of this petition.

4. That an Interim Injunction do issue against the 1st and 2nd respondents from interfering in the devolved functions of the County Government of Bomet in respect of the operations and management of the 2nd interested party pending hearing and determination of this petition.

5. That an Interim Injunction do issue restraining and prohibiting the 2nd respondent from any further unlawful and illegal directives not allowed by the Constitution as regards to 4th Schedule of the Constitution and Section 121 of the County Governments Act pending hearing and determination of this petition.

6. That an Interim Injunction do issue directing the 2nd respondent from implementing the Gazette Notice on inquiry report with regard to the 2nd interested party pending hearing and determination on this petition.

7. That an Interim Injunction be issued to stay the ruling of the Cooperative Tribunal delivered on 26/6/2016 in CTC 253 of 2016 pending hearing and determination of this petition.

8. That costs hereof be provided for.

9. That there be such other or further orders as the court may deem fit and just to grant in the circumstances.”

The Responses

5. The 2nd Interested Party filed a Replying affidavit of Joseph Cheruiyot sworn on 9th September 2016 in which it is raised primarily the issue of non-disclosure of the pendency of an appeal by the petitioners from the Cooperative Tribunal decision in Case NO. 253 of 2016 to the High Court in Civil Appeal No 560 of 2016 seeking similar prayers to those sought in the Petition.

6. The 3rd Interested Party similarly raised the issue of multiplicity of proceedings by the petitioners who had “already challenged the Inquiry Report vide Cooperative Tribunal Cause No. 253 of 2016 and the Tribunal’s decision on the issues raised was delivered on the 26th day of July 2016 [and] the petitioners were dissatisfied with the said decision and proceeded to file civil appeal no. 560 of 2016.”

7. The respondents filed a Notice of Preliminary Objections dated 29th September 2016 as follows:

“1. The Petition and the application herein are misconceived and incompetent, fatally defective, hollow and a non-starter in law following a multiplicity of suits filed by the applicant over the same subject matter and cause of action involving the same parties being Nairobi HC Civil Appeal No. 560 of 2016 which is awaiting hearing and determination and as such the petition and the application herein should be struck out with costs to the respondents.

2. The Petition herein is therefore incompetent, bad in law and should therefore be struck out in limine and be dismissed with costs to the Respondents.”

8. The 1st Interested Party did not enter appearance.

9. The petitioners’ Notice of Motion dated 26th August 2016 and the respondents Preliminary Objection dated 29th September 2016 were argued together on 3rd October 2016 and ruling was reserved.

Submissions by the Parties

10. Counsel for the petitioners, Mr. Mengich appearing with Mr. Kyobika, rested their case on alleged breach of their property rights under Article 40 (2) (a) of the Constitution and of their right to freedom of association under Article 36 of the Constitution following the recommendations of an Inquiry ordered by the 2nd Respondent Commissioner for Cooperatives. The thrust of the petitioners argument is that the regulation of affairs of cooperative societies is a County Government function under Article 186 and the 4th Schedule of the Constitution and the Commissioner for Cooperatives as a body established by section 3 of the Cooperatives Act under the national government had no mandate over cooperative societies. It was contended that various County Governments should under Article 187 of the Constitution enact their own County cooperative legislation to regulate cooperative societies in their counties through County Cooperative commissioners. Accordingly, it was contended that the 2nd Respondent’s conduct of an Inquiry under section 58 of the Cooperatives Act, which recommended the sale of the 2nd Interested Party’s property and the bar of the petitioners from holding of any office in any society in the jurisdiction of the County of Bomet, the 3rd Interested Party, is unconstitutional.

11. For the Respondents, Mr. Ogosso urged a Preliminary Objection dated 29th September 2016 which raised the issue of **sub judice**, that the matters pending before this court are also pending before the High Court Civil Appeal Division in Civil Appeal No. 560 of 2016, which is an appeal from the ruling of the Cooperatives Tribunal made on 26th July 2016 in Tribunal case No. 273 of 2016 consolidated with no. 253 of 2016. The Respondents contend that the present petition is therefore an abuse of the process of the Court, and accuses the petitioners of forum shopping. On the merits, the Respondents contend that the 2nd Respondent Commissioner exercises powers - including the power of inspection which the petitioners are challenging in the Petition - under the Cooperatives Act, cap. 490 as there is no County Governments Co-operatives law. Conceding that cooperatives operations are a devolved function, the respondent contend that they are however governed by the Cooperatives Act cap. 490 and that if the petitioners object to the Act, they should move the Court for it to be declared unconstitutional. On the balance of convenience with regard to public interest favours the Commissioner being able to act where there is

misappropriation of funds.

12. Mr. Nyakundi for the 2nd Interested Party supported the Respondents' submission of abuse of process of the Court and pointing out that Tribunal Case NO. 273 of 2016 was filed *ex parte* by the Petitioners seeking to set aside the order of the Tribunal of 26th July 2016 in a ruling delivered after hearing *inter partes* in the earlier case no. 253 of 2016. On the merits, the 2nd Interested Party contended that the 2nd respondent Commissioner had authority under Schedule 4 of the Constitution Paragraphs 15, 21, 29, 32 and 33 which give the national government mandate to develop policy and statutes to provide for establishment of County Governments on matters within the latter government. Although, the management of cooperatives is a devolved function, there are components of management which are within the domain or mandate of the national government, and that governments at either level should complement each other. It was submitted that the Inquiry Report was only a recommendation subject to adoption by the General Meeting of the 2nd Interested Party. Counsel also emphasised the supreme authority of the General Meeting of the Company and urged that the members of the company cannot be stopped from holding the Annual General Meeting at which elections may be held, and submitted that the petitioners raised no constitutional grievance for redress by a constitutional court.

13. For the 3rd Interested Party (County Government of Bomet), Mr. Matwere urged its Grounds of Opposition dated 27th September 2016 said that the County Government was assisting the SACCO in sorting out the issues in the dispute, pointing out that some aspects of the petition had been overtaken by events in that elections had already been held and that the property of the SACCO is not the property of the members including petitioners. Counsel submitted that the petitioners were guilty of material non-disclosure having not disclosed that they had approached the tribunal and subsequently the High Court on appeal from the Tribunal and sought stay of the Commissioner's Report by way of Notice of Motion in the Appeal, which was a replica of the Notice of Motion before this Court. It was contended that the Inquiry Report did not raise any constitutional issues and that the petitioners should, therefore, have sought judicial review of proceedings before the Tribunal.

14. In Reply, the Counsel for Petitioner concede that there was an appeal to the High from the Tribunal ruling of 26th July 2016 but sought to distinguish the two proceedings before the Court in that the appeal was about elections; that the Petition herein a challenge the commissioner's power to order an Inquiry and the resultant Inquiry Report, which was not part of the case before the Tribunal; and that the respondents and the County Government were not parties to the appeal. It was further submitted that the court had both constitutional interpretative jurisdiction as well as supervisory jurisdiction over inferior bodies, and that the petitioners as elected officials of the 2nd Interested Party represented the proprietary interests of the shareholders of the SACCO, which were threatened with violation by the Commissioner's Inquiry Report.

15. Replying on the Preliminary Objection, Counsel for the Respondents reiterated that there was non-disclosure of the appeal HCCA no. 560 of 2016.

ISSUES FOR DETERMINATION

16. The issues for determination are in the alternative:

- a. Whether the Notice of Motion and the Petition would be dismissed for non-disclosure of material facts, and if not
- b. Whether the conservatory orders sought by the petitioners would be granted.

DETERMINATION

Material non-disclosure

17. In accordance with the decision in *R v Kensington Income Tax Commissioners ex p. Princess*

Edmond De Polignac [1917] 1 KB 486, where Warrington LJ at page 509 where he said:

“It is perfectly well settled that a person who makes an ex parte application to the Court, that is to say, in the absence of the person who will be affected by that which the Court is asked to do, is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained. That is perfectly plain and requires no authority to justify it.”

See also **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others, C.A. Civil Application No. 140 of 1995** [1995] eKLR.

18. I have perused the proceedings before the Tribunal, the appeal therefrom to the High Court in Civil Appeal No. 560 of 2016 against the reliefs sought in this Petition. It is clear that the subject matter in the three proceedings is the same. In the Tribunal Case No. 253 of 2016, a group of 10 officials joined the 2nd Interested Party in challenging the petitioners herein as defendants from acting as officials of the 2nd Interested Party following impugned elections at a meeting of 4th May 2016.

19. The issue of the Inquiry by the Commissioner was pleaded in the Tribunal suit at paragraphs 25-26 of the Plaint dated 24th May 2016 as follows:

“25. In exercise of his powers under the Cooperatives act, the Commissioner for Cooperative development appointed an Inquiry team to look into the financial affairs of the 1st Claimant which process is ongoing.

26. The Claimants aver that the parallel technical; Committee stated above was merely intended to disrupt the ongoing inquiry into the affairs of the society and its recommendations were intended to pre-empt any possible action by the Commissioner against the Respondents who had mismanaged the society as the said report treats their wrongdoing casually and actually clears them of any misdeed. ”

20. In response, the petitioners who were the defendants in the Tribunal case no. 253 of 2016 said in paragraphs 20 and 21 of the Defence dated 26th May 2016 that –

“20. The 1st to 10th respondents admit the contents of paragraph 25 save to add that the preliminary Inquiry that was on-gong in eh society was procedural and that similar inquiries had been conducted by SASRA and the Cooperative Bank of Kenya and by the Internal Auditors and deny any form of mismanagement as alleged and instigated by the plaintiffs.

21. The 1st to 10th respondents deny the contents of paragraph 26 and avers that the technical committee was set up on mutual understanding by the parties and deny that the same was intended to defeat or pre-empt ongoing inquiry over alleged mismanagement. The Claimants should await the report of the Inquiry instead of casting aspersions on the Respondents over perceived or alleged mismanagement.”

21. In its ruling of 26th July 2016, the Tribunal said as material that –

“The contention by the claimants is that they are the bona fide officials of the 1st Claimant having assumed office after elections were held in January 2016 and that there were no elections held in May by which the Respondents purport to assume office. The respondents deem to agree that actually there were no actual elections conducted in May and they shopul;d assume office as claimants came to office in the interim and the interim term of the claimants expired in May. The Respondents are also contesting the January elections, how the meeting was called and conducted, person in attendance and the purpose of ousting the respondents from office. However,

communication from the office of the Commissioner of Cooperatives, placed on record show that the claimants are in office. This communication also shows an attempt at changeover, for bank signatories, in May to bring in the respondents. The Cooperative Societies Act and Rules do not contemplate such a situation. The society would need to go into elections to elect office bearers. This will require a general meeting. It is the members that have power to elect office bearers. We are guided by section 27(1) (4) of the Cooperatives Act.”

22. In the Memorandum of Appeal from the tribunal decision of 26th July 2016, the issue of the Commissioner’s Inquiry Report is raised as a ground of appeal as follows:

“8. That the members of the Cooperative Tribunal erred in law by relying on letters from the Commissioner of Cooperatives Development and in the process its decision was biased basing on the Inquiry Report tabled on 1st July 2016 confirms the position.” (sic)

23. The Appeal then seeks among others orders that-

“c. The proceedings and orders from CTC 253 of 2016 and Inquiry Report dated 10th June 2016 pursuant to letters issued by the Commissioner for Cooperatives be quashed.”

24. In a Notice of Motion filed in the appeal dated 25th August 2016, only a day before the petition herein the petitioners seek principal Orders as follows:

“2. That this honourable court be pleased to grant a stay of execution of the ruling of the honourable Members of the Cooperative Tribunal delivered and signed by C. Kithinji on the 26th July 2016 pending appeal.

3. That this Honourable Court be pleased to stay any further implementation of the Inquiry Report and any other order that may be issued pursuant thereto by the Commissioner of Cooperatives Development pending hearing of the appeal.

4. That the appellants be granted leave to challenge the Inquiry Report pursuant to orders of the Commissioner for Cooperative Development.”

CONCLUSION

25. In seeking substantially the same orders in this petition as sought in the Memorandum of Appeal in HCCA No. 560 of 2016 and without disclosing the fact of the appeal filed the previous day, the petitioners were guilty of material non-disclosure. The Constitutional Division of the High Court has no supervisory jurisdiction over other divisions of the High Court, nor does it have a monopoly over the fundamental rights jurisdiction and such other divisions of the Court and courts of equal status may deal with any question of constitutional interpretation of rights and fundamental freedoms as may arise in the proceedings before them. See Court of Appeal decisions in ***Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others*** [2016] eKLR, ***Prof. Daniel N. Mugendi v. Kenyatta University & Others***, CA No 6 of 2012 and ***Judicial Service Commission v. Gladys Boss Shollei & Another***, CA No 50 of 2014.

26. Whether the Commissioner has power to order inquiry into the affairs of a co-operative is a relevant issue to the appeal and the Court in considering the appeal may determine the point.

27. To hold otherwise will be to open the Court to a possibility of conflicting decisions by courts of concurrent jurisdiction over the same or similar question, if the Court in this petition were to invalidate the commissioner’s inquiry and the appeal court upholds the order of the tribunal in reliance of the inquiry report.

28. Had the Court been made aware of the pendency of the appeal from the Tribunal decision of 26th July

2016 and of the orders sought therein, the Court would not have granted the interim orders granted herein on 31st August 2016 and the same will be hereby discharged.

29. Having found that the petitioners are guilty of material non-disclosure of the pendency of the appeal seeking similar orders as in the Petition, the Court does not have to determine the issue of grant or otherwise of conservatory orders sought herein.

ORDERS

30. Accordingly, for the reasons set out above, the Court upholds the Respondents' Preliminary Objection dated 29th September 2016 and the Notice of Motion dated the 26th August 2016 as well as the Petition dated 26th August 2016 are dismissed with costs to the Respondents and Interested Parties.

31. For avoidance of doubt, the operations of the 2nd Interested Party will be restored to the position obtaining as at 31st August 2016, when the Order of the Court herein discharged was made, and in the interests of the members of the Society the parties herein and their Counsel are, pursuant to section 1A (3) of the Civil Procedure Act, directed to ensure compliance with this Order within the next seven (7) days.

DATED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2016.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mengich and Mr. Kyobika instructed by M/S Mengich & Co. Advocates for the Petitioners

Mr. Sekwe with Mr. Ogosso for the Respondents.

Mr. Nyakundi instructed by M/S Orina Riechi & Co. Advocates for 2nd Interested Party.

Mr. Matwere Advocate for 3rd Interested Party.