



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO 68 OF 2015

IN THE MATTER OF THE CO-OPERATIVES ACT CAP 490 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE DISSOLUTION AND LIQUIDATION OF CO-OPERATIVE SOCIETIES

AND

IN AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

KAGAA FARMERS COOPERATIVE SOCIETY.....APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE SOCIETIES.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF INDUSTRIALIZATION &

COOPERATIVE DEVELOPMENT.....2ND RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 31st March, 2015, the *ex parte* applicant herein, **Kagaa Farmers' Cooperative Society**, (hereinafter referred to as the Society) seeks the following orders:

1. That this honourable court be pleased to grant the Applicant herein an order of certiorari to remove this court for purpose of quashing the decision of the Commissioner of Co-operatives ordering the dissolution and liquidation of Kagaa Farmers Co-operative Society contained in the Kenya Gazette Notice of 5th September 2014.

2. That this honourable court be pleased to grant the Applicant an order of Mandamus compelling the Cabinet Secretary Ministry of Industrialization and Co-operative development to hear and determine the appeal dated 29th September 2014 lodged by members of the Applicant.

3. That the cost of this application be provided.

Ex Parte Applicant's Case

2. According to the applicant, the 1st Respondent herein made decision to dissolve and liquidate the Applicant society in a decision contained in the Kenya Gazette Notice of 5th September 2014 which decision was made without adherence to the rules of natural justice as the Applicant society or its members were not given an opportunity to be heard. Being aggrieved by the decision, the applicant appealed as directed in the gazette notice to the Cabinet Secretary in the Ministry of Industrialization and Co-operatives Development but in an obvious refusal to exercise the discretion conferred upon him by statute has neither rejected nor allowed the Appeal.

3. It was the applicant's case that an uncertain position obtained at the society given that no communication had been received by the Applicant from either Respondent. To the applicant, the decision by the 1st Respondent to order the dissolution and liquidation and fettering of discretion by the 2nd Respondent lend both actions amenable to judicial review.

4. It was disclosed that the Applicant only recently conducted its elections to elect the *bona fide* office holders after years of wrangles which elections were conducted pursuant to a court order to help end the said persistent wrangles. Consequently the Applicant society had not had occasion to streamline its operation and was in the process of dealing with all outstanding issues when the 1st Respondent issued the order of dissolution and liquidation.

5. It was therefore the applicant's case that it is only just that the impugned decision of the 1st Respondent as well as the fettering of discretion by the 2nd Respondent should be quashed by an order of certiorari by this honourable court.

Respondent's Case

6. In opposition to the application, the Respondent filed the following grounds of opposition:

1. THAT the 1st & 2nd respondents acted within the law while discharging their duties hence the application is an abuse of the court process.

2. THAT the application does not meet the basic tenets of a judicial review application and is instead an appeal disguised as Judicial review application.

3. THAT the application's for the writ of Certiorari and Prohibition is fatally defective, a non-starter, unsustainable in law and the same amounts to an abuse of the process of court and should struck off with costs to the respondents.

4. THAT the office of the commissioner for cooperative development is established pursuant to the provisions of section 3 of the Co-operative Societies Act cap 490 of the Laws of Kenya and from which it exercises and discharges its mandate jointly and variously overseeing the management of cooperative societies all over the country.

5. THAT it is also the case that the office of the Commissioner is responsible for the growth and development of co-operative societies within the republic of Kenya by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration in accordance with the provisions of Co-operative societies act cap 490 of the laws of Kenya.

6. THAT the Subject of this suit, Ex-parte applicant society has been involved in a number of litigation matters before the Cooperative Tribunal being CTC Nos 02 of 2009, 507 of 2013& 234 of 2011.

7. **THAT the Cooperative Tribunal in a ruling delivered on 14th March 2014 after considering the history of the matter and while relying on a report from the 1st respondent herein directed that The society be dissolved under the supervision of the 1st respondent.**
8. **THAT subsequent to that ruling the 1st respondent in obedience with the tribunal directive and in accordance with the provisions of The Cooperative Societies Act at section 65 commenced Liquidation process for the society vide a Kenya gazette notice No 6199 dated 5th September 2014.**
9. **THAT the Cooperative Tribunal established pursuant to section 76 & 77 of The Cooperative Society Act made a determination on this issue conclusively and from whose final orders the 1st respondent acted. That decision has never been appealed against.**
10. **THAT there is no evidence to prove the allegations that an appeal has been lodged before the 2nd respondent. A judicial review court does not sit as an appellate court so as to substitute its views with that of the tribunal.**
11. **THAT an order of certiorari cannot issue in the circumstances while paying disregard to the tribunal decision in CTC 234 of 2011 contained in a ruling dated 14th March 2014 and from which no appeal has been lodged in line with section 69(2) of The Cooperative societies Act.**
12. **THAT with respect to the judicial review application, the same does not meet the threshold and basic tenets of a judicial review application on the grounds of illegality, unreasonableness, irrationality, impropriety of procedure or improper consideration.**
13. **THAT in the circumstances and based on the foregoing reasons, the notice of motion is therefore baseless, misconceived and devoid of any merit and the orders sought should not be granted.**

Interested Parties' Case

7. On their part the interested parties filed a replying affidavit sworn by **Daniel Githiora Gatuha**, one of the interested parties herein on 2nd October, 2015.
8. According to the interested parties, the application is fatally and incurably defective. The same is bad in law and has no merits and is an abuse of the court process. To them the application is factually incorrect and a misrepresentation of facts and the law.
9. It was averred that the deponent to the replying affidavit was the lawfully recognized Chairman of the Society while the deponent was an imposter who had refused to vacate office even after losing elections and did not even have the support of the society members and keeps on bullying members and imposing himself on the society against the will of the members.
10. According to them if there was any appeal to be preferred, the deponent was the one who ought to have lodged the said appeal against the decision of the court and the commissioner of Co-operatives in placing the society under receivership. Considering the fact that the society does not transact any meaningful business nowadays, it was proper for it to be wound up and the assets shared among the members. The society, it was disclosed was a land buying society with interest in coffee farming but presently there is no coffee to be farmed and that all the land that was under coffee had been subdivided into small portions of land (plots) and some given to members.
11. It was therefore the interested parties' position that there are no compelling reasons as to why the society should continue being in existence. To the contrary, the continued existence of the society is causing more harm than good to its members. Some of them have since died without benefiting from its

existence. Majority of the present members are very old and it is only prudent that it be wound up and the properties/respective pieces of land and any other assets shared among the existing members so as to alleviate their continued suffering. To the interested parties, the deponent to the supporting affidavit favours the continued existence of the society for he will continue masquerading as the chairman and misappropriate the assets of the society. It was averred that he has even sold some properties (parcels of land) to an unsuspecting members of the public but is unable to acquire title deeds for them or transfers the properties to them. While it was conceded as deposed by the deponent of the supporting affidavit, **Joe Karanja Njoroge**, that there are persistent wrangles in the society, the interested parties maintained that he is the main cause and the only way to end the wrangles is by winding up the society.

12. It was averred that the court was very correct to make an order for winding up since it had seen how persistent the wrangles were and they were not likely to end with or without elections.

Determinations

13. I have considered the issues for determination in this Motion.

14. It is clear that by a decision dated 14th March, 2014, the Co-operative Tribunal directed the 1st Respondent to proceed with the process of liquidation of the Society. Pursuant to the said decision the 1st respondent vide Gazette Notice No. 6199 dated 2nd September, 2014 appointed liquidators in respect of *inter alia* the Society herein. It is that particular notice that provoked these proceedings.

15. It is averred by the respondent and interested parties which averment is not seriously disputed that the decision of the Tribunal whose implementation was the subject of the impugned Gazette Notice has not been challenged. In other words what the applicant is challenging is a decision implementing the directions of the Tribunal. Those directions are however not being challenged in these proceedings. Although the applicant is challenging the decision contained in the Gazette Notice, it is clear from the material before the Court that the Gazette Notice was not the decision but just the implementation of the decision.

16. The effect and import of a Gazette Notice was determined in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that the decision in question is to be by way gazettelement, the gazettelement is merely an instrument of information and is not to be construed as the decision itself. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision...”

17. Without successfully challenging the decision of the Tribunal it is my view and I so hold that there would be no basis upon which the Gazette Notice intimating an intention to implement the said decision can be impugned.

Order

18. Consequently, I find no merit in the Notice of Motion dated 31st March, 2015 and the order which commends itself to me and which I hereby grant is that the said Motion be and is hereby dismissed with costs.

Dated at Nairobi this day 4th of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kenyatta for Mr Kaburu for the interested party

Mr Odhiambo for the Respondent

Cc Muriuki