



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, TUNOI & LAKHA, J.J.A.)
CIVIL APPEAL NO. 77 OF 1997

REPUBLIC.....APPELLANT

AND

THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....RESPONDENT

AND

SUKUMA WIKI CO-OPERATIVE SOCIETY LTD

ONESMUS THIONGO KINYATI

CHARLES MAINA MWANGI

DAVID KIRAGU WANJAGI

MAINA GIKUHI

JOHN KIARIE SIMON

ANDREW WATIKI GIKONYO

MUCHOKI MBUTI

CRISPUS MAINA WAITHAKA.....INTERESTED PARTIES

EX-PARTE

DANIEL MACHARIA

ELISHIBA WANGAI (MRS.)

JOSEPH MWANIKI

KAMAU KAGOMBE

FREDERICK KIBOCHI

NJERI NJOROGÉ

**Appeal from the Judgment of the High Court of Kenya at
Nairobi (Mr. Justice A. B. Shah) dated the 5th day of October, 1994**

in

MISCELLANEOUS CIVIL APPLICATION NO. 1111 OF 1984)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Nairobi (A.B. Shah, J. as he then was) dismissing an application for orders of prohibition and certiorari by the applicants, now the appellants, to prohibit the Commissioner for Co-operative Development (the Commissioner) from meddling in the affairs of Sukuma Wiki Co-operative Society (the Society), especially, from being a signatory to the Society's bank accounts, usurping the functions of the management committee and collecting rents for the Society's immovable properties; and, to quash such acts by the Commissioner.

The Society was registered under the Co-operative Societies Act Cap 490 of the Laws of Kenya (the Act) on 7th April, 1975. Its membership is over 1,600 and, as the name suggests, the Society caters mainly for petty traders and vegetable vendors within the City of Nairobi and its environs.

The Society also provides its members with living accommodation at fair and reasonable charges. To achieve its objects the Society raises funds by selling shares to its members.

It is not in dispute, and it is admitted, that since its inception the appellants have served as the management committee of the Society and have not in perfect compliance with the applicable provisions of the Act, the rules framed thereunder and the Society's by-laws, held any annual general meetings or conducted elections for new office bearers or the management committee.

This state of affairs created massive management crisis within the Society as a result of which there was a clear division amongst its members. The Commissioner was compelled to resolve the issue and he obviously thought that the best way to deal with the issue at hand was to convene a meeting of all the Society's members so as to elect new office bearers. This is because under rule 24 of the Co-operative Societies (Amendment) Rules, 1990, the supreme authority of a registered society is vested in the general meeting of the members at which every member shall have the right to attend and vote on all matters affecting the society. The Commissioner therefore did direct that such a meeting be held on 27th November, 1993. As it came to pass, all the appellants were voted out and the interested parties elected as the new management committee.

It is contended by Mr. Muturi Kigano, counsel for the appellants, that those elections were irregular because they were conducted in blatant contravention of the Commissioner's guidelines issued in February, 1990, which mandated that members of societies' management committees shall hold office for one year from the date of their election after which retirement by rotation shall commence with one third of the said members retiring during the annual general meeting held at the end of that year. However, the issue as to whether what did take place in that meeting was irregular, unlawful or null and void does not fall to be resolved by us for, a directive by a junior officer at the Provincial Co-operative Office nullified those elections.

In his replying affidavit dated 13th September, 1994, the commissioner deponed to as follows:-

"5. THAT the society's election held on 27th November, 1993 were nullified on 16th December, 1993 by one of my officers based at the Provincial Co-operative Office, Nairobi Area without the knowledge and/or authority from his superiors.

6. THAT from the preceding paragraph, a leadership vacuum was created in the society as there were two committees.

7. THAT arising from the existing state of affairs, I directed that a general meeting be convened to resolve the management crisis."

By a written notice dated 9th August, 1994, the Commissioner directed that the Society's Annual General Meeting be held on 27th August, 1994, its main agenda being the election of the Society's management committee. The meeting was duly held and the interested parties elected in 1993 were confirmed as members of the management committee of the Society.

The appellants were clearly aggrieved by the results of the meeting and promptly filed an action seeking the reliefs of prohibition and certiorari. The application was heard and dismissed by Shah, J. (as he then was) who held that the appellants had agreed to call a meeting under the umbrella of the Commissioner and that they cannot rely on a misconstrued nullification of the 1993 elections and that:-

"The applicants (the appellants) are approbating and reprobating. When it suited them they agreed that a meeting for elections be called. When they lost they relied on technicality of rules to stay in power."

At the hearing of this appeal, Mr. Kigano submitted as he did in the superior court, that the Commissioner had no powers under the Act and the rules thereunder, to convene an annual general meeting and therefore the orders of prohibition and certiorari should have issued as of right.

Under section 84 of the Act the Minister may make rules applicable to societies seeking registration, or to registered societies, or to any class of registered society, for the better carrying out of the provisions and purposes of the Act. Rule 26 of the Co-operative Societies Rules (the Rules) reads as follows:

"The annual general meeting of members of a registered society shall be convened each year by the committee or the Commissioner or his representative within one month of the date of receipt of the report on the audit of the society by the committee:

Provided that-

(i) the Commissioner may at any time after the audit of the accounts has been completed convene an annual general meeting which shall proceed as if it had been convened by the committee;

(ii) in either case at least fifteen clear days notice shall have been given of the intention to hold the meeting."

It is plainly obvious from the material before us that no report on the audit of the accounts of the society was in issue, and moreover, there is no evidence that it was ever carried out or completed so as to confer authority on the Commissioner or his representative to convene an annual general meeting of the Society.

By rule 28 of the Rules, a special general meeting may be convened at any time by the committee under certain conditions. Also under sub-rule 4 thereof, the Commissioner or his representative may at any time convene such a meeting and direct what matters shall be discussed at the meeting. It must follow, therefore, that if the Commissioner wanted to resolve the members' dissatisfaction with the management committee of the appellant Society, he should have convened a special general meeting under rule 28 (4) of the Rules. This he did not do.

There is no statutory authorisation for the purported annual general meeting convened by the Commissioner in 1994. It was a nullity ab initio in which case prohibition should have issued ex debito justitiae and the learned judge was wrong in refusing to grant it.

Mr. Kamonde, for the respondents, submitted that the appellants did not obtain leave to appeal and

consequently the appeal is incompetent and ought to be struck out. We called for the original superior court file and after perusal we are satisfied that leave was granted. However, whether leave was obtained or not is immaterial since under Order XLII of the Civil Procedure Rules appeals from prerogative Orders lie as of right. Mr. Kamonde's submission is therefore misplaced.

In the circumstances, this appeal must be allowed. The judgment of the superior court is set aside and the appellants application dated 2nd September, 1994 is granted as prayed. We would award the appellants costs of the appeal and in the Court below against the Commissioner and the interested parties.

Dated and delivered at Nairobi this 5th day of December, 1997.

A. M. AKIWUMI

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR