IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 367 OF 2014

BETWEEN

REPUBLIC *ex parte* KENYA PLANTERS CO-OPERATIVE UNION.....APPELLANT

AND

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

CABINET SECRETARY MINISTRY OF

INDUSTRIALIZATION AND ENTERPRISE DEVELOPMENT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from the Judgment of the High Court at Nairobi (W.K. Korir, J)

dated 30th *October, 2014 in JR. Misc. Civil Application No.312 of 2014)*

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JUDGMENT OF THE COURT

The appellant partially succeeded before the High Court where W.K Korir, J. declared in its favour that the 1st respondent (the Commissioner) did not follow the law governing elections in co-operative societies when it purported to call for a special general meeting and elections by its letter dated 11th June, 2014. By an order of *certiorari,* the learned Judge called into court and quashed the decision contained in that letter, thus maintaining the *status quo* regarding officials of the appellant. The appellant was however aggrieved by the finding of the learned Judge that, although the appellant is incorporated under two statutes, the Companies Act and the Co-operative Societies Act, it is a co-operative society governed by the latter Act; and that in view of that, the Commissioner had jurisdiction over the affairs of the appellant.

The only question we have been asked to answer in the appeal is whether the learned Judge properly construed the relevant provisions of the law and the evidence in finding that the appellant was not a limited liability company governed by the Companies Act but a co-operative society whose affairs were regulated by the Co-operative Societies Act.

This brief background will help in understanding how this question arose. The Commissioner, by a letter dated 11th June, 2014, addressed to County Co-operative Commissioners, issued a notice of a Special General Meeting (SGM) to elect new directors of the appellant. This notice was predicated on the fact that elections were last held on 28th July, 2006 and that the terms of the interim directors were due to lapse in July, 2014 hence the need for the directors to seek fresh mandate. The elections were scheduled to be held on 31st July, 2014 in all the fifteen electoral zones.

A second letter dated 25th June, 2014 was addressed by the Principal Secretary of the Ministry of Industrialization Enterprise and Development to the Governors of the relevant counties informing them of the decision by the Ministry to organize an SGM to be held on 31st July, 2014 pursuant to **section 27(8)** and **(10)** of the Co-operative Societies Act in all its 15 electoral zones to elect 15 new directors.

Aggrieved by these letters, and the elections of grassroots directors conducted pursuant to the two letters aforesaid, the appellant, through its board of directors commenced proceedings for orders of judicial review to prohibit the respondents from convening, presiding or in any way holding an SGM of the appellant and from negatively interfering with the property, management and operations of the appellant; *certiorari* to quash the decision contained in the letters dated 11th June, 2014 and 25th June, 2014 regarding convening an SGM and to quash the illegal and irregular elections held on 31st July, 2014.

The thrust of the appellant's case is that the elections that were held on 31st July, 2014 were illegal, irregular, flawed and void *ab initio* for the reason that the term of the directors in office at the time had not expired and their being in office had never been challenged in any way; that the Commissioner had no mandate over the appellant and could not interfere with the running of its affairs since it was a limited liability company. The appellant emphasized that from inception, it has always been a limited liability company having been incorporated on 2nd June, 1945 under the Companies Act with a certificate of incorporation No. C.1/45; that it has its own Articles of Association as required by the Companies Act which governs the manner in which meetings are to be held and the procedure for the election of its directors; that its management, operations and business are governed by a board of directors in accordance with the Companies Act; and that in its Annual General Meeting of 30th July, 2014, it resolved to continue operating as a limited liability company. It was further averred that the appellant had previously enjoyed exemptions from all the provisions of the repealed Co-operative Societies Act, in addition to being granted full exemptions by Gazette Notice No. 1095 of 1945 issued under the Co-operative Societies Ordinance of 1945; that the exemptions were later revoked by Gazette Notice No. 3099 dated 25th April 2005, reverting the appellant to the Companies Act. It was therefore its position that since the provisions of the Co-operative Societies Act do not apply to companies registered under the Companies Act, the convening of its meetings is the mandate of its directors and not the Commissioner. That being the case, it was contended that the elections conducted by the Commissioner were irregular and without legal effect.

The Commissioner for his part deposed that the appellant has dual registration under the Co-operative Societies Act as well as the Companies Act; that **Clause 1** of the appellant's Articles of Association provides that the Articles of Association together with the Memorandum of Association constitute regulations for the purposes of the Co-operative Societies Act and; that the appellant's exemption from the provisions of the cooperative Societies Act was revoked vide Gazette Notice No. 3099 of 25th April, 2005, the effect of which was that the appellant, from that time was governed by the Co-operative Societies Act; that therefore he had the power to call for elections, attend meetings and require every society to send him notices, agenda and minutes of meetings under **sections 27(8)** and **(10)** as read with **sections 93, 93A(a)** and **(b)** of the Co-operative Societies Act which mandated him to convene.

Those named as the interested parties were the officials elected in the challenged elections. With leave of the Court, they withdrew their participation in this appeal, as clearly by the impugned judgment their positions had changed. But it was their contention before the trial court that because of its dual registration, the appellant could only disengage from the operations and binding provisions of the Co-operative Societies Act through a process that culminates with its dissolution as a co-operative society, which process was not initiated and carried through by the appellant.

Korir, J, who heard the case in the court below found, among others, that the Commissioner had the power to convene an SGM and to call for elections. He said;

> **"It is not disputed by the parties herein that KPCU enjoyed dual registration prior to the purported resolution of 30th July, 2014. It is also clear that any exemption that had been granted to KPCU was revoked vide Gazette Notice No. 3099 of 29th April, 2005. Therefore, as at the time the 1st Respondent called the elections of KPCU on 11th June, 2014, he had full jurisdiction over KPCU.**
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> **The general jurisdiction is found in Section 3 of the Co-operative Societies Act. Under the Co-operative Societies Act, the 1st Respondent is also given special jurisdiction to call for a special general meeting of a co-operative society. The power extends to calling for elections and even attending meetings. Sections 27 (8), 27 (10) and 93A are very clear on the powers of the 1st Respondent to that effect."**

But as we have indicated at the beginning of this judgment, the learned Judge, relying on the provisions of **section 27(5)** of the Co-operative Societies Act further found that, though clothed with the power to convene the meeting, in the case before him the Commissioner had acted contrary to the provisions of the law governing elections in co-operative societies which requires that:

> **"In accordance with Section 27(5) of the Co-operative Societies Act, "[a] general meeting of a co-operative society shall be convened by giving at least fifteen days written notice to the members." Election of a co-operative society's office bearers can only be done during a general meeting or a special general meeting. In order for KPCU's members to participate in elections in their zones, 15 days' notice ought to have been issued. The venue of the elections ought to have been specifically stated. The notice to the members should be in writing. The 1st Respondent has not shown that he did all these. He only exhibited the letter dated 11th June, 2014 which was addressed to the County Co-operative Commissioners. There is no evidence that the County Co-operative Commissioners in turn issued notices to all the members of KPCU in the 15 electoral zones. The purported election of the interested parties on 31st July, 2014 therefore fell short of the requirements of the Co-operative Societies Act. The 1st Respondent is therefore guilty of acting contrary to the provisions of the law governing elections in co-operative societies."** (Our emphasis)

Ultimately, the learned Judge found that the election of the interested parties having arisen from an unlawful and a flawed process, was a nullity. It is that part of the appellant's claim that succeeded, with the directors who were in office before the impugned elections were called being confirmed to continue until a properly convened elections were held.

Although the appellant has proffered 13 grounds to challenge the foregoing decision, during the hearing, however learned counsel only argued the ground on corporate personality of the appellant; whether it is a limited liability company incorporated and regulated under the Companies Act or a co-operative society governed by the Co-operative Societies Act.

Urging this single ground, Mr. Mwangi on behalf of the appellant urged us to uphold the position that the appellant was incorporated as a limited liability company on 2nd June, 1945 under the Companies Ordinance of 1933; that because of the prevailing practice at the time the appellant was allowed to operate also as a co-operative society without strict application of the laws governing co-operatives. Counsel submitted finally that the appellant, by a resolution at its AGM held on 30th July, 2014 resolved to operate as a limited liability company and to continue operating as such; and that in yet another AGM held on 29th October, 2015, the appellant reiterated this position and by consensus resolved to operate in accordance with the best corporate governance practices as a limited liability company.

Mr. Odhiambo, learned counsel for the respondents, on his part submitted that the Memorandum and Articles of Association of the appellant are regarded as regulations under the Co-operative Societies Act, hence both the Companies Act and Co-operative Societies Act are applicable. Counsel asserted that the appellant is an apex society at the national level and that, while it is true that at the time of incorporation the appellant enjoyed some exemptions, these exemptions were revoked by Gazette Notice No. 3099 of 29th April, 2005 bringing back the management of the appellant to the Co-operative Societies Act and Companies Act; that the appellant could only exit the governance of the Co-operative Societies Act through the procedure stipulated under the Co-operative Societies Act, namely **sections 61(5)**, **62** and **65** of the Co-operatives Societies Act.

On a first appeal, like this, the Court is expected to subject the evidence as a whole to a fresh and exhaustive examination in order to arrive at its own independent conclusion on that evidence, of course appreciating the fact that the trial court had the advantage of hearing and seeing the witnesses. See **Peters vs. Sunday Post** (1958) E.A 424.

The answer to the only question in this appeal lies in the history of the co-operative movement in Kenya. Briefly, before the enactment of the Co-operative Ordinance in 1931 many organizations were registered as companies. At the time, the appellant was registered, it was incorporated as a limited liability company on 2nd June, 1945 under the Companies Ordinance of 1933 and duly issued with a certificate of incorporation No. C.1/45. At more or less the same time it was also registered as a co-operative society and was issued with a certificate of registration No. 29 issued on 19th November, 1945 under the Co-operative Societies Ordinance of 1931. Consequently, though a limited liability company in the first place, the appellant also operated as a co-operative society without being required to strictly comply with the Co-operative Societies Ordinance through special exemptions granted to it in order to enjoy certain corporate benefits that otherwise accrued only to co-operative societies. The exemptions were extended on 18th December 1945 by Gazette Notice No. 1095. Both its Memorandum and Articles of Association are headed **"COMPANY LIMITED BY SHARES AND REGISTERED AS A CO-OPERATIVE SOCIETY**." and **clause 1** of the Articles of Association states:

> **"These presents shall constitute the Articles of Association of the company for the purposes of the Companies Act and (together with the Memorandum of Association of the Company) shall also constitute the Regulations of the Company for the purposes of the Co-operative Societies Act…"**

Then came a drastic change in this arrangement by the amendment in 1997 of **section 95** of the Co-operatives Act prohibiting any company from operating as a co-operative society, following which the Minister for Co-operative Development and Marketing by Gazette Notice No. 3099 of 29th April, 2005 revoked all the exemptions that the appellant had been enjoying under the Co-operatives Act. The result was that the appellant could not continue operating both as a company and a co-operative society. It was to elect to continue either as a company or co-operative society but not both.

Aware of this situation and desirous of avoiding the effect of the amendment of **section 95** and gazette notice of 29th April, 2005, the appellant's shareholders resolved in a meeting held on 30th July, 2014 that it be removed from the provisions of the Co-operative Societies Act. The question is whether it was enough by such a resolution alone, for the appellant to exit the co-operatives world in order to remain purely a limited liability company. We must point out that it is erroneous to imagine that by the aforesaid amendment the appellant, by operation of the law automatically ceased to exist as a co-operative society. The answer is in **section 61(5) Co-operative Societies Act** that states that**;**

> **"(1). If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this**
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> **Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.**
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> **……**
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> **5. No co-operative society shall be dissolved or wound up save by an order of the commissioner."** (Our emphasis).

Apart from the aforesaid resolution, the appellant also contended that since it had failed as required by **section 62(1)(b)** of the Co-operative Societies Act to file returns with the Commissioner for a period of three years, the latter ought to have cancelled its registration on that score. There is no evidence that the Commissioner has on his own motion exercised this power.

It therefore follows that since the appellant has neither commenced the process of dissolution as a society as explained above nor has the Commissioner canceled its registration, the appellant remains under dual registration as a company and co-operative society.

It is untenable under the current legal regime for an entity to operate as a company and a co-operative society at the same time, as demonstrated by many examples such as **section 95(1)** of the Co-operative Societies Act, which stipulates that;

> **"The provisions of the Companies Act, Cap 486, other than those referred to in sections 64 and 71 of this Act, and the Registration of Business Names Act, Cap 499, shall not apply to a co-operative society."**1

There are marked distinctions on the operation, structure and management of companies and societies. They are governed by different statutes.

In the end, and with respect, we agree with the learned Judge that the exemptions that the appellant had been enjoying, having come to an end by operation of the law, it was upon it to make an election, whether to continue its operations as a company or a co-operative society. Clearly, its expressed desire is to be a limited liability company, yet it has not taken the steps outlined in law for it to get there.

Ultimately, we come to the conclusion that there is no merit in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 5th day of June, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR