IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 13 OF 2014

BETWEEN

WASHINGTON SILVANUS WASHIALI KHWALE .....APPELLANT

AND

DISTRICT CO-OPERTAIVE OFFICER, MUMIAS.....1st RESPONDENT

THE HON. ATTORNEY GENERAL ….....2nd RESPONDENT

ALLOYS MANDU.....3rd RESPONDENT

ISAAC ASHUMA ….....4th RESPONDENT

MOSES NABULINDO ….....5th RESPONDENT

WILLIAM KHAKINA ….....6th RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega Justice G. Dulu, J) dated 28th November, , 2013

in

HCMISC J. R. No. 44 OF 2011

****

JUDGEMENT OF THE COURT

By a Notice of Motion said to be made under Order 53 Rule 3 (1) (2) Civil Procedure Rules the Appellant, Washington Silvanus Washiali Khwale, as ex-parte Applicant through the Republic prayed:

> **"THAT prerogative orders of certiorari do issue and remove into this Court and quash the decision of 1st Respondent to convene special general meeting and instigating the removal of the exparte applicants as members of management committee.."**

Named as 1st and 2nd respondents were respectively the District Co-operative Officer, Mumias, and the Honourable the Attorney – General. The appellant made the application together with 3 others who

withdrew in the course of the proceedings before the High Court of Kenya at Kakamega.

The grounds upon which the Motion was made were that the 1st respondent had acted ultra vires his powers; that no inquiry as envisaged by Section 58 of the Co-operative Societies Act (Cap 490 Laws of Kenya) had been instituted by the Commissioner of Co-operatives; that the removal of the applicants from office without an inquiry amounted to condemning the applicant without notice and without hearing him and finally that it was in the interest of justice that the orders sought be granted.

The Motion was supported by a statement and affidavit as required.

The Motion was heard by George Dulu, J, who in a Ruling delivered on 28th November, 2013 dismissed it with costs and it is those orders that provoked this appeal. The genesis of the whole matter was this. Some sugar cane farmers in the Mumias area decided to be registered as provided by the Co-operative Societies Act. They formed Mumias Cane Farmers Co-operative Union Limited ("the Union") which was duly registered by the Commissioner of Co-operatives on 16th march, 2010. The Union is called Mumias Cane Growers Co-operative Society Limited in some documents. Officials were duly elected and the appellant took the position of Chairman.

For reasons that are not clear from the record the District Co-operative Auditor of the then Mumias / Butere District decided to carry out an impromptu audit of the activities of the union for the period May-July 2011. This exercise resulted in an impromptu Inspection Report No. CS/12 484 issued on an unstated date. That report gave various recommendations to the union. It is that report that the 1st respondent used to summon a meeting of the Union which he did by a letter dated 26th August, 2011 which stated:-

"MINISTRY OF CO-OPERATIVE DEVELOPMENT AND MARKETING

Telegram "USHIRIKA DISTRICT COOPERATIVE OFFICE

Telephone:056-641349 MUMIAS DISTRICT

When replying please quote P. O. BOX 919

MUMIAS

26th AUGUST, 2011

CS/12484/GEN./VOL.1/(4)

The Board of Directors

Mumias Cane Farmers Cooperative Union

P. O. Box 184

MUMIAS

RE: SPECIAL GENERAL MEETING

A special General Meeting will be held on 19th September, 2011 to discuss:

1. Inspection Report
2. Way forward for the Union

The meeting will be held at Cross-road Cafe Hall starting at 10:00 a.m.

Stanslaus Wambani

District Co-operative Officer

MUMIAS

CC

Commissioner for Co-operative Development

P. O. Box 40811

NAIROBI

Managing Director

Mumias Sugar Company Ltd

Private Bag

MUMIAS

Provincial Co-operative Officer

P. O. Box 761

KAKAMEGA

Chairmen

All affiliation Societies (Mumias Cane Farmers Co-op Union)

The Chairman

Supervisory Committee (MACAFCU)"

That special general meeting was duly held as summoned and the minutes recorded thereat show that the agenda drawn had the following items for discussion: prayers to be followed by introductions, then Inspection Report, the way forward for the Union and finally resolutions. The minutes show that after prayers and introductions were conducted Mr. Stanslaus Wambani, holding the 1st respondents office, acting as "Presiding Officer" addressed the members essentially on the inspection report and informed them that the union had not been managed well. After a few members were given an opportunity to contribute to the debate, a delegate, Mr. Juvenalia Orao, proposed the way forward as removal of the current officials and immediate elections to fill all elective offices. This proposal was carried; all officials were removed, elections were conducted immediately and offices were duly filled.

Those are the proceedings that prompted the appellant to file the judicial review matter which is the subject of this appeal.

Two replying affidavits were filed in opposition to the judicial review application.

Stanslaus R. Wambani, the District Co-operative Officer, Mumias, deponed that his was an extension of the office of the Commissioner for Co-operative Development created under Section 3 of the Co-operative Societies Act; that the judicial review application was fatally defective; that the motion did not disclose a reasonable cause of action; that the Commissioner had power under the Act to convene special general meetings and to direct matters to be discussed thereat; that he had power and did convene the meeting complained of; that it was members of the union themselves who resolved to dissolve the entire management committee and in its place elected new office bearers; that the dissolved management committee had acted in breach of the Act; that the ex-parte applicants had been rejected by members and that although election of office bearers was not part of the agenda of the special general meeting the members themselves had nevertheless elected to dissolve the management committee and replace it through elections at the said meeting.

Alloys Mandu, the 3rd respondent, in his affidavit in opposition to the Motion before the learned Judge deponed that the Motion was fatally defective and an abuse of the process of the court; that the applicants were imposters and busy bodies who lacked locus standi to bring the action; that orders sought would paralyse the operations of the union without good cause; that two of the three applicants had since disowned the action; that inspection report and the special general meeting had been conducted lawfully; that new office bearers had taken over and finally that the Motion was frivolous and should be dismissed.

One of the issues that the learned Judge framed for his determination was whether the 1st respondent had power to convene the special general meeting. The learned Judge found that the 1st respondent as representative of the Commissioner had power to call that meeting.

The second issue framed by the learned judge was whether the removal of the appellant from office was lawful. The learned Judge readily found that the removal of officials was not an item in the agenda but proceeded to hold that:

> **"From the record of the proceedings at the meeting, the decision contested was made by the delegates and not by the District Co-operative Officer. There is no record that the District Co-operative Officer initiated or encouraged the decision to be made. The written agenda did not included (sic) that item. Judicial review orders are meant to correct ultra vires actions by public officers or public institutions. They do not cover decisions made by private entities....."**

Because of the finding that it was the delegates who removed the officials at the said meeting the learned judge therefore found that such action was by a private entity not subject to judicial review. He said:

> **"...No evidence was tendered in court to show that that decision was made by the District Cooperative Officer. I find that the 1st respondent did not act beyond his powers. I also find that the decision complained of is a decision of a private institution not amenable to judicial review..."**

The Motion thus failed and was dismissed.

As a first appellate court we are obliged to examine and re-evaluate the evidence on record and interfere with the findings of fact of the trial court only if those findings are based on no evidence , or are based on a misapprehension of the evidence, or if the trial court is shown demonstrably to have acted on wrong principles – See **Mwanasokoni v Kenya Bus Services Limited [1985] KLR 931** and the earlier decision in **Selle & Anor v Associated Motor Boat Co. Limited & others [1968] E. A. 123.**

Five grounds are taken in the Memorandum of Appeal. In the first ground the learned judge is faulted for holding that judicial review was not available and it is stated that the learned judge misdirected himself in adopting a narrow and restrictive interpretation of the scope of judicial review remedies.

In the second ground the learned judge is faulted for overlooking the statutory provisions of the Cooperative Societies Act with regard to the scope of the powers available to the Commissioner and whether the 1st respondent could invoke such powers.

The third ground of appeal questions whether the 1st respondent had been authorized by the Commissioner to convene the meeting while the penultimate ground attacks the process adopted by the 1st respondent in convening a meeting and allowing items not in the agenda to be introduced and acted upon at the meeting.

The last ground of appeal faults the learned judge for not holding that minutes produced before him were unsigned and undated and were not authentic.

Mr. Amasakha, learned counsel for the appellant in urging the appeal before us submitted that the learned Judge was wrong in holding that the decision reached at the said special general meeting was made by a private entity when it had been summoned by the 1st respondent. Counsel submitted further that the appellant could not be removed from office at a special general meeting where such removal was not part of the agenda of the meeting.

Mr. Onyiso, learned counsel for the 1st and 2nd respondents supported the Ruling appealed from arguing that the 1st respondent was mandated by the Commissioner through delegation to convene and conduct the meeting. According to counsel, the appellant was wrong to apply for judicial review when the avenue open to him was an appeal to the Cooperatives Tribunal established under the Act. Counsel was also of the view that since elections had been held and the union was running matters should remain undisturbed.

Mrs. Osodo, learned counsel for the 3rd respondent associated herself with submissions made for the other respondents adding that the agenda item "**way forward**" was wide enough to allow for the removal of officials and their replacement through an election.

We have considered the record of appeal, the Memorandum of Appeal and the submissions made before us.

The office of Commissioner of Co-operative Development is created by Section 3 of the Act which is an office in the public service. That Section also provides that:-

> **"(2) There shall be such number of officers, including Deputy Commissioner, as may be necessary to assist the Commissioner in the administration of the provisions of this Act."**

In the interpretation Section of the Act "Commissioner" :-

> **"means the Commissioner for Co-operative Development appointed under Section 3 and includes any person on whom any of the powers of the Commissioner have been conferred in accordance with this Act."**

It was urged by the appellant before Dulu, J, and also before us, that the 1st respondent had no authority to convene the special general meeting held by the union on 19th September 2011 and that it was only the Commissioner who could summon such a meeting. The learned Judge found that the 1st respondent had power to convene the said meeting on behalf of the Commissioner. We think that the learned Judge was right to reach that decision. We have set up in this judgement the definition of the office of "**Commissioner**" and it will be seen that the office includes officers acting on behalf of the Commissioner in the performance of that office. The complaint by the appellant regarding the convening of the special general meeting by the 1st respondent has no basis at all and we reject it.

Could the meeting so convened proceed to discuss the conduct of the appellant, resolve to remove him from office and proceed to elect other officers when the agenda set out for the meeting did not have such an item?

As already pointed out the agenda of the special general meeting had two specific items for discussion, the first being "**inspection Report**" and the second, "**Way forward for the Union.**" When the meeting was convened the members chose to discuss the conduct of the management committee; they found the appellant and other officials to have mismanaged the union and passed a resolution removing the appellant and all other officials from office. Elections were conducted immediately and other officers were elected into office.

As we have stated, the learned Judge found that it was the members of the Union and not the 1st respondent who removed the appellant from office. He also found that such action was by a private entity and judicial review was not available to the appellant.

Section 27 of the Act provides for a committee of a co-operative society which is the governing authority of the society. It provides for general meetings and specifies the matters that are to be dealt with in such meetings one of which is election of office bearers for the following year. The section further provides for special general meetings which may be convened by the committee to:

> **"(a) approve annual estimates or to discuss any urgent matter which the committee decides to be in the interests of the society, or**
>
> **(b) on receipt of a written notice for such meeting signed by such number of members of the society as may be prescribed in its rules who state the objects and reasons for calling the meeting.**

In the by-laws of the Union approved by the Commissioner on 16th March, 2010 it is provided that the general meeting of the Union would be the ultimate authority of the Union and no resolution would be implemented without approval of a general meeting. The by-laws provide that:-

> **"13 ___**
>
> **The following amongst other matters shall be dealt with by the General meeting**
>
> **(a) Election, suspension or removal of members of Managing Committee including the Chairman of the Union..."**

It is further provided:-

> **"17. ___**
>
> **Election for management committee shall be held annually and at any other time as may be necessary subject to the provision of the Act Rules and these By-laws**
>
> **(a) __**
>
> **(b) __**
>
> **(c) Elected members of the committee shall be removed only by two thirds of members of the Union present and voting at a general meeting....."**

As already stated the learned Judge found that the 1st respondent had authority to convene the meeting, the subject of the dispute before him but also found that it was not the 1st respondent but the members of the union who precipitated and took the steps that led to the removal of the appellant from office and the election of other officials at the said special general meeting. In the event the learned Judge found that judicial review was not available to the appellant as, according to the judge, the actions complained of were actions of a private entity and not those of a public body to be the subject of the supervisory jurisdiction of the High Court.

We have enumerated in this judgment the steps that led to the events that took place at the said meeting. An impromptu inspection was called by the 1st respondent and when its report was ready it was the 1st respondent who by his letter of 26th August, 2011 convened a special general meeting to discuss two items set out in the agenda. The minutes of that meeting show that the 1st respondent addressed the meeting where he presented the inspection report. It was during the discussions that ensured that a resolution was proposed and carried to remove the appellant and all other officials of the union from office and to conduct fresh elections which were carried out immediately.

In the persuasive case of **Kiamokama Tea Factory v Abel Mogaka & Others [2013] e KLR** the respondents in the case issued a notice pursuant to provisions of the Companies Act calling for an extra

ordinary general meeting for the purposes of considering the removal of a Director of the plaintiff company. It was contended for the applicant that the notice calling that meeting did not comply with the said Act and that the requisition of the said meeting was contrary to a court order that had been issued and that the planned meeting was a nullity. The High Court held that whereas the notice convening the meeting gave the agenda of the meeting as removal of directors of the company a letter to the police on the same issue gave a different agenda. In the event the respondents were acting in bad faith and they were barred from holding the meeting.

Similar facts appear in another persuasive case of **Agricultural Development Cooperation of Kenya v Nathaniel Tum & Anor [2014] e KLR** where conveners of a meeting were similarly barred from holding an extra-ordinary meeting.

In the present case Dulu, J, held, correctly as we have stated, that the 1st respondent had authority to convene the said meeting. He further held that it was the members of the union, not the 1st respondent, who proceeded to remove the appellant from office.

Mr. Amasakha submitted before us that the learned Judge erred in holding that it was the members and not the 1st respondent who made the resolutions complained of. This submission is not without merit. One may well ask – at which point did the 1st respondent stop chairing the meeting he had called for the members to take over the meeting and make resolutions as a private entity? The 1st respondent called the meeting using authority donated to him by the Act. The meeting – a special general meeting – had a specific agenda which did not include discussion on the conduct of the committee at all. It was the 1st respondent who precipitated the concatenation of events that led to discussion of matters that were not in the agenda. The meeting which had been regularly convened became irregular when items not on the agenda were introduced and discussed. The learned Judge therefore fell into error when he held that it was the members of the union who made resolutions as a private entity. That was not the position at all. The irregular resolutions were made as a result of the meeting that had been convened by the 1st respondent. The 1st respondent was responsible for all the matters that ensued. He was acting in his official capacity and judicial review was certainly available to the appellant to question irregularities that took place at the meeting.

We have therefore reached the conclusion that this appeal succeeds. In the event we quash the decision reached at the special general meeting of the union held on 19th September, 2011 that led to the removal of the appellant from his position as chairman of the union.

In the circumstances of the matter we order that fresh elections of the union be held within 90 days of the date of this judgment where the appellant will participate as a candidate if he so desires. We grant costs to the appellant here and in the court below to be paid by the 1st respondent.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OFDECEMBER , 2014

D. K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

…..... .....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL