REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCILLENIOUS APPLICATION NO.247 OF 2001

REPUBLIC.....APPLICANT

VERSUS

KONZA RANCHING & FARMING

CO-OPERATIVE SOCIETY & ANOTHER.....RESPONDENT

R U L I N G

The applicants herein as named in the statement of fact namely Paul Muthoka Mbole; Danson Mbubi Mutembi, John Kimeu and Peter Ndungwa moved the high court by way of an exparte chamber summons filed on 20.8.2001 seeking leave to apply for orders of certiorari and mandamus in the manner shown. It is noted that the initial application did not ask for leave to operate as stay necessitating the applicant to file another amended exparte chamber summons with an additional prayers that leave granted do operate as stay and that the order be served through the Machakos Police station.The court proceedings show that that order was granted on 28.8.2001 and after it had been granted is when the applicants asked that it be made to operate as stay and since there was no prayer for it to operate as stay sought leave to amend the application which leave was granted and eventually amended application was presented and the court made orders for leave to operate as stay on 21.8.2001.

The substantive application was filed, served and this ruling is in respect of the substantive application.

The substantive application was by way of notice of motion filed on 10.9.2001. It seeks an order of certiori to remove into this honorable court for the purposes of being quashed a suspension decision dated 26th July, 2001 made by the management committee of Konza Ranching and Farming Co-operative Society limited as per letter reference Gen/3/264, 265, 266 and 267 all dated 27th July, 2001 and purportedly in accordance with provisions of By law number 15 (1) of Konza Ranching and Farmers Co-operative Society Ltd.

(2) An order of Mandamus directing the management committee of Konza Ranching and Farming Co-operative Society Ltd. to vacate its decision dated 26th July, 2001 and further direct that the said management committee of the aforesaid society to retract and withdraw their suspension of the applicants and the intended referral to the Annual General Meeting and reinstate the applicants as full members of the aforesaid society.

(3) That the grant of leave under this order of certiori do operate as stay of the proceedings in question

including intended expulsion at the Respondents Annual General Meeting until this application is heard and determined interparties.

(4) That the order granted and subsequent decree made be served with assistance of the O.C.S Machakos Police Station.

(5) That costs be awarded to the applicant.

I would like to make observation on the format of the application as it is presented to court.

(1) the application as well as its sister applications preceeding it being the amended exparte application filed on 21.8.01 and the initial application for leave filed on 20.8.01 all have the same characteristic in that they have grounds in the body of the application.

(2) Each application does not have a verifying affidavit.

(3) Each application has an affidavit in support dated 20.8.01 for the initial application, and different one dated 6.9.01 for the substantive application. The amended chamber summons did not have an affidavit in its support.

(4) There is a statement accompanying the initial application which statement was amended to accompany the amended application for leave.

(5) There is no statement accompanying the substantive application filed on 10.9.01.

(6) I note that there are annextures annexed to the affidavit in support of the substantive application which were not annexed to the initial application for leave.

The grounds in support of the application are derived from the body of the application, affidavit in support annextures and submissions in court and the major ones are that :-

(1) Konza Ranching and Farming Co-operative Society draws its legal identity from the Co-operative Societies Act. The current Act came into force in 1998. It came into operation on 10.6.64 as per its certificate of incorporation and its operations regarded by its by laws. That the by laws provides for a management committee which exercises functions of an administrative nature.

(2) That the management committee summoned the applicants to appear before it and answer serious allegations vide letters dated 6.7.01 in line with by law No.15 (1). The applicants replied to those letters to the effect that they would not attend the meeting scheduled to be held because there were other matters pending in the S.P.M's and High Court over the same subject matter and their attendance will amount to contempt of the court proceedings.

(3) That despite the above the Respondents went ahead and made a decision suspending the applicants which decision was to be reported to the annual general meeting for expulsion.

(4) That the applicants contention is that at the time of making the decision the Respondents were exercising quasi judicial function and were bound not to pass a decision affecting the rights of the applicants without giving the applicants an opportunity of being heard.

(5) That none of the allegations they dealt with fell under the matters the management committee had

powers to deal with under regulation 15(1) of their by law and so they exceeded the powers conferred to them by their own by laws. No evidence was adduced and a decision taken based on that evidence and so that decision was ultra vires the by laws. This was contrary to the rules of natural justice as the Respondents acted as prosecutors and judges in their own cause. Also by refusing to grant an adjournment the Respondents did not act fairly and this prejudiced the applicants as they stand to loose their share, land membership and other benefits through a decision not made within the by laws.

(6) That under the by laws a person can appeal to the commissioner for co-operatives under section 55 of the ordinance as it then was. That, that section was repealed and there is no other current provision providing for the appeal thus forcing the applicants to come by way of judicial review which was the only avenue for the redress open to the applicants. Secondly this was a proper case for judicial review as the management committee have in constituted themselves into a court or tribunal when they deliberated on the rights of the applicants.

(7) While responding to the Respondents papers they maintained that the management committed acted as an inferior tribunal and so this court has jurisdiction to issue the order being sought and the court is properly seized of the matter.

(8) That the matter is not Res Judicata as it was dealing with judicial review while tribunals case No.49/2000 dealt with by law No.15 (1) where the applicants were suspended without being heard while the chamber summons in case No.204/2000 has no relevance to the proceedings herein.

(9) They do not agree that the proceedings herein have bared the society from running its affairs as what they are being restrained from doing has nothing to do with the general management of the day to day affairs of the society.

(10) That matters which are to be referred to the co-operative tribunal are those matters which deal with the affairs of the society and not matters dealing with infringement of rights and judicial review. The best forum for that is a court of law. Secondly if the Respondents know that there was such a tribunal in existence, then they should have reported to that tribunal the subject matter of the proceedings herein.

The Respondents have opposed this application on the basis of the grounds set out in their replying affidavit, annextures and submission in court and legal authorities referred to and the major points to be relied upon are:-

(1) The format adopted in bringing the application is not the correct one as the names of the applicants have not been recorded on the face of the application.

(2) The procedure adopted is also wrong as the notice of an intention to apply for such leave which is supposed to be served on the Deputy Registrar a day before the presentation of the application per leave as required by order 53 rule (1) was presented simultaneously by with the application for leave. Secondly, the applicant did not take advantage of that provisol to that rule to seek the court’s leave to waive that requirement in that rule in their favour.

(3) The prayer for leave to operate as stay was unprocedurely obtained as the applicant on realizing that they had not prayed for leave granted to operate as stay were unprocedurely allowed to amend their chamber summons to seek leave to operate as stay which was granted. This was irregular because once leave is granted the exparte proceedings are spent and the issue of leave to operate as stay could only have been entertained in the substantive application and for it to be heard interpartes.

(4) Turning to the merits of the application counsel submitted that the dispute is in a wrong forum as it concerns a dispute of members of a cooperative society within the management of a co-operative society under the Co-operative Societies Act which gives jurisdiction to the high court only in appellate capacity when dealing with an appeal from the decision of a tribunal. (b) That the reliefs being sought cannot be availed to the applicant as the writ of certiorari cannot issue to quash a decision which is purely administrative and not quasi judicial. (c) That the writ of mandamus also cannot issue herein as the Respondents have not refused to do anything of which they are required to do and neither have they exceeded their jurisdiction as the management committee did what was required of them namely to investigate the allegations and then report them to the Annual General Meeting. (d) The matter is Resjudicata as it has been adjudicated upon in other forums and decisions taken which decisions have not been upset by superior tribunals. (e) That the Respondents were within the by laws when they took the action they did in reply to these points counsel for the applicant stated that:-

(1) There is no provision that the names of the applicants have to appear in the body of the application but in the statement and they maintain that the application is proper as presented.

(2) That if there is any defect in the format of the application then that is curable under order 6 rule 12 of the Civil Procedure Rules and order 50 rule 12 which makes provision to the effect that no pleadings should be rejected on the basis of want of form. The same is curable under section 3 and 3A of the Civil Procedure Acts which enjoins the court to administer justice.

(3) That failure to lodge the notice to the registrar before the presentation of the other pleadings can be excused by this court.

(4) There is no application for review of the order granting leave to operate as stay and so that matter is concluded and cannot be challenged subsequently.

(5) They maintain that this court has jurisdiction to entertain the matter as the application is dealing with judicial review and not purely disputes arising from the co-operative societies act.

(6) That the issue of resjudicata does not arise as the proceedings herein relate to a particular meeting which had not been deliberated upon previously.

On the court's assessment of the facts herein, it is clear that the argument for and against the application have taken two dimensions one dealing with incompetence due to lack of form and the second one dealing with its substance.It is this court's considered view that the first aspect to be dealt with is the one dealing with lack of form and when that is cleared and ousted is when the court can go to deal with the substantive aspect or the merits of the same.

The first and foremost complaint is one leading to lack of jurisdiction based on the argument that the dispute relates to a co-operative society which should be and adjudicated upon under the procedure laid down under the Co-operative Societies Act. On the basis of the authorities cited, this court agrees that disputes dealing with purely co-operative affairs under the Co-operative Societies Act are outside the jurisdiction of this court save for purposes of appeal under the relevant Act. However, as submitted by the applicants counsel the reliefs being sought herein are by way of judicial review for orders of certiorar and mandemus.

These reliefs fall under the operation of order 53 of the Civil Procedure Rules. Order 53 rule 1(2) and rule 3(1) confers jurisdiction to grant such reliefs to the High Court only. It follows that since the reliefs being sought by the applicant were orders for certiorari and mandemus then it is only the High Court which is vested with jurisdiction to entertain this application. This court is therefore seized of the matter and can competently rule upon it.

Having established jurisdiction I now come to look at the competence of the application. The proceedings of this nature are commenced or set in motion by lodging of a notice to the Deputy Registrar of an intention to do so order 53 rule 1(3) requires that this notice be given a day preceeding, the presentation of the application for leave. Although the rule is couched in mandatory terms there is a provisal to the effect that the court may extend that period or excuse non-compliance for good cause shown.This means that the court has to be invoked either to extend the period or excuse noncompliance. Herein the notice was improperly lodged. Counsel for applicant merely stated in his reply to the submissions of the Respondent that the court on can excuse. This court has not been requested either formally or informally to excuse non compliance neither have any good cause shown to warrant this court to invoke that provisal to validate that notice. It follows that as matters stand now that notice is invalid. On the format itself it is correctly submitted by counsel for the Respondents that the case of Farmers bus service and others versus Transport Licensing Appeal tribunal (1959) EA 779 sets out the format on the framing of such an application.

On the issue of an exparte amendment to which a prayer for leave to operate as stay after an application for leave has been presented, I agree with the Respondents submissions that **the case of National labour party (labour) and two others versus Head of Civil Service and director of Personnel management (Kenya government) Nairobi Civil Application No.287/00 (UR135/00** delivered on 16.7.01 sets out the correct position in law that once leave has been granted the exparte proceedings are over and any other relief not prayed for at the initial stage has to be included and canvased in the substantive motion. It follows that the order for leave to operate as stay granted herein by the high court Nairobi was granted without jurisdiction and it was therefore invalid.

I have also perused the provisions of order 53 Civil Procedure Rules and find that there is no provision which provides for amendment of the exparte chamber summons to include any reliefs, inadvertedely omitted when presenting the initial application. The rules only provide for the amendment of the statement of the facts with leave of court.

Turning to the substantive motion itself I find that it has grounds in the body of the application.

(b) There is a prayer for leave to operate as stay which had already been granted earlier on.

(c) There is no statement accompanying it.

(d) There is no verifying affidavit accompanying it.

(e) There is a fresh affidavit accompanying it.

The correct procedure is set out in order 53 Civil Procedure Rules is that when the application for leave is properly made it is accompanied with

(a) A statement which gives the description and the names of the applicants.

(b) A verifying affidavit verifying the grounds in the statement.

(c) Where annextures are to be exhibited then an affidavit to which annextures are to be annexed.

These are the same documents which are to accompany the substantive application. The procedure herein was not followed as it can be noted further that some other exhibits were produced at a later state at the time the substantive application was filed.

Counsel for the applicant has urged this court to invoke order 6 rule 12 of the Civil Procedure Rules and also order 50

rule 12 which enjoins the court not to reject pleadings due to want of form reject them on technical grounds.

A perusal of order 53 Civil Procedure Rules shows clearly that there is no saving provision whereby the court can deal with the matter substantively if there is a defect in the framing of the application. The question to be decided now is whether the other civil procedure provisions can be imported into order 53 Civil Procedure Rules to remedy that situation.This was the question which was dealt with by the court of appeal in the case of The **commissioner of Lands Versus Kunste Hotel Ltd. Nakuru C.A 234/95** where it was observed at page 8 the 6th line from the bottom that "in exersing the power to issue or not to issue an order of certeriori the court is neither exercising civil or criminal jurisdiction. It will be exercising special jurisdiction".

The purport of that ruling is that order 53 Civil Procedure Rules is exhaustive in itself and an application has to confine itself within its ambit and where it does not comply with the rules therein then it is invalid and it cannot be acted upon. It follows that the saving provisions on defective pleadings cannot be called into play to assist the application under review. In short its defects are fatal to it.

Being defective it means that it has to be struck out. That being the case there is no need to go into the other merits of the application as in doing so it will just be an exercise in futility or an academic exercise that will not give rise to any enforceable reliefs.

For the reasons given the application under review is dismissed with costs to the Respondent.

Dated, Read and delivered at Machakos this ……. Day of ……. 2001.

R. Nambuye,

Judge.