Republic v Cabinet Secretary Ministry of Co-operatives and Micro- Small & Medium Enterprises (MSMES) Development & another; Mwalimu National Savings & Credit Co-operative Society Ltd & another (Interested Parties); Kaio (Exparte) (Application E031 of 2024) [2024] KEHC 15043 (KLR) (Judicial Review) (25 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15043 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E031 OF 2024

J NGAAH, J

NOVEMBER 25, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY MINISTRY OF CO-OPERATIVES AND MICRO- SMALL & MEDIUM ENTERPRISES (MSMES) DEVELOPMENT ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

MWALIMU NATIONAL SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD ..... INTERESTED PARTY

SACCO SOCITIES REGULATORY AUTHORITY ..... INTERESTED PARTY

AND

ALPHONCE M. KAIO ..... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 9 April 2024 expressed to be brought under Order 53 rules 3 and 4 of the Civil Procedure Rules, 2010; and, sections 8 and 9 of the *Law Reform Act*, cap. 26. The applicant seeks the following orders:

    "

"1. An order of prohibition against the 1st respondent's determination of the ex parte applicant's appeal lodged with the 1st respondent pursuant to the provisions of Regulation 72 (8) of the Sacco Societies (Deposit Taking Sacco Business) Regulations 2010 on the 14th September 2021 and determined by the 1st respondent on the 28th September 2023.

2. An order of certiorari to bring into this Court for the purpose of quashing the 1st respondent's determination of the ex-parte applicant's appeal lodged with the 1st respondent on the 14th September 2021 and determined by the 1st respondent on the 28th September 2023.

3. An order that the leave so granted by this (sic)do(sic) act as a stay of the 1st respondent's determination of the ex-parte applicant's appeal lodged with the 1st respondent on the 14th September 2021 and determined by the 1st respondent on the 28th September 2023."

The applicant has also sought for costs of the application.

2. The application is based on a statutory statement dated 25 March 2024 and an affidavit verifying the facts relied on sworn on even date by Mr. Alphonce M.Kaio, the applicant in this application.

3. Mr. Kaio has sworn that he holds a bachelors degree in commerce from KCA University and that he is a registered Certified Public Accountant-Kenya. He joined the 1st interested party as an entry level manager in the year 1993 and rose through the ranks to become the acting Chief Executive Officer in August 2017. He was confirmed to this position in March 2018 and given a formal contract for three years effective 1 July 2019. According to this contract, the applicant was bound to implement the decisions of the 1st interested party's Board of Directors.

4. During the applicant's tenure as the Chief Executive Officer, the 1st interested party witnessed a great improvement and efficiency of service that led to the 1st interested party's capital rise from Kshs.37,000,000,000/= in August 2017 to Kshs. 57,700,000,000/= by the year 2020.

5. On the 11 June 2021, the applicant received a letter from the 2nd interested party referenced "Suspension & Notice to Show Cause of Intention to Remove as an Officer of a Sacco Society." The said notice was issued under the provisions of Section 48, 49, 50 & 51 (c) of the *Sacco Societies Act* 2008 and Regulations 66, 67 & 72 of the Sacco Societies (Deposit Taking Sacco Business) Regulations 2010(hereinafter "the Regulations").The 2nd interested party is alleged to have moved on its own to investigate the applicant.

6. The applicant was asked to give written submissions and would only make oral submissions at the discretion of the 2nd interested party. According to the applicant, this was contrary to the provisions of Section 4 (3) (b) of the *Fair Administrative Action Act*, 2015. The applicant was subsequently suspended from office vide the 2nd interested party's letter of 22 June 2021.

7. The applicant made written submissions in response to the accusations levelled against him.In his evidence, he exhibited documentary evidence, including the 1st interested party's Board of Directors' resolutions that the applicant was bound to implement in accordance with the terms of his contract. Amongst these resolutions, the Board of Directors of the 1st interested party approved what the applicant has described as "the intended payments to the subsidiary companies of the 1st interested party".

8. In its findings dated 9 September 2021, the 2nd interested party found the applicant guilty of the charges against him. The applicant was surprised with the 2nd interested party's finding because the action he is said to have taken, which was the basis of the charges against him, was grounded on the advice of the 1st interested party's legal officer. This advice was given when the applicant was on leave and that he only learnt of it from the 2nd interested party. The applicant denies having received a letter, apparently, containing the advice, since it was never brought to his attention even after he resumed from leave.

9. In any event, the legal fees paid which, apparently was at the center of the applicant's dismissal, was agreed upon by the Executive Board Committee of the 1st interested party. The applicant is a member of this Board but he has no voting rights. Further, the Chairman of the Board is said to have agreed to the amount to be paid as legal fees.

10. Being aggrieved by the decision of the 2nd interested party, the applicant appealed to the 1st respondent on the 14 September 2021 in accordance with the provisions of Regulation 72 (8) of the Regulations. In spite of the applicant's pending appeal, the 1st interested party terminated the applicant's employment through a letter dated 24 November 2021.

11. Owing to the 1st respondent's delay in hearing and determining the applicant's appeal, the applicant filed a Constitutional Petition in the Employment and Labour Relations Court, being ELRC Pet. No. E005 of 2022 (Milimani) Alphonce M. Kaio versus Sacco Societies Regulatory Authority and Mwalimu National Savings Credit Co operative Society Ltd, Cabinet Secretary of Agriculture Livestock Fisheries & Co-operatives and the Attorney General. On the 30 June 2022 the court struck out the applicant's petition because it was filed while his appeal was pending for hearing and determination before the 1st respondent.

12. The applicant then commenced judicial review proceedings against the 1st respondent in this Honourable Court, being HCTRMISC/E103/2022 Alphonce M. Kaio versus Cabinet Secretary Ministry of Agriculture Livestock and Fisheries to compel the 1st respondent to determine the applicant's appeal. The 1st respondent eventually heard the applicant's appeal and made his decision on 28 September 2023 upholding the 2nd respondent's findings.

13. According to the applicant, the 1st respondent's decision is based on errors of law and fact. For instance, the 1st respondent is said to have failed in finding that the 2nd interested party could unilaterally proceed and determine how the manner of its proceedings can be conducted in what the applicant considers to be clear violation of the provisions of Section 4 of the *Fair Administrative Action Act*.

14. None of the respondents responded to the application but the interested parties did. The 1st interested party's affidavit was sworn by Mr. Kenneth Odhiambo who has introduced himself as the Chief Executive Officer of the 1st interested party. In his affidavit, Mr. Odhiambo has, rather than depose on matters of fact, submitted on matters of law. This is apparent from the 1st respondent's written submissions whose content is no different from the "depositions" in his affidavit.

15. Nonetheless, the 1st interested party has brought to the fore regulation 72(8) of the Regulations according to which a person aggrieved by the removal from office of a Sacco society or from the office of the 2nd interested party may appeal to the minister. The 1st interested party's position is that according to this regulation, the applicant ought to have appealed to this Honourable Court instead of filing an application for judicial review. As a matter of fact, the applicant's application is an appeal though it is disguised as an application of judicial review.

16. The 1st interested has also urged that since the 1st respondent has already rendered his decision, an order of prohibition cannot issue considering that the order of prohibition is an order from this Honourable

Court directed to a subordinate court or tribunal or body which forbids that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land.

17. The 2nd interested, it is urged, has a regulatory mandate under the *Sacco Societies Act*,2008 and that according to this mandate, the 2nd interested party can act on its own motion and, undertake inspections or require a Sacco society to submit information and reports on its financial affairs of the deposit-taking business to enable the 2nd interested party to evaluate the society's financial condition. Further, regulation 72 of the Regulations gives the 2nd interested party power to remove an officer of a SACCO Society from office for various reasons.

18. The 1st interested party, on the other hand, is statutorily bound to comply with the directions of the 2nd interested party. Accordingly, pursuant to the letter dated 11 June 2021, the 2nd interested party suspended applicant from the service of the 1st interested party and, subsequently, barred him from holding the office of the Chief Executive Officer. In the letter dated 24 November 2021, terminating the applicant's employment, the 1st interested party clearly stated that, the decision to terminate the applicant's employment was in compliance with the directive of the 2nd interested party contained in the latter's letter dated 9 September, 2021. It has been urged that it was in the interest of the 1st interested party's shareholders and members for the 1st interested party to recruit a new Chief Executive Officer to ensure continuity in discharging its mandate to members.

19. As far as the procedure adopted for suspension and subsequently, the termination of the applicant's services are concerned, it has been sworn that in June, 2021, the 2nd interested party determined that there were reasonable grounds to be believe that the applicant had continuously and severally conducted the business of the 1st interested party contrary to the interest of the members of the 1st interested party. On 11 June 2021, the 2nd interested party took certain administrative measures, including suspension of the applicant. In particular, one Mr. Wellington A. Otiende, the Chairman of the Board of Directors issued to the applicant a suspension notice and a notice to show cause which stated the charges against him.

20. The 2nd interested party considered the applicant's submissions and issued its findings and observations through a letter dated 9 September 2021 which ultimately removed the applicant as the Chief Executive Officer of the 1st interested party and barred him form holding such position for a period of three (3) years. He was, however, allowed to hold any other position in a Sacco Society. In issuing the termination letter of 24 November 2021, the 1st interested party was merely implementing the decision of the 2nd interested party.

21. The applicant was, thus, given a prior and adequate notice of the nature and reasons for the proposed administrative action. He was also given an opportunity to be heard and to make representations in that regard. The information, materials and evidence which formed the basis of the 2nd applicant's decision were also given to the applicant. The 2nd interested party adhered to the values of fair administrative action and the principles of natural justice; hence, it is urged, the orders of prohibition and certiorari are unavailable to the applicant.

22. The 2nd interested party's replying affidavit was sworn by Peter Njuguna who has deposed that he is the Chief Executive Officer of the 2nd interested party.

    He has sworn that the 2nd interested party is a statutory agency established under the provisions of the *Sacco Societies Act* cap. 490B, with the principal statutory mandate of licensing of SACCO Societies to undertake deposit-taking Sacco business in Kenya, which business is also known as Front Office Service Activity (or FOSA); and, Supervising and regulating such SACCO Societies in Kenya.

23. At all times material to this application and, in particular, with effect from the 2011 or thereabouts, the 1st interested party was and has been one of the SACCO Societies licensed, regulated and supervised by the 2nd interested party pursuant to the provisions of the *SACCO Societies Act* as read with the Regulations. The key objective of licensing, supervision and regulation of SACCO Societies, such as the 1st interested party, is to ensure the protection of the members' funds and savings deposited in such SACCO Societies by the members and the public in general.In order to achieve these objectives, the Act and the Regulations authorise the 2nd interested party to exercise various supervisory, enforcement and regulatory powers over licensed SACCO Societies as well as officers of those Saccos. These powers are provided in section 51 of the *Societies Act* and in regulations 67 and 72 of the Regulations.

24. As at June 2021, the applicant was serving as an officer of the 1st interested party in the position of Chief Executive Officer and, by that fact, he was an officer of a SACCO Society within the meaning of the *Sacco Societies Act* and the Regulations. Accordingly, he was amenable to the supervisory and regulatory jurisdiction of the 2nd interested party in the performance of his responsibilities.

25. In the course of exercising its supervisory and regulatory oversight over the affairs of the 1st interested party, the 2nd interested party determined that there were reasonable grounds to believe that the applicant had continuously and severally conducted or caused to be conducted or allowed to be conducted, the business of the 1st interested party in a manner that was-

> "(a) Contrary to the provisions of the *Sacco Societies Act*, and the Regulations made thereunder, within the meaning of the provisions of Section 51 of the *Sacco Societies Act*, as read with Regulation 67 of the Regulations 2010 made thereunder, and;
>
> (b) Unsafe and unsound, without paying due regard to diligence and prudence of an ordinary businessman within the meaning of the provisions of Section 51 of the *Sacco Societies Act*, as read with Regulation 67 of the Regulations 2010 made thereunder; and
>
> (c) Detrimental to, and not being in the interest of Sacco members and members of the public at large within the meaning of the provisions of Section 51 of the *Sacco Societies Act*, as read with Regulation 67 of the Regulations 2010 made thereunder which puts to risk the continued sustainability and financial stability of the said SACCO Society."

26. Consequently, and in order to protect member deposits and funds held by the 1st respondent, the 2nd interested party intervened in the manner in which the 1st interested party was being managed, by instituting and commencing supervisory administrative actions against the 1st interested party, as an institution, and several officers of the said SACCO Society in accordance with section 51 of the *Sacco Societies Act*.

27. In particular, on 11 June 2021 the 2nd respondent issued several remedial administrative directives to the 1st interested party and also commenced supervisory administrative proceedings by way of suspension with an intention to remove from office, two officers of the the 1st respondent. These officers are named as the applicant in this suit and one Mr Wellington A. Otiende who was the Chairman of the 1st respondent's Board of Directors.

28. As far as the applicant is concerned, the 2nd interested party issued and served him with a letter of suspension and a notice to show cause dated 11 June 2021. The 2nd interested party directed the

suspension of the applicant from performing functions of an officer of the 1st interested party for a period of ninety days pending the determination of the allegations raised against him in accordance with the provisions of the *Sacco Societies Act* and the Regulations.

29. The letter listed four allegations against the applicant and the grounds for the intended removal from office and required of the applicant to respond to each of the allegations in writing within a period of thirty days from the date of service of the said letter.The letter of suspension and notice to show cause were duly served upon the applicant on 11 June 2021 by a process server. On 9 July 2021, the 2nd interested party received a written reply from the applicant responding to the suspension and notice to show cause; the response was dated 8 July 2021. The applicant provided a detailed response to each of the allegations of fact contained in the notice to show cause.

30. The 2nd interested party duly considered the reply and subsequently made what it has described as "an evidence-based finding" that the statement of facts containing the allegations against the applicant were proven, and the applicant had failed to provide sufficient or reasonable cause or explanation why the 2nd interested party should not take supervisory actions of removing him as the Chief Executive Officer of the 1st interested party.

31. Consequently, the 2nd respondent directed the removal of the applicant as the Chief Executive Officer of the 1st respondent with effect from 9 September 2021. The 2nd interested party also found the applicant ineligible to hold office of a Chief Executive Officer in Kenya for a period of three years. The applicant was, however, allowed to serve as an officer of the the 1st interested party in any capacity, other than that of a Chief Executive Officer. He was also allowed to serve as an officer of a SACCO Society in Kenya in any capacity other than that of a Chief Executive Officer.

32. The applicant was notified of his right to appeal to the Minister if he was aggrieved by the decision of the 2nd respondent and, indeed, he appealed and his appeal was determined on 28 September 2023. It is the decision of the Minister that is now the subject of these proceedings.

33. One of the questions raised by the 1st interested party which I have to dispose of as a preliminary point is whether the applicant ought to have filed an appeal against the decision of the Minister instead of invoking the judicial review jurisdiction of this Honourable Court. Regulation 72 under which the applicant appealed to the Minister against the decision of the 2nd respondent deals generally with prohibitions and removal of officers and states as follows:

> 72. Prohibitions and removal of officers
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> (1) The Authority may prohibit any individual seeking to be a director or employee of a Sacco Society, if the individual has been charged or convicted with a crime involving monetary loss, fraud, perjury, or breach of contract of a licensed financial institution.
>
> (2) The Authority may prohibit an individual from seeking to be a director or employee if he or she is likely to pose a threat to the interest or threaten to impair public confidence in the Sacco Society.
>
> (3) A person against whom disciplinary action has been taken by way of removal from office shall be ineligible to hold office in any Sacco Society for a period of three years or such other period as may be determined by the Authority.
>
> (4) The Authority may direct a Sacco Society not to conduct business or discontinue conducting business with an individual or legal entity that has been charged with a crime involving monetary loss, fraud, perjury, breach of contract or a crime which may

pose a threat to the interest of the Sacco Society or threaten to impair public confidence in the Sacco Society.

(5) The prohibition order shall be addressed to the Sacco Society board of directors and the prohibited party, stating specifically the reason for the prohibition and that it shall take immediate effect.

(6) The Authority or Sacco Society may remove an officer from office, if the officer—

(a) directly or indirectly violates the Act, these Regulations or the Sacco societies bylaws;

(b) engages or participates in any unsafe or unsound practice in connection with the Sacco Society;

(c) has a non-performing loan or becomes a bad debtor; and

(d) commits any act, or practice or fails to take appropriate action, thereby committing a breach of fiduciary responsibility, resulting in or likely to result in—

(i) a Sacco Society suffering financial loss or other damage;

(ii) members' interest being prejudiced; or

(iii) any party receiving unfair financial gain or other benefit.

(7) A notice to remove an officer from office by the Authority shall contain specific statement of facts constituting the grounds for removal and shall take immediate effect.

(8) A person aggrieved by the removal order may appeal to the Minister.

34. Of particular relevance to this application is Regulation 72(8) of the Regulations which, as noted, provides that a person aggrieved by the decision to remove him from office may appeal to the Minister. It is not in dispute that this is the provision which the applicant invoked when he lodged his appeal against the 2nd respondent's decision.

35. Neither the regulations nor the *Sacco Societies Act* prescribes the course a person aggrieved by the Minster's decision should take against such a decision. According to the 1st interested party, the applicant ought to have appealed against the decision of the Minister rather than file an application for judicial review. In the 1st interested party's words:

> " 6. That the ex-parte applicant's application is totally misconceived and an outright misapprehension of the law on challenging the decision of appellate tribunals. The decision of the 1st respondent of 28th September, 2023 ought to be appealed to the High Court and not to seek judicial review remedies of prohibition and certiorari against it." (See paragraph 6 of the 1st interested party's affidavit).

36. The reason the 1st interested party has given for this position is that, " a comparative analysis of Regulation 72(8) of the Sacco Societies (Deposit-taking Sacco Business) Regulations, 2010 with other statutes that establish alternative remedy with appellate mechanisms yields the results that the decision of quasi-judicial body exercising statutory appellate jurisdiction is for appeal to the High Court and not for judicial review." Examples of "other statutes" have been as the *Tax Procedures Act*, cap.469B; the *Political Parties Act*, cap.7D and the *Legal Education Act*, cap. 16B.

37. There is nothing in the Act that suggests that the decision of the Minister is final and, in the absence of any provision of the law on the recourse a person aggrieved by the decision of the Minister may take, a judicial review court would step in, in exercise of its supervisory jurisdiction to prevent excesses associated with misuse or abuse of authority.

38. It is trite that the decisions of an appellate tribunal are subject to judicial review in cases where the statute does not expressly provide for an appeal against them. This question has been discussed by David Foulkes in his book Foulkes Administrative Law, 7th Edition. Citing the case of Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> "It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
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> To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151).

39. And, no doubt, this was the principle applied by Lord Wright in General Medical Council versus Spackman (1943) AC627, at 640 where he stated as follows:

> "I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

40. Judicial Review would not only be the only path available to a person dissatisfied with the conduct or decision of the Minister but also, by its very nature, judicial review comes into play where there is no other alternative form of remedy that is as convenient, beneficial and effective. This principle was well articulated by Lord Widgery CJ in R versus Peterkin, ex Soni (1972) Imm AR 253 where the learned judge noted as follows:

> "The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere". (Emphasis added).

41. Thus, the proper course available to the applicant was the judicial review option and not an appeal. The applicant could not invoke the appellate jurisdiction of this Honourable Court without an express provision of law in that respect.

42. Speaking of judicial review, it is the grounds on which judicial review reliefs are sought that are of immediate interest to the court. The grounds constitute the first hurdle which an applicant must surmount because without them, an application for judicial review would be baseless and fatally

defective. As it were, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to supervisory jurisdiction of this Honourable Court is the grounds upon which the application is made.

43. This is obvious from Order 53 Rule 1(2) which states in rather peremptory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

44. And Order 53 Rule 4(1) states, also unambiguously, that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

45. These grounds have not been left to speculation or conjecture. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law

by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

46. The grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

47. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

48. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

49. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010.

50. Thus, courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

51. What has been presented in the applicant's statutory statement as grounds upon which the judicial review reliefs are sought do not come out clearly as such grounds as defined in Council of Civil Service Unions versus Minister for the Civil Service (supra). The "grounds" have been presented more as grounds of appeal than grounds for judicial review. They are relatively long but I propose to reproduce them here in their entirety just to demonstrate my point. They have been captured in the statutory statement as follows:

> " 22. The 1st Respondent in its determination failed to recognize that as the ex-parte applicant being a contractual employee of the 1st interested party the ex-parte

applicant was duty bound to follow the directions and resolutions of the Board of Directors of the 1st interested party.

"23. That the 1st respondent in its determination erred in law in failing to determine that the 2nd interested party's suspension and notice to show cause to the ex-parte applicant was instituted after investigations had been commenced and done by the 2nd interested party and as such any hearing and determination done by the 2nd interested party was not a fair hearing as demanded by the provisions of Article 50 (1) of *the Constitution* for the 2nd interested party cannot be said to be independent if it was the party that commenced the compliant, investigated the complaint and heard and determined the same.

24. The 1st respondent in its determination erred in law in determining that the proceedings were to be canvassed in manner that is of the own making of the 2nd interested party and contrary to the rules of natural justice.

25. That the 1st respondent in its determination erred in law in determining that the 2nd interested party could proceed to hold proceedings in a manner contrary to the mandatory provisions laid out in the provisions of Section 4 of the *Fair Administrative Action Act* 2015.

26. That the 1st respondent in its determination erred in law and fact in failing to recognize and determine that the ex parte applicant was not granted any information, materials and evidence to be relied upon in making the decision or taking the administrative action in breach of the ex parte applicant's rights set out in Article 47 of *the Constitution* as set out in Section 4 (3) (g) of the *Fair Administrative Action Act* 2015.

27. That the 1st respondent in his determination erred in law and in fact in failing to recognize and determine that the process as conducted by the 2nd interested party was in breach of the general principles of common law and the rules of natural justice as demanded by the provisions of Section 12 of the *Fair Administrative Action Act*.

28. That the 1st respondent in determining the appeal erred in fact in failing to recognize that the charges laid against the ex parte applicant were explained detailed and supported with written resolutions from the Board of Directors of the 1st interested party of which the ex parte applicant was duty bound to follow.

29. That the 1st respondent in determining the appeal erred in law and in fact in failing to recognize that the 2nd interested Party had advised the 1st interested party to seek approval from its members which emmbers granted approval and as allowed under the provisions of section 47 of the *Sacco Societies Act* the Members at an . Annual General Meeting are the Supreme Organ of the 1st interested party and thereafter no objection was raised by the 2nd interested party after approval was given by the 1st interested party's members.

30. That 2nd interested Party's recommendation has barred the ex parte applicant from securing employment in the field of his education and thus the ex parte Applicant has suffered and continues to suffer a great loss and damage.

31. That this Court has supervisory jurisdiction over the 1st respondent as the authority granted to the 1st respondent to entertain appeals is granted by statute.

32. That the delay by the 1st respondent to entertain and determine the ex parte applicant's appeal being over 2 years since the lodging of the Appeal and an explanation being given for the inordinate delay does vitiate the 1st respondent's determination.

33. That the delay by the 1st respondent to entertain and determine the ex parte applicant's appeal being over 2 years since the lodging of the appeal and no explanation being given for the inordinate delay does raise a claim of a reasonable apprehension of bias for the 2nd interested party's suspension and notice was penned by a party chosen with the approval of the 1st respondent under the provisions of section 13 (6) of the *Sacco Societies Act*.

34. That there is currently no other suit in any other court or Tribunal with the same parties seeking the same relief save that the ex-parte applicant had filed a Constitutional Petition being ELRC Pet. No. E005 of 2022 (Milimani) Alphonce M. Kaia -v- The Sacco Societies Regulatory Authority and Mwalimu National Savings Credit Co-operative Society Ltd, The Cabinet Secretary of Agriculture Livestock Fisheries & Co-operatives and the Attorney General (Interested Parties) which Petition was struck out by the Superior Court and HCJRMISC/E103/2022 Alphonce M. Kaio versus Cabinet Secretary Ministry of Agriculture Livestock and Fisheries which is currently stayed.

35. That the striking out of the ex-parte applicant's constitutional petition does not oust this Court (sic) jurisdiction to entertain this matter as the therein Honourable Court opined that as the appeal still pending before the 1st respondent stood unresolved.

36. That I verily believe that the delay by the 1st respondent in making determination of my Appeal it can be argued that the determination lacks value for it can be said that the 1st Respondent was prejudiced as a result of the numerous legal proceedings that I had commenced against him.

37. That by upholding the 2nd interested party's determination that the ex-parte applicant should not hold office as a Chief Executive Officer is a breach of the ex- parte applicant's right to self - determination as per the provisions of Article 1 (1) of the International Covenant on Economic, Social and Cultural Rights 1966.

38. That this Court has the Jurisdiction to entertain this matter."

52. To say that the foregoing averments or pleadings constitute all or any of judicial review grounds, as defined and known in law, would be nothing more than speculation. It would be speculation because it is apparent that the applicant has not identified and expressed accurately the possible grounds for judicial review. It has been noted that the need to identify and specify the grounds of judicial review is not simply a matter of analytical nicety.

53. As a matter of fact, considering that Order 53 Rule 1(2) of the Civil Procedure Rules requires that an application for leave be accompanied by a statement setting out, among other things, the grounds on which it is sought, and Order 53 Rule 4(1) of the same rules states that no grounds should be relied upon except those specified in the statement accompanying the application for leave, the need for singling out and specifying these grounds is not just a practical necessity for the convenience of the court or of either of the parties to the dispute, but it is a legal obligation by which an applicant is bound. I am not convinced that the applicant has discharged this burden. What he has done, instead, is to 'throw everything' to court for it to make up its mind which of the judicial review grounds the application is based. This, the court cannot do.

54. That said, it is rather obvious from the "grounds" upon which the applicant's application for judicial review is based, that the applicant has generally escalated his dispute before the 1st respondent to this Honourable Court and largely questioned the merits of the 1st respondent's decision rather than the process by which it was arrived. There is no other reason why the applicant would be pleading that the 1st respondent "erred in law and in fact" if he is not asking this court to interrogate the facts afresh and come to its own factual conclusions and interpret the law differently from the interpretation given to it by the 1st respondent. Thus, although the application is camouflaged as a judicial review application, it is effectively an appeal which, by its very nature, requires of this Court to interrogate the merits of the 1st respondent's decision and come to its own conclusions.

55. There should be little debate that an appeal is not synonymous with judicial review and that the court cannot assume appellate jurisdiction in exercise of its judicial review jurisdiction. This is why where the intention of the legislature is that an appeal will lie against the decision a public body, authority or tribunal, it expressly states so. Where there is no such express provision, judicial review sets in.

56. One of the hallmarks of appellate jurisdiction is that the appellate court is entitled to substitute its own decision for that of the subordinate court or tribunal. Not so for judicial review where the court would be concerned more about the process rather than the merits of the decision. It has been held that it not part of the purpose for judicial review to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question (see Lord Hailsham in Chief Constable of the North Wales Police versus Evans (1982) 1 WLR 1155 at 1160F).

57. It has also been held in R versus Entry Clearance Officer, Bombay ex p Amin (1983) 818 at 829 (B-C) (per Lord Fraser) that judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and it is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

58. The same point was emphasised in Chief Constable of North Wales Police versus Evans (supra) where Lord Brightman said at page 1173F and 1174G that:

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."(Emphasis added).

Lord Hailsham stated in the same case that:

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which

it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court." (At page 1161A).

On his part Lord Roskill said in R versus Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd 1982(AC) 617 at 633C that:

> " The court must not cross that boundary between administration whether good or bad which is lawful and what is unlawful performance of a statutory duty".

59. One of the cases that is oft-cited in arguing that the scope of judicial review has expanded and, apparently, the breadth to which a judicial review court can now go in interrogation of the merits of a decision, in the wake of the enactment of the *Fair Administrative Action Act*, 2015, is the Supreme Court case of Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment). Even then the Supreme Court still held as follows:

> " (76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced."

60. This is the position the Court of Appeal adopted in an earlier decision of Energy Regulatory Commission v S G S Kenya Limited & 2 others (2018) eKLR Civil Appeal No. 341 of 2017 where it held, inter alia, as follows:

> " In a judicial review matter, the Court's mandate is limited to procedural improprieties, and extends not to the merits of a decision.

61. Be that as it may, the impugned decision shows that the applicant's concerns arising from the 2nd interested parties decision were addressed by the 1st respondent. To the specific question whether the applicant ought to have been allowed to make oral submissions in addition to his written response and written submissions, the 1st respondent determined as follows:

> " It is worth noting that the provisions of the *Sacco Societies Act* 2008 & the Regulations made pursuant to the Act, that empower the Authority to make supervisory administrative sanctions against officers of a sacco does not provide for a right to a physical/oral hearing

before an enforcement action is imposed but despite this the applicant was given an opportunity to ask or make oral submissions but he declined."

62. The 1st interested party then considered the provisions of Article 50 of *the Constitution* and the decision of Lord Denning M.R. in Selvarjan versus Race Relations Board (1976) 1 ALL ER 12 at page 19 where the learned judge is said to have stated as follows:

> " The investigative body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution of proceedings, or deprived of remedies or redress or in some such way adversely affected by the investigation and report then he should be told be told the case made against him and be afforded a fair opportunity of answering it.
>
> The investigative body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end, the investigative body itself must come to its own decision and make its own report."

The 1st respondent came to the conclusion that the applicant had been given a fair hearing and that he was properly dismissed.

63. I would conclude by saying that even if the applicant had set out the grounds of judicial review, as the law requires of him, his application would still fail to the extent that he seeks this court to evaluate afresh the evidence presented before the 2nd respondent and come to its own conclusions or to substitute the 1st respondent's decision with the court's own decision. In short, I find the applicants application to be not only defective but it is also without merit. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND POSTED ON THE CTS ON 25 NOVEMBER 2024

NGAAH JAIRUS

JUDGE