



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 01 OF 2021 (JR)

IN THE MATTER OF: FOR JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF CETIORARI AND PROHIBITION

AND

IN THE MATTER OF CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATION ACT (4 OF 2015)

AND

IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT (NO.12 OF 1997) & THE RULES THEREUNDER

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE COMMISSIONER

FOR CO-OPERATIVE DEVELOPMENT.....1STRESPONDENT

THE ASSISTANT DIRECTOR OF

CO-OPERATIVE AUDIT 2ND RESPONDENT

THE PRINCIPAL CO-OPERATIVE OFFICER (NAIROBI)3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4THRESPONDENT

AND

EX- PARTE APPLICANTS

KENNEDY MASESE OMWANCHA

ERNEST OMBOGO MONYENYE

ELIZABETH BOSIBORI MOCHACHE

EDWARD MANYEGA MIRORO

OKONGO MASANTA

LYMDON OMWANCHA GIKENYI

JASON RATEMO CHEYA

CHARLES ONTOBO OMWANDO

JUDGEMENT

1. The *ex-parte* applicants, Kennedy Masese Omwancha, Ernest Ombogo Monyenye, Elizabeth Bosibori Mochache, Edward Manyega Miroro, Okongo Masanta, Lyndon Omwancha Gikenyi, Jason Ratemo Cheya and Charles Ontobo Omwando are former officials of Mobamba Farmers' Co-operative Society (herein the "Cooperative Society"). They have moved this court vide a Notice of Motion dated 5th May 2021 for orders that;
 - a. The Honourable Court be pleased to grant an order in the nature of writ and/or order of certiorari, removing into this court and quashing, the findings, recommendations and the inquiry report of Mobamba Farmers' Co-operative Society Limited of November/December 2020, authored by the 2nd and the 3rd respondents at the behest of the 1st respondent;
 - b. The Honourable Court be pleased to grant an order in the nature of writ or order of certiorari, removing into this court and quashing, any administrative steps action, decision or measures initiated or put in process/motion by the respondents, or their agents and hinged or founded on the impugned inquiry report which is schemed at taking any adverse action against the *ex-parte* applicants premised on the findings or recommendations and contained in the impugned inquiry report of the respondents, including any surcharging process initiated, if any;
 - c. The Honourable Court be pleased to grant an order or judicial review in the nature of writ and/or orders of prohibition, against the respondents prohibiting the same from dealing with the impugned inquiry report, decision, findings/recommendations of the respondents contained in the impugned inquiry report in whatsoever manner detrimental to the *ex-parte* applicants;
 - d. The *ex-parte* applicants be at liberty to apply to the honorable court for all necessary and/or consequential orders that, that the honorable court may deem fit to grant;
 - e. Costs of this application be borne by the respondents and the interested party.
2. The application is based on the grounds set out therein and an affidavit sworn by Kennedy Masese Omwancha on behalf of the *ex-parte* applicants.
3. In summary, the *ex-parte* applicants claim that the respondents commenced an enquiry into the affairs of the Co-operative Society through an inquiry order published on 13th November 2021 vide Gazette Notice No. 9342. According to the *ex-parte* applicants, the inquiry order as gazetted, was general and not specifically directed at them nor did it indicate that they were being accused of any impropriety.
4. They claimed that they were issued with general summons to appear and give information for purposes of the inquiry, after which the respondents purported to convene a Special General Meeting on 20th January 2021. In the meeting, the inquiry report decreeing that the *ex-parte* applicants be surcharged and pay a total sum of Kshs. 20,972,388.97/= was unanimously adopted.
5. According to the *ex-parte* applicants the Special General Meeting was held without issuing notices to genuine, registered members of the Cooperative Society. They alleged that the people who attended the meeting were non-members and the few genuine members who were present, were working in cahoots with the Respondents and could not make a quorum.
6. They asserted that the meeting held on the 20th January 2021, did not constitute a Special General Meeting within the meaning of the Cooperative Societies Act and was incapable of deliberating upon any matters touching on the affairs of the Cooperative Society. Therefore, any resolution stemming therefrom could not be the basis of any recourse under the provisions of Cooperative Societies Act.
7. They added that the business of the Cooperative Society had to be carried out by the supreme decision-making organ, the general meeting and the decision of the respondents to assemble none members without notice to the genuine registered members amounted to an illegality. Since the inquiry report had not been dealt with in accordance with the law, it could not have any legal effect and could not be acted upon.
8. The *ex-parte* applicants further claimed that they only got to learn about the decision to surcharge them when they were served with a surcharge order on the 15th March 2021, after the period to appeal under the Cooperative Societies Act had lapsed.
9. In their view, the respondents were driven to take the impugned actions by political motives and the interests of the Governor of Kisii County, in the affairs of Cooperative Society as seen in a letter written by the Governor triggering the processes complained of.
10. They claimed that having already condemned them unheard, the respondents had posthumously sought written submissions from them to show cause why they should not be surcharged without giving the basis of arriving at the subject amount.
11. Based on the report which they had procured with a lot of difficulty, the *ex-parte* applicants noted that the core issue therein was the alleged sale of some assets. They asserted that the sale had been above board and was done pursuant to the resolution of the AGM, with the approval of the District Cooperative Officer.
12. The respondents were also accused of conducting the impugned processes in disregard of express court orders issued in favour of

another litigant which the respondents chose to ignore.

13. It was deposed that the alleged enquiry having been in the nature of quasi-criminal proceedings, it was incumbent upon the respondents to comply with all the requisite rules and processes touching on fair hearing, relating to the charges, meetings and resolutions affecting the rights of the Applicants.

14. The respondents were accused of acting illegally, unreasonably, irrationally and *ultra vires* its powers both in the manner of conducting the inquiry and in the manner of adopting their report. They were also accused of acting in contravention of the provisions of Articles 47, 50 (1) of the Constitution and Sections 4,5, and 6 of the Fair Administrative Act and therefore, the determination reached was null and void ab initio.

15. The application was unopposed as none of the respondents filed responses despite service.

ISSUES, ANALYSIS AND DETERMINATION

16. Learned counsel for the *ex-parte* applicants filed written submissions which I have duly considered. In his submissions, counsel raised the following issues;

a. **Whether the *ex-parte* applicants were informed of the charges against them as required under the provisions of Article 50 (1) and 47 of the Constitution and Section 4(3) of the Fair Administrative Act.**

b. **Whether the respondents acted illegally by circumventing the *ex-parte* applicants right to appeal as provided under Section 73 (1) of the Cooperative Society's Act;**

c. **Whether the respondents fraudulently procured the adoption of the inquiry report;**

d. **Whether the actions of the respondents were politically instigated.**

17. I would crystallize the issues for determination as follows;

a) **Whether the conduct of the inquiry ordered by the commissioner of cooperatives met the threshold envisaged under Article 47 and 50 of the constitution and sections 4, 5 and 6 of the Fair Administrative Act.**

b) **Whether the respondents fraudulently procured the adoption of the inquiry report.**

c) **Whether the decision to surcharge the applicants was reached without adequate notice to and without according the applicants the right to be heard.**

18. Broadly, counsel argued that the *ex-parte* applicants were not informed of the charges against them nor were they given an opportunity to defend themselves prior to the decision to have them surcharged contrary to **Article 47 and 50 and Section 4 (3) of the Fair Administrative Act.**

19. **Article 50** of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

20. **Article 47(1)** of the Constitution provides for every individual's right to fair administrative action thus:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

21. **Section 4** of the **Fair Administrative Action Act** ("the Act"), defines what constitutes expeditious, efficient, lawful, reasonable and procedurally fair administrative action. Sub rule **4(3)** thereof states;

3. *"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

22. Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act demand that all state and non-state agencies and any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates, adhere to the established principles of fair administrative action.

23. The concern of judicial review is the manner in which a decision is made and not the merits of the decision. The court interrogates the legality, rationality and procedural propriety of acts done by decision making bodies. In the landmark case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the court defined what constitutes illegality, irrationality and procedural impropriety thus;

“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

24. The dispute in the present case relates to former officials of a cooperative society. Cooperative societies are governed by the Cooperative Societies Act (“the Act”). Under **Section 58** of the Act, the Commissioner for Co-operative Development is empowered to call for an inquiry into the by-laws, working and financial conditions of any co-operative society. The provision stipulates;

58 (1) The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.

(2) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.

(3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.

(4) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—

(a) dissolve the Committee; and

(b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.

(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.

25. On 13th November 2020, the Commissioner for Cooperatives Development, who is sued as the 1st respondent, caused to be published in the Kenya Gazette a notice directing the 2nd and 3rd respondents to conduct an inquiry to look into the by-laws; working, financial conditions governance structure; and the conduct of management committee, past or present members of officers of Mobamba Farmers Society Limited.

26. Pursuant to the instructions of the Commissioner, the 2nd and 3rd respondents issued summons dated 16th November 2020, to the *ex-parte* applicants, to appear before them at A.T.C. Kisii on 19th November 2020 at 2:00 p.m. In the summons, the 2nd and 3rd respondents indicated that they had reason to believe that the *ex-parte* applicants could give them valuable information that would be necessary for the exercise assigned to them by the 1st respondent.

27. The *ex-parte* applicants claim that when they appeared before the respondents, they were merely interviewed on the general affairs of the Cooperative Society. They complained that they were not informed of any charges against them which would attract penal consequences and were shocked to learn that the respondents had compiled an inquiry report which recommended that they be surcharged for a total sum of Kshs. 20,972,388.97/=.

28. In the inquiry report dated November/December 2020 the 2nd and 3rd respondents stated that members of the Cooperative Society had made numerous complaints over the illegal sale of land belonging to the Cooperative Society and buyers had equally complained that they were yet to receive title deeds from the purchase of land. The 2nd and 3rd respondents indicated that in conducting the inquiry, they employed a multifaceted approach comprising of review of relevant documents and interview of the Cooperative Society’s officers and government officials.

29. One of the recommendations made by the 2nd and 3rd respondents in their report was for the previous committee members to be surcharged and ordered to pay back a sum of Kshs. 22,174,535/= which had been lost by the society. They also recommended that the former officials be barred from holding an elective post of a cooperative society.

30. The principles of fair administrative action demand that an administrator give a person to be affected by his decision prior and adequate notice of the decision and an opportunity to defend himself.

31. Lenaola J. (*as he then was*) in the case of **R -vs- Kenya Medical Training College ex-parte James Kipkonga Kandagor Misc. App. No.10 of 2004 [2004] eKLR** emphasized;

“A person being tried is entitled to disclosure of the charges and the evidence against him. Days when secrecy of such matters was the norm are long gone. This duty on the part of those laying charges is continuous and applies both at the pre-trial stage and continues during trial...”

32. Similarly, the court in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, held that;

As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well”.

33. Although the gazette notice and the summons issued upon the *ex-parte* applicants did not specify any charges against the *ex-parte* applicants it should be noted that the process undertaken by the 2nd and 3rd respondent was an inquiry. After the inquiry process, the 2nd and 3rd respondents made recommendations which they presented before the Cooperative Society for adoption. The recommendations made by the inquiry team were not cast in stone.

34. Counsel referred this court to the case of **Republic v Commissioner for Co-operative Development & 3 others ex-parte Elisha Otieno and 22 others [2016] eKLR** where the *ex-parte* applicants were similarly aggrieved by the actions of the Directorate of Co-operative Development particularly with the activities of the team set up to inquire into the business of Egerton University SACCO. The court held as follows;

“The mandate of the enquiry team was to “investigate into the conduct of past and present society’s officers in carrying out the society’s functions”. Following their enquiry in exercise of this mandate the team found that the Ex Parte applicants had “Misappropriated and misused funds” belonging to the society and had generally mismanaged the society.

On this basis the inquiry team recommended that the persons concerned be surcharged, relieved of their positions in the Society and be barred in future from holding offices in other co-operative societies.

These recommendations were undoubtedly serious and far reaching. The implementation of the same would certainly alter the legal position of the Ex Parte applicants to their detriment. The amounts to be surcharged were not small (some Ksh. 1.75 million) and would be recoverable as a civil debt. Therefore it behoved the inquiry team to adopt a procedure which would accord the Ex Parte applicants a fair hearing. According to their report the methodology adopted by the inquiry team to carry out its task was to examine all relevant documents as well as to ‘interview’ past and present members of the society. The respondents insisted that this ‘interview’ of the Ex Parte applicants amounted to a ‘hearing’ and therefore they were duly accorded their right to be heard. The Ex Parte applicants acknowledged having been invited to appear before the inquiry board for an ‘interview’ and they conceded to having signed the acknowledgements annexed to the Respondents Replying affidavit. However the Ex Parte applicants maintain that at said interviews no charges and/or allegations were leveled against any of them. They were only asked to shed light on the running of the Society and were not asked to explain any instances of mismanagement and/or missing funds.

Therefore it is clear that for one to be said to have been accorded a fair hearing, he/she must be informed of the specific particulars of the case against him and be allowed reasonable time to prepare and submit a response (defence) and submit the same for consideration before a decision can be made. Was this procedure followed by the inquiry team? It seems unlikely. The respondents have only tendered evidence of having invited the Ex Parte applicants for an ‘interview’. There is no evidence that they were given specifics and/or particulars of the allegations/accusations against them. They were not invited to prepare submissions/responses for consideration by the inquiry team before the recommendations were made. The inquiry team only summoned the Ex Parte applicants to appear before them for an ‘interview’ as the team believed that they had information necessary to assist the team fulfill its mandate. The Ex Parte applicants were invited to bring along to this interview only documents or information they deemed necessary for the purposes of the inquiry. Without having been given the specifics of what the inquiry was to cover, without having been told of the specific accusations against them the Ex Parte applicants would have no way of knowing which documents or information was necessary for them to present before the inquiry team.

The Ex Parte applicants were facing (and indeed were eventually found culpable for) very serious allegations of mismanagement of the society and the society’s funds. Not only is there no indication that the inquiry team informed them of the specific nature of the allegations against them, there is no evidence that any Ex Parte applicant was invited to or gave any explanation, mitigation or input before the team came up with its recommendations. If indeed this crucial procedure had been adhered to – if indeed the Ex Parte applicants had been properly informed of the allegations against them and had been allowed an opportunity to respond to those allegations nothing would have been easier than for the Respondents to tender tangible proof to the court that this was done. Their failure to tender such evidence means this procedure was not followed.

Once the inquiry team presented its report to the Board of Directors the report was only for adoption and implementation by the Board. The Ex Parte applicants would not have a chance to appeal and make interventions before the Board prior to adoption of the inquiry report. The only opportunity the Ex Parte applicants had in the process to make any interventions was before the Inquiry Team. This opportunity was grudgingly accorded them in the form of an **'interview'**. This interview as I have shown earlier did not meet the threshold of a fair hearing. Their right to a fair hearing was not in my view accorded to them."

35. The above decision of the court although highly persuasive is not binding. Where a clear procedure for the redress of any grievance is prescribed by the Constitution or the Statute, that procedure should be strictly followed. Otherwise the court would find itself guilty of usurpation of power. On this, the Court of Appeal in **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015] eKLR** held:

"It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court."

36. Similar findings were made in the cases of **Samson Chembe Vuko v Nelson Kilumo & 2 Others [2016] e KLR, Speaker of the National Assembly vs Karume [2008] 1 KLR 425** and **Kones v Republic & Another exparte Kimani Wanyoike & 4 Others [2008] e KLR**.

37. Under the Cooperative Societies Act, an order to surcharge officials of a cooperative society is made by the Commissioner for Cooperative Development upon receiving the inquiry report. The Commissioner derives the powers to issue surcharge orders from **Section 73 of the Cooperative Societies Act** which provides;

73. Power to surcharge officers of co-operative society

(1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—

(a) has misapplied or retained or become liable or accountable for any money or property of the society; or

(b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.

(2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.

(3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.

38. The *ex-parte* applicants claim that they only got to learn that they had been found guilty and decreed to be surcharged when they were served with the surcharge order on 15th March 2021. I went through the bundle of documents attached to the application and did not come across a surcharge order issued by the 1st respondent. What the *ex-parte* applicants attached to their application was a "Notice of Intention to Surcharge under Section 73 of the Cooperative Societies Act" dated 8th February 2021 which reads in part:

"TAKE NOTICE that the Commissioner for Co-operative Development has been notified that you are accountable for monies indicated against your names in relation to the business of Mobamba Farmers Co-operative Society Limited particulars which are set out in the Inquiry Report read and adopted in accordance with section 58 of the Co-operative Societies Act."

39. The Notice listed the names of the persons adversely mentioned in the inquiry report and the amounts they were being held accountable for and further read:

"WHEREFOR by way of written submissions you are hereby called upon individually to show cause within 14 days from the date of receipt whereof why you should not be surcharged in accordance with Section 73 of the Act.

TAKE FURTHER NOTICE that unless an explanation is received within the aforesaid period an order of surcharge shall be issued without further reference to you."

40. The *ex-parte* applicants complained that the respondents had purported to seek written submissions from them posthumously having already condemned them unheard. A careful reading of Section 73 of the Cooperative Societies Act and the above Notice issued by the 1st respondent shows that this claim could not be further from the truth.

41. The Governor of Kisii County was not joined to the case to respond to the claims that he instigated the inquiry process for political reasons. In any event, if the Governor had raised concerns over the running of the Cooperative Society, he would have been within his right to do so, as the regulation of cooperative societies is a function falling under the mandate of the County Governments in the Fourth Schedule of the Constitution.

42. **Section 58** of the Act empowers the Commissioner for Co-operative Development to call for an inquiry into the by-laws, working and financial conditions of any co-operative society of his own motion.

43. According to the inquiry order dated 13th November, 2020 the instructions given to the 2nd and 3rd respondents were to conduct an inquiry and look into the by-laws; working, financial conditions governance structure; and the conduct of management committee, past or present members of officers of Mobamba Farmers Society Limited in accordance with Section 58 as read together with Section 73 of the Cooperative Societies Act.

44. The 2nd and 3rd respondents carried out their instructions as seen in the extensive inquiry report annexed to the application and marked as exhibit "KM 4 (a)."

45. From the foregoing, I have no hesitation in coming to the conclusion that in so far as the first issue is concerned, the initiation and conduct of the subject inquiry was ring fenced in law under section 58 of the Act. There was no illegality, irrationality or procedural impropriety in the administrative action by the Commissioner in instituting the inquiry.

46. I propose to deal with issues b) and c) together as the answer to both overlaps. Here, the court endeavours to question whether the respondents were condemned unheard and on the basis of an irregularly adopted report.

47. The ex-parte applicants averred that they were former officers and members of the Cooperative Society. They were therefore required to furnish any information regarding the affairs of the society, as the inquiry team would ask from them as provided under Section 58 (2) above.

48. The ex-parte applicants have not demonstrated to this court that the 1st respondent merely adopted the inquiry report without giving them an opportunity to be heard. On the contrary, the 1st respondent invited the ex-parte applicants and other persons adversely mentioned in the inquiry report to respond to the allegations made against them in the report before a surcharge order could be issued.

49. The ex-parte applicants have not indicated when the "Notice of Intention to Surcharge" was served upon them. They have also not stated whether they accepted the invitation to respond to the inquiry report before the 1st respondent.

50. It is apparent that the ex-parte applicants were under the misguided impression that the recommendations made by the inquiry team were conclusive. They claimed that the respondents had circumvented their right of appeal because the inquiry report was adopted for enforcement on 20th January 2021 and they only came to learn of it on 15th March 2020 when they were served with the surcharge notice. According to them, the 30 days for appeal began running from the date the recommendation to surcharge them was adopted in the Special General Meeting therefore, their fate was sealed when 30 days lapsed from the date when the inquiry report was adopted.

51. The right to appeal against a surcharge order made by the Commissioner for Cooperative Development is provided under **Section 74** of the **Cooperative Societies Act** thus;

74. Appeal against order

(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.

52. The above provision clearly states that a person aggrieved by a surcharge order made by the Commissioner can appeal to the Cooperative Tribunal within thirty days. *The Notice of Intention to Surcharge* is not a *Surcharge Order* as the ex-parte applicants seem to imply. The time to appeal would begin to run from the time such an order would be given and not when the inquiry report was adopted by the Cooperative Society as argued.

53. The ex-parte applicants have not annexed the surcharge order, if at all one was issued. This court cannot therefore conclusively state that they were denied their right of appeal.

54. The recommendations made by the 2nd and 3rd respondents in the inquiry report were not conclusive. The ex-parte applicants were given an opportunity to counter the various allegations made against them when they were served with the Notice of Intention to Surcharge.

55. They had an opportunity to defend the decisions they made while they were officers of the Cooperative Society and present evidence to justify their sale of assets belonging to the Cooperative Society before the 1st respondent. This, in my view, was the great opportunity that the respondents had to demonstrate the illegality in the manner in which the inquiry report was adopted by the Cooperative Society through the Special General Meeting they claimed was convened in contravention of the Cooperative Societies Act. In a nutshell, the applicants were accorded a right to be heard when they were served with a *Notice of Intention to Surcharge*' a right for reasons known to them, failed to exercise.

56. The failure by the respondents to enter appearance or give evidence did not absolve the ex-parte applicants of the duty to prove their case to the required standard. The court of appeal in *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*) had this to say on the burden of proof;

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof"

57. The *ex-parte* applicants have not demonstrated that the inquiry conducted by 2nd and 3rd respondents did not meet the basic tenets of fair administrative action as they were invited to make representations or defend themselves on the specific allegations made against them in the inquiry report and show cause why they should not be surcharged.

58. Consequently, I find that the application contesting the findings, recommendations and the inquiry report prepared by the 2nd and 3rd respondents on the 1st respondent's instructions has no basis. The Notice of Motion dated 5th May 2021 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF SEPTEMBER, 2021.

A. K. NDUNG'U

JUDGE