



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JR MISC APPL. 84 OF 2020

REPUBLIC

VERSUS

THE COMMISSIONER OF COOPERATIVE

DEVELOPMENT.....1ST RESPONDENT

MU 84 SACCO SOCIETY LIMITED.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE

JOSEPH K. SAMOEI & 19 OTHERS.....EX PARTE APPLICANTS

RULING

1. The ex-parte applicants (**JOSEPH K. SAMOEI & 19 OTHERS**) filed an application for orders that leave be granted to the ex-parte applicants to apply for:

- Orders of certiorari to bring to this honourable court and quash the resolution of the 2nd respondent in petitioning the 1st respondent to carry out an inquiry report into its affairs
- Orders of certiorari to bring into this honourable court and quash the inquiry order dated 15th November 2018 issued by the 1st respondent.
- Orders of certiorari to bring to this honourable court and quash the inquiry report dated 22nd day of March, 2019 and the resolution adopting it dated the 23rd day of March 2019.
- Orders of certiorari to bring to this honourable court and quash the decision of the respondents to appoint 9 members of the interim management committee instead of the 5 allowed by law.
- Orders of certiorari to bring to this honourable court and quash notices of intention to surcharge dated the 16th day of April 2020.
- That leave so granted do operate as stay of execution or proceeding of the intention to surcharge or any prosecution of the ex parte applicants as a result of the same.
- Costs be provided for.

2. The ex parte applicants are all members of **MU 84 SACCO SOCIETY LIMITED** (the 2nd respondent) who by resolution during an AGM petitioned **THE COMMISSIONER OF COOPERATIVE DEVELOPMENT** (the 1st respondent) to carry out an inquiry on the affairs of the SACCO and past officials. The 1st respondent issued an inquiry order dated the 15th day of November 2018 appointing the inquiry officers and limiting the scope of inquiry to three aspects.

The inquiry report was adopted by the 2nd respondent on the 23rd day of March 2019 and an interim management committee put in place. As a result of the report the ex parte applicants have been served with a notice to surcharge them for a sum of Kshs. 14,317,050/-.

3. The ex parte applicants are aggrieved with the said inquiry, the manner and the process used to carry out the same which they say was flawed, irregular and unfair. They contend that the resolution petitioning the 1st respondent was irregular and flouted the provisions of sections of the **Cooperative Act and Rules** as the same was not on any agenda and the minutes of the meeting, and the resolution was not made into the minute book and signed as required by **rule 22(2) of the Cooperative Societies Rules**.

The resultant inquiry order dated 15th November 2018 is described as defective and irregular as it is addressed to **Maseno Sacco** in its third scope rather than the 2nd respondent and that no correction or fresh order was ever made. The ex-parte applicants contend that the inquiry order was only valid for one month after it is issued yet the inquiry was carried out several months thereafter without any extensions issued by the 1st respondent.

4. It is their lament that during the inquiry the inquiry officers did not as a matter of fairness or right to be heard as espoused in **article 47 of the Constitution**, give any hearing or seek any clarification from the ex-parte applicants before making the adverse findings about them and the resultant report was highly inaccurate, unfair and infringed on their right to fair and administrative action and treatment of the law.

Subsequently, the 1st respondent presented the report at a special general meeting on the 23rd day of March 2019, and only read the findings and recommendations without presenting or circulating copies to members or giving them time to read the same or discuss the same and only required the members to adopt the same and the resultant resolution was also defective as the same was not captured in the minute book as required by **rule 22(2) of the Cooperative Societies Rules**.

5. The 1st respondent thereafter, through the inquiry officers dissolved the management committee and caused the appointment and election of 9 members of the inquiry committee instead of the required 5 as **per section 58(4) of the Cooperative Societies Act**.

The applicants contend that the notices of intention to surcharge served upon them are defective since the same was supposed to be implemented or done within 90 days of the adoption report, coupled with the fact that the inquiry report and the process was highly flawed and irregular.

They maintain that the interim committee that was appointed to run the affairs of the Sacco, and implement the report failed to comply with the law as they failed to file indemnity forms within 14 days (and in the required format). Further, they never filed any wealth declaration forms within 30 days as provided by rule 29 of the Cooperative Act.

That under **section 27 of the Cooperative Societies Act (Cap 490)**, the supervisory committee is not supposed to have more than 3 members yet in this instance, 9 members were appointed rendering the whole management committee and the processes null and void for want of compliance with the law. The ex-parte applicants point out that they are in danger of suffering a violation of their fundamental and constitutional rights to a fair administrative action and fair expectation if the intention to surcharge is not stayed.

6. The ex parte applicants' main contest is on the legality of the process and the resolution by the 2nd respondent to petition for an inquiry, the legality of the inquiry order and its validity, the manner the inquiry report was carried out, the adoption of the report and the manner of adoption, the legality of the election of the management committee and the resultant notices of intention to surcharge.

The applicants submit that **Section 76 of the Cooperative Societies Act**, is very clear as to the nature of disputes to be referred to a tribunal, and that it does not in any way forbid the aggrieved party from challenging any administrative process.

7. The 2nd respondent in its grounds of opposition is faulted as having failed to point out the specific provision of the Cooperative Societies Act and its by-laws that deny the court jurisdiction to entertain and determine the application dated 5th August 2020. That the 2nd respondent filed grounds of opposition instead of a replying affidavit through which they would have disputed the facts, as they would have an opportunity to annex the minutes, resolutions of all the meetings to show that they had complied with the law and they cannot respond on behalf of the acts of the 1st respondent who has not filed any response.

8. It is also argued that the 2nd respondent has not challenged the ex-parte applicants' assertion that the said inquiry order was defective for having been addressed to another Sacco, and not the 2nd respondent in the first limb of the order. Further that the inquiry order dated the 15th November 2018 was only valid for 15 days and that the same was not extended despite the report having been dated 22/3/19 and was adopted the next day. That they have failed to prove or annex that the minutes of the said meeting and the resolution petitioning for an inquiry order was taken down in the minute book as well as the resolution adopting the inquiry report on 23/3/19.

9. The resolution petitioning the 1st respondent is contested as being irregular and that it flouted the provisions of sections of the Cooperative Societies Act and its rules as the same was not in any agenda and the minutes of the meeting and resolution was not made into the minute book and signed as required as rule 22(2) of the Cooperative Societies Act rules and section 27(5)(b)(c)(h).

The court is urged to find that the applicants have established a prima facie case with a high probability of success. They pray this court grants the orders sought in the interest of justice. The respondents will not be prejudiced in any way if the orders sought herein are granted.

10. The 2nd respondent opposed the application and contended that the court has no jurisdiction in law to stay the 1st and 2nd respondent's notices of intention to surcharge dated 16th April 2020, or to entertain disputes or settlement of disputes concerning the Cooperative Societies Act or arising out of the by-laws of the 2nd respondent and the ex parte applicants. Further, that the resolution and petition of the members of the 2nd respondent to carry out in-depth investigation to establish the extent of financial losses by the 2nd respondent incurred as a result of misappropriation by the ex parte applicants has since been executed.

11. It is argued that the resolutions of the 2nd respondent in a meeting held on 23-3-2019 on adoption of the 1st respondent's inquiry report and the election of the 2nd respondent's management committee comprising of nine members, plus the supervisory committee comprising of three members since have been executed. As a consequence, the management committee and supervisory committee have been properly in office ever since 23-3-2019 to date. In addition, the resolutions of the 2nd respondent's meeting of 4-5-2019 on the handing over from the 2nd, 12th, 17th and 15th ex parte applicants and taking over by the 2nd respondent's management committee elected on 23-3-2019 in the presence of the 2nd respondent's supervisory committee and the 1st respondent has been done.

12. The respondents argue that the resolutions to initiate inquiry, the inquiry order dated 15-11-2018(MR1) the inquiry report dated 22-2-2019(MR2), resolution of 23-3-2019 and forwarding letter and notice of intention to surcharge (MR3) have not been annexed with the ex-parte applicants' application dated 5-8-2020. That in any event, the process of inquiry has been concluded.

The ex parte applicants' application dated 5-8-2020 is described as being bad in law, unmerited, a waste of judicial time, defective, vexatious and an abuse of the court process and has been overtaken by events.

13. This court is urged to find that there is nothing to review by way of orders of certiorari in terms of the 2nd respondent's resolution in petitioning the 1st respondent to carry out an inquiry report into the affairs of the 2nd respondent, the 1st respondent's inquiry report dated 15-11-2018 and inquiry report dated 22-3-2-19, the 2nd respondent's resolutions of 23-3-2-19 that adopted the said inquiry report dated 22-3-2019 and elected the 2nd respondent's management committee and supervisory committee and the 1st respondent's intention and notices of intention to surcharge dated 16-4-2020.

14. That the application is an abuse of the provisions of **order 53 rule 1 of the Civil Procedure Rules 2010 and section 8 and 9 of the Law Reform Act** and all other enabling provisions of the law. Further that the notices to surcharge the ex parte applicants for the total sum of kshs. 14,317,050 arose from the unchallenged adoption of the inquiry report dated 22-3-2019 in the 2nd respondent's meeting held on 23-3-2019, and should not be stayed. That nonetheless, should this court be inclined to allow the ex parte applicant's application dated 5-8-2020 for leave, then the said leave should not operate as stay as it will cause the 2nd respondent great loss bearing in mind the total sum of money surcharged is large. The court is urged to strike out the application.

15. ISSUES FOR DETERMINATION

1. Whether the court has jurisdiction to stay the 1st and 2nd notices of intention to surcharge,
2. Whether the applicant is entitled to the orders sought.

WHETHER THE COURT HAS JURISDICTION TO STAY THE NOTICES

The respondent has not stated the section which restricts this court's jurisdiction. **Section 76 of the Cooperative Societies Act** provides;

76. Disputes

(1) If any dispute concerning the business of a co-operative society arises;

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

16. This provision deals with the actual disputes. The present application seeks leave to institute judicial review proceedings as the applicants are challenging the legality of the process.

Article 47 of the constitution provides;

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the

person has the right to be given written reasons for the action.

This article provides jurisdiction to this court to make determinations on administrative actions. The respondent has not demonstrated this court's lack of jurisdiction to handle this matter.

WHETHER THE APPLICANT IS ENTITLED TO THE ORDERS SOUGHT

In **Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR** the court held;

At the leave stage an applicant must show that:- (i) 'sufficient interest' in the matter otherwise known as *locus standi*; (ii) that he/she is affected in some way by the decision being challenged; (iii) that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (v) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

17. Whether the applicant has locus standi

The ex parte applicants are members of the 2nd respondent, and were issued with the notice to surcharge them under **section 73 of the Cooperative Societies Act** and it is therefore not in doubt that they have locus standi.

Whether the applicants are affected by the decision being challenged

The notice of intention to surcharge summons the applicants to show cause why they should not be surcharged. It is fair to say that they will definitely be affected by the decision being challenged.

Whether the applicants have an arguable case and the case has reasonable chances of success

The applicants are aggrieved by the inquiry order dated 15th November 2018. They contend the resolution petitioning the 1st respondent was irregular and flouted provisions of the cooperative act and rules, specifically **rule 22(2) of the Cooperative Societies act**. The respondents did not produce any evidence to rebut this position and in the premises I am persuaded that there exists an arguable case.

Whether the decision was made by a public body

The 2nd respondent is a duly registered cooperative society under the auspices of the Cooperative Societies Act, and operating Matatu business between **Eldoret town and Moi University** with the authority of the **National Transport and Safety Authority**.

I find that the impugned decision was made by a public body.

Consequently, I hold and find that the ex-parte applicants have met the threshold for the orders at the leave stage to be granted, and the leave so granted shall operate as stay. The applicant to file a motion within 21 days hereof.

Virtually Delivered and Dated this 17th day of December 2020 at Eldoret

H. A. OMONDI

JUDGE

Mr. Mwaka for applicant