



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 2 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COOPERATIVE TRIBUNAL.....RESPONDENT

MARY CONCEPTOR NZAKUVA.....1ST INTERESTED PARTY

CATHERINE WANJIKU KARIUKI.....2ND INTERESTED PARTY

EX PARTE: JACKSON WEKESA ABALA

JUDGMENT

The Applications

1. Jackson Wekesa Abala (“the Applicant”) and Mary Conceptor Nzakuva and Catherine Wanjiku Kariuki (“the 1st Interested Party and 2nd Interested Party” respectively) were both Members of the Law Society Saving and Credit Society (hereinafter “the Society”). The Applicant took a loan from the Society which the Interested Parties guaranteed. The Applicant thereafter defaulted on the loan repayment, which the Interested Parties were made to pay as guarantors. The Interested Parties subsequently filed proceedings against the Applicant in the Co-operative Tribunal (the Respondent herein), seeking recovery of the amount of loan they had guaranteed, namely Co-operative Tribunal Case No 149 of 2018. Judgment was entered by the Respondent in the Interested Parties favour on 2nd August 2018 for the principal sum of Kshs 550,000/- with interest and costs of Kshs 66, 290/=. Subsequently, warrants of arrest issued against the Applicant on 7th January 2019 as a result of his inability to pay the said amount.

2. The Applicant thereafter moved this Court through a Notice of Motion application dated 30th January 2019, seeking the following orders:

a) An order of Certiorari do issue to remove into this Court and quash the entire proceedings, the decree on 9th August 2018 and or/any other consequential orders made in the Cooperative Tribunal in Cooperative Tribunal Case No 149 of 2018 between Mary Conceptor Nzakuva and Catherine Wanjiku Kariuki vs Jackson Wekesa Abala.

b) An order of Prohibition prohibiting the Cooperative Tribunal from further entertaining the proceedings in Cooperative Tribunal Case No.149 of 2018 between Mary Conceptor Nzakuva and Catherine Wanjiku Kariuki vs Jackson Wekesa Abala.

c) That all necessary and consequential orders be made that meets the ends of justice in the circumstances of the case

d) Costs of the application.

3. The Applicant’s application is supported by a Statutory Statement dated 8th January 2019 and a verifying affidavit sworn by the Applicant on the same date and on 30th January 2019. The Applicant also swore a further affidavit on 25th February 2019. The Respondent did not enter any appearance or file any response to the application. The Interested Parties on their part filed Grounds of Opposition dated 5th February 2019 and a Replying affidavit sworn on the same date by the 1st Interested Party.

4. The parties were directed by this Court to canvass the instant application by way of written submissions. The Applicant’s Advocates on

record, Nyauchi and Company Advocates filed submissions dated 5th March 2019, while Jimmy Nzakuva & Partners Advocates for the Interested Parties filed submissions dated 5th March 2019. The cases set out by the Applicant and Interested Parties now follow.

The Applicant's Case

5. The Applicant's case is that the proceedings in the Co-operative Tribunal arose from a purely civil dispute, and do not fall within the definition of disputes which are to be determined by the Respondent under section 76(2) of the Cooperative Societies Act. However, that despite the Respondent tribunal lacking jurisdiction, it was seized of the matter and entered summary judgement for the Interested Parties, and despite the Applicant having instructed his counsel to come on record for him. The Applicant alleged that the Tribunal acted *ultra vires* and overstepped the jurisdictional limits conferred by statute. The Applicant posed that the civil Courts are the proper forum for the dispute, and that the prosecution of the case in the Respondent Tribunal amounts to forum shopping and violates his legitimate expectation

6. Furthermore, that the Respondent has conducted itself irrationally, unfairly during the proceedings and violated the rules of natural justice, by limiting the Applicant's right to a fair trial. It is his case that he was condemned unheard as he was not granted a reasonable opportunity to state his case despite his incessant pleas. In addition, that the Respondent adhered to strict rules of evidence in violation of section 78 (1) of the Cooperatives Societies Act.

7. The Applicant in his further affidavit deposed that he was ailing when the Interested Parties' case documents were served upon him, and that failure to enter a defence on time therein was an inadvertent oversight by his counsel on record. Furthermore, that the consent to settle the matter was irregularly procured in the Respondent Tribunal by his advocate without his knowledge and approval, and in collusion with the Interested Parties. In addition, that he subsequently made several offers to the Interested Parties to settle the dispute through alternative dispute resolution which were rejected. That he also applied for the Tribunal proceedings in order to appeal but there was inordinate delay in supplying the same due to understaffing at the Tribunal, thereby defeating his efforts to appeal which was time barred. Therefore, that in the circumstances, the only available mechanism for redress available to him is through judicial review.

8. The Applicant in his submissions relied on Articles 25, 47 and 165 of the Constitution, and section 6 of the Fair Administrative Action Act to urge that he had a right to access justice through judicial review. He also cited the decision in **Republic vs The Commissioner of Lands ex-parte Lake Flowers Limited, Nairobi HCMISC. Application No 1235 of 1998** for the proposition that the availability of other remedies is no bar to the granting of judicial review, but can however be an important factor in exercising the discretion whether or not to grant the relief. The Applicant also relied on the cases of **Republic vs Registrar of Companies ex parte Independent Electoral Board of Kenya National Chamber of Commerce & Industry (KNCCI), (2016) eKLR** and of **Republic vs Kenya National Examinations Council ex-parte Geoffrey Gathenji & Others Civil Appeal No 266 of 1996** for the discretionary powers of the Court and parameters of judicial review.

9. The Applicant submitted that the Respondent acted beyond its jurisdiction under section 76(2) of the Co-operative Societies Act, and referred to the case of **Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300** for the position that for one to succeed in application for Judicial review one has to show that the decision complained of must be tainted with illegality, rationality and procedural impropriety. He further submitted that the Respondent acted irrationally and unreasonably, and relied on the case of **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB 223** for this proposition. That the actions of the Respondent to deny the Applicant a hearing despite his incessant pleas amounted to procedural impropriety and breach of the rules of natural justice, and its decision was therefore irrational. Also cited was the case of **Re Bivac International SA(Bureau Veritas), (2005) 2 EA 43** on the importance of judicial review to step in to cure instances of acts of illegality, irrationality and impropriety of procedure.

10. Lastly, the Applicant submitted that judicial review is not about the merits of the decision but the decision making process, and relied on the Court of Appeal decision in **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No 185 of 2001** for this proposition.

The Interested Parties' Cases

11. The 1st and 2nd Interested Parties opposed the application on the grounds that it is without merit and an abuse of the Court process, and as such should be dismissed with costs. Further, that the application is defective for failing to attach the proceedings or decision sought to be quashed as provided for under Order 53 Rule 7 of the Civil Procedure Rules. According to the Interested Parties, the Respondent is vested with powers under section 76 (1)(a) of the Co-operative Societies Act to entertain proceedings and make determinations such as the one in question, and that the Applicant has failed to demonstrate how the Respondent acted in excess of its powers, or that its proceedings and decisions are tainted with illegality to warrant issuance of an order of prohibition.

12. The Interested Parties also allege that the Applicant has violated express provisions of the Fair Administrative Action Act, particularly Section 9(2) as he has not exhausted all the available and alternative mechanisms for review or appeal under the law before applying for judicial review. In particular, that section 81 of the Cooperative Societies Act clearly provides for a mechanism of appeal from the Co-operative Tribunal's determinations to the High Court which the Applicant has not done.

13. The Interested Parties elaborated that the Applicant admitted to the jurisdiction of the Respondent and further participated in the proceedings in the Respondent Tribunal by filing applications therein. They gave a detailed account of the proceedings in the Tribunal and averred that after they got judgment, the Applicant did pay an amount of Kshs 100,000/= in part settlement of the debt he owed. Further, that despite part compliance with the judgment issued by the Respondent, the Applicant made an application seeking annulment of the said judgment and to file his defence out of time, which application was heard and dismissed by the Respondent in a ruling delivered on 22nd November 2018. That all the parties were heard in the subsequent Notice to Show Cause proceedings, that resulted in the ruling delivered by the Respondent on 7th January 2019 that the Applicant pays the decretal amount in full and in default warrants of arrest were to issue.

14. The Interested Parties thus contended that the Respondent was well within its jurisdiction to hear and determine the dispute between

them and the Applicant, and was fair, impartial and reasonable in the exercise of its powers. Further that the Applicant is filing multiplicity of applications to frustrate them from enjoying the fruits of their judgment, and is unlawfully seeking an appeal of the Respondent's determination in this Court through judicial review.

15. While relying on the provisions of Section 76 of the Co-operative Societies Act, the Interested Parties submitted that the Respondent had the requisite jurisdiction to determine the dispute before it as all the parties were members of the Law Society of Kenya Sacco Limited, which came about when the Applicant defaulted on the loan repayment. They relied on the case of **Samuel Njagi Mwangi vs James Kamau Wainaina, (2018) eKLR** on the disputes that can be referred to the Tribunal.

16. Further, that Article 47 of the Constitution of Kenya provides for fair administrative action, and that the Applicant was in this respect served with the statement of claim and given the statutory time of 15 days within which to enter appearance in accord with the law, after which the Respondent entered judgment in default of appearance. That the Respondent therefore gave the Applicant an opportunity to be heard, and after the Applicant made an application to set aside the interlocutory judgment, he was again given a hearing date on which date his advocate voluntarily withdrew the application. Likewise that he was given hearing to show cause why warrants of arrest should not issue and for his second application to set aside the judgment. They submitted therefore that the Respondent was exercising its powers and authority conferred under section 76 of the Co-operatives Act and other enabling provisions of the law in a fair and rational manner, as provided for by substantive and procedural laws.

17. Lastly, the Interested Parties submitted that section 81 of the Co-operative Societies Act is clear that if any party is not satisfied with a determination of the Respondent they should appeal within 30 days of the decision to the High court. However, that Applicant has not appealed, and has therefore not exhausted the remedies under the Co-operative Societies Act as required by section 9(2) of the Fair Administrative Action Act. They relied on the case of **Republic vs Kenyatta University ex parte Ochieng Orwa Dominick & 7 others, (2018) eKLR** with regard to the mandatory nature of section 9(2) of the Fair Administrative Action Act, and on the case of **Wise born Industries (k) Limited vs Fortune Sacco Limited (2017) eKLR** for the proposition that where a specific procedure has been provided in law it should be followed.

The Determination

18. Having taken into account the parties respective parties' pleadings and submissions, this Court notes that the issues arising for determination in this regard are whether the Respondent acted outside its jurisdiction and powers in entertaining the Interested Parties claim in Co-operative Tribunal Case No 149 of 2018. If this issue is resolved in the negative, the Court will then proceed to consider the other two substantive issues as to whether the Respondent accorded the Applicant a fair hearing during the hearing of the said appeal, and whether the Applicant is entitled to the relief sought.

19. In considering the said issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

20. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

21. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3**

others, (2016) KLR that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

22. This Court will proceed to examine and determine the issues raised by the parties in light of the foregoing principles.

Whether the Respondent acted outside its Jurisdiction and Powers.

23. In determining whether or not the 1st Respondent acted outside its powers, regard is made to the description of illegality by Lord Diplock in Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410 as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233, Lord Pearce held as follows on when a public body may lack jurisdiction:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

24. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the jurisdiction and powers of the Respondent are derived from section 76 of the Cooperative Societies Act which reads as follows:

“(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.”

25. A literal and ordinary interpretation of the section is that where the parties to a dispute are current or past members of a co-operative society, or members of a cooperative society and the society, or between two co-operative societies; and the subject matter of the dispute is the business of a co-operative society, then the dispute shall be referred to the Tribunal. Section 76(2) proceeds to give examples of such disputes and is not exhaustive in this respect. In the present application it is not in dispute that the Applicant and Interested Parties are members of the Law Society of Kenya SACCO, which is a co-operative society. It is also not in dispute that the Interested Parties guaranteed a loan which was advanced to the Applicant by the Law Society of Kenya Sacco.

26. The specific relief sought by the Interested Parties in their claim before the Respondent in Co-operative Tribunal Case No 149 of 2018 was a refund by the Applicant of Kshs 400,000/= and Kshs 150,000/= to be paid to their respective Law Society of Kenya SACCO Accounts. Their dispute thus concerned the refund by the Applicant of monies they paid to settle his loan obligations with the Law Society of Kenya SACCO. It is thus my finding that the Respondent was properly seized of the claim filed before it by the Interested Parties in Co-operative Tribunal Case No 149 of 2018, as it involved the business of refund of a loan payment to the Law Society of Kenya SACCO by the Interested Parties on behalf of the Applicant, who are both members of the said SACCO.

Whether the Respondent acted Fairly

On the second issue as to whether the Respondent acted fairly, two key legal principles apply. Firstly, the requirements of natural justice that guide all administrative decisions are that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision. The Court of Appeal in this regard observed as follows in the case of David Oloo Onyango v Attorney-General [1987] eKLR:

“There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.”

27. Secondly, Article 47 of the Constitution, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the Constitution provides as follows in this regard:

- (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.**

28. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

“(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.**
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
- (a) attend proceedings, in person or in the company of an expert of his choice;**
 - (b) be heard;**
 - (c) cross-examine persons who give adverse evidence against him; and**
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

29. In the present application, the Applicant annexed copies of the proceedings before the Respondent to his Further Affidavit, and after perusal of the same, this Court observes that other than at the time of entry of the *ex parte* judgment on 29th May 2018, the Applicant was represented in all subsequent proceedings and participated in the hearings of applications to set aside the *ex parte* judgment and the Notice to Show Cause, on which a reasoned ruling was delivered by the Respondent. In addition, the Applicant does not dispute that he made part payments of the sums due to the Interested Parties pursuant to the orders made by the Respondent, and is therefore estopped by his conduct from claiming that he had no knowledge of the said orders or that his Advocate on record did not have instructions. The procedure adopted by the Respondent was thus fair, as the Applicant was given the opportunity to state his case and was heard, and reasons given by the Respondent for its decision. The only recourse in the circumstances available to the Applicant is to appeal the decision of the Respondent on the merits.

Whether the Applicant is entitled to the Relief Sought

30. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge, (1997) e KLR *inter alia* as follows as regards the nature of the two judicial review orders:

““Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... .Only an order of *certiorari* can

quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

31. This Court has found that the Respondent acted within its jurisdiction and fairly, and the Applicant is thus not entitled to the orders he seeks. In the premises, the Applicant’s Notice of Motion dated 30th January 2019 is not merited and is hereby declined with costs to the Interested Parties.

32. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF APRIL 2019

P. NYAMWEYA

JUDGE