



IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 12 OF 2017

BETWEEN

PAUL MUTUMA.....PETITIONER

AND

DIRECTOR OF CO-OPERATIVES, MERU COUNTY1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT

JUDGMENT

1. The petitioner has brought the petition dated 19th May 2017 seeking to enforce his fundamental rights and freedoms. He claims that his rights to a fair hearing under **Article 50** of the Constitution and to fair administrative action under **Article 47** of the Constitution have been violated when he was surcharged for allegedly misappropriating Kshs. 10,300,000/- belonging to United Star Sacco Society Limited. He prays for the following main relief in the petition;

a) A declaration that the Respondents' intention to surcharge the petitioner without according the Petitioner an opportunity to defend himself, in respect of the alleged misappropriation of Kshs. 10,300,000/- purportedly belonging to United Star Sacco Society Limited, as insinuated in the two surcharge notices dated 29.03.2017 and 26.04.2017 respectively and addressed to the petitioner is unconstitutional and therefore null and void.

2. The gravamen of the petitioner's case is set out in the petition and in his supporting affidavit sworn on 19th May 2017 and it is that although he received the two notices of intention to surcharge him dated 29th March 2017 and 26th April 2017, he was never notified of any allegations of financial impropriety against him and was never given an opportunity to be heard before the notice of surcharge was issued. He also deponed that he had never worked for United Star Sacco Limited. He stated that he was never supplied with an inquiry report or any other documentation implicating him in the alleged improprieties. He contends that as a result, his rights to a fair hearing and fair administrative action have been violated.

3. The petition is opposed by the 1st respondent through the affidavit of Elijah Kobia, the Director of Co-operatives in the Meru County Government sworn on 2nd October 2017. He deponed that the petitioner was the Chairman of Ntiminyakiru Rural Saving and Credit Sacco between 2009 and September 2014 when it suffered gross mismanagement under his leadership. He was consequently removed at a Special General Meeting held on 18th September 2018 and thereafter an inquiry was instituted pursuant to a resolution of the membership of the Sacco under **section 83** of the *Meru County Cooperatives Societies Act, Act No. 7 of 2014* ("the Act").

4. Elijah Kobia further deponed that the inquiry was completed and the report issued in December 2016. The report revealed misappropriation of funds and mismanagement while the petitioner was chairman hence in accordance with **section 99** of the *Act*, he issued a notice of intention to surcharge him. By that notice, the petitioner was required to show cause why he should not restore the sum of Kshs. 10,300,000/-.

5. The 1st respondent contends that he served the two notices on the petitioner and that he followed the procedure laid down in the *Act* and even accorded him sufficient time to show cause why he should not be surcharged hence his rights were not violated as alleged or at all.

6. The only issue in this matter is whether the petitioner was afforded an opportunity to be heard as alleged by the petition and this issue implicates the procedure for surcharge under the *Act*. The power of the Director of Co-operatives to impose a surcharge is provided for under **section 99** of the *Act* as follows;

99. (1) Where it appears that any person who has taken part in the organization or management of a cooperative 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 directorate 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 directorate may, if it 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 directorate thinks just or to contribute such sum to the assets of the society by way of compensation as the directorate 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.

7. I have seen the two notices issued to the petitioner. The first one titled, “*Notice of Intention to Surcharge under Section 99 of the [Act]*” stated, after setting out that the petitioner was involved in misappropriation and mismanagement, that “*WHERE OF by way of written submissions the Director calls upon you to show cause within fourteen (14) days from the date hereof why the said amount should not be recovered from you by way of an order of surcharge in accordance with section 99 of the [Act].*” The petitioner received this notice and through his letter dated 12th April 2017, requested the 1st respondent to provide him with a copy of the Inquiry report and full particulars of the transactions leading to the conclusion that he had misappropriated funds. The petitioner’s letter was quickly followed by another letter by his advocates, *Carlpeters Mbaabu and Company Advocates*, dated 26th April 2017 demanding that the notice of surcharge be withdrawn in its entirety.

8. The next letter from the 1st respondent dated 26th April 2017 was titled, “*Surcharge orders under section 83 and 99 of the [Act]*”. It required petitioner to pay Kshs. 10,300,000/- and warned that if the amount was not paid within 14 days, then recovery proceedings would be commenced against the respondent.

9. I find and hold that both the petitioner and 1st respondent proceeded on the wrong footing in this matter. The petitioner acknowledged the notice of intention to surcharge dated 29th March 2017 which was well within the power of the 1st respondent to issue under **section 99** of the **Act**. In order to respond to the notice, the petitioner requested the 1st respondent to furnish full particulars of the case against him. Had the 1st respondent answered the request for particulars, the petitioner would have mounted his defence to the notice to show cause and this matter would not have reached this stage.

10. As I have alluded to elsewhere, I have no doubt that the 1st respondent is entitled to issue the notice of intention to surcharge the petitioner under the **Act**. At any rate, it has not been contended by the petitioner, in the petition, that the 1st respondent does not have such a power. I therefore hold that in order to resolve this matter, I have to put it on a proper cause to ensure that the petitioner is given a fair hearing by having an opportunity to defend himself. In so doing, I am alive that this court can fashion appropriate relief under **Article 23** of the Constitution.

11. In light of the orders I propose to make, I am aware that once the decision to surcharge the petitioner has been made by the 1st respondent, he has the right to appeal to the Cooperative Tribunal and then to the High Court under **section 100** of the **Act**. The relief I am granting is intended to afford the petitioner an opportunity to make his defence in response to the notice to show cause issued by the 1st respondent.

12. I therefore order as follows;

(a) I quash the order or direction contained in the 1st respondent’s letter dated 26th April 2017 requiring the petitioner to pay or restore Kshs. 10,300,000/- .

(b) I direct the 1st respondent to furnish the petitioner with all the documents requested by him in his letter dated 12th April 2017 and any further documents that he may require to prepare his response to the notice of intention to surcharge dated 29th March 2017 within **thirty (30) days** from the date hereof.

(c) There shall be no order as to costs.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

Mr Mbaabu instructed by Carlpeters Mbaabu & Company Advocates for the petitioner.

Ms Mbijiwe, Advocate for the 1st respondent.