



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO. 21 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: SECTIONS 58 AND 60 OF THE CO-OPERATIVE SOCIETIES ACT  
CAP 490 LAWS OF KENYA**

**IN THE MATTER OF: RULES 23 AND 46 OF THE CO-OPERATIVES SOCIETIES RULES  
OF 2004**

**IN THE MATTER OF: SECTIONS 5, 22, 48, 50 AND 51 OF THE SACCO SOCIETIES ACT,  
NO. 14 OF 2008**

**IN THE MATTER OF: RULES 59, 60, 61, 63, 65, 66, 67 AND 68 OF THE SACCO  
SOCIETIES (DEPOSIT –TAKING SACCO BUSINESS) REGULATIONS OF 2010**

**IN THE MATTER OF: THE INQUIRY REPORT ON EGERTON UNIVERSITY SACCO  
LIMITED BY THE DIRECTORATE OF CO-OPERATIVE DEVELOPMENT**

**IN THE MATTER OF: EGERTON UNIVERSITY CO-OPERATIVE SAVINGS & CREDIT  
SOCIETY LTD AND THE BY LAWS MADE THERE UNDER**

**BETWEEN**

**ELISHA OTIENO ..... 1<sup>ST</sup> APPLICANT**  
**CHESTER EVERIA ..... 2<sup>ND</sup> APPLICANT**  
**EDWARD MAINA ..... 3<sup>RD</sup> APPLICANT**  
**GEORGE MARANGA .....4<sup>TH</sup> APPLICANT**  
**KEPHA ORINA ..... 5<sup>TH</sup> APPLICANT**  
**LEONARD CHESANG ..... 6<sup>TH</sup> APPLICANT**

SIMEON OLE TENGES ..... 7<sup>TH</sup> APPLICANT

PROF. DANIEL MUCHIRI ..... 8<sup>TH</sup>  
APPLICANT

VICTOR RUTTO ..... 9<sup>TH</sup> APPLICANT

MARTHA ANUNDA ..... 10<sup>TH</sup> APPLICANT

AGGREY TSHOMBES ..... 11<sup>TH</sup> APPLICANT

JOB KIPKEBUT ..... 12<sup>TH</sup> APPLICANT

SAMUEL NYABWARI ..... 13<sup>TH</sup>  
APPLICANT

THOMAS MININGWO ..... 14<sup>TH</sup>  
APPLICANT

TIMS KERRY ..... 15<sup>TH</sup> APPLICANT

FLORENCE WANDERI ..... 16<sup>TH</sup> APPLICANT

GEORGINA ONDIEKI ..... 17<sup>TH</sup>  
APPLICANT

JOYCE ONDIEKI ..... 18<sup>TH</sup> APPLICANT

PAULINE LOKURUKA ..... 19<sup>TH</sup> APPLICANT

PROF. ANTHONY KIBE MWANGI ..... 20<sup>TH</sup>  
APPLICANT

REV. RAPHAEL WANYAMA ..... 21<sup>ST</sup> APPLICANT

SAMUEL OWIDI ..... 22<sup>ND</sup> APPLICANT

JOSEPH MUCHIRI MWANGI ..... 23<sup>RD</sup> APPLICANT

AND

THE DIRECTORATE FOR CO-OPERATIVE DEVELOPMENT ..... 1<sup>ST</sup>  
RESPONDENT

THE COUNTY DIRECTORATE OF CO-OPERATIVES ..... 2<sup>ND</sup>  
RESPONDENT

THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

AND

CHAIRMAN TO EGERTON UNIVERSITY  
SACCO

**SOCIETY LTD DR. PATRICK MULIRO ..... 1<sup>ST</sup> INTERESTED PARTY**

**GEORGE OCHARO ..... 2<sup>ND</sup> INTERESTED PARTY**

**KIBOR BENARD ..... 3<sup>RD</sup> INTERESTED PARTY**

**ENG. LUCA NYAGAKA ..... 4<sup>TH</sup> INTERESTED PARTY**

### **RULING**

By way of the Notice of Motion application dated 28/6/2016 the Applicants seek inter alia the following orders

***“3. THAT this Honourable Court be pleased to vary/or review its ruling delivered on the 17<sup>th</sup> June, 2016 in so far as it states that the ruling does not apply to the 3<sup>rd</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> ex-parte applicants herein.***

***4. THAT costs of this application be provided for”***

The application was set down for hearing in court on 15/11/2016. The Respondent despite having been properly served with the Notice of Motion failed to put in any reply. The court heard oral submissions in support of the application by **MR. AIM** Counsel for the applicants.

This Notice of Motion arises from a ruling of this court delivered on 17<sup>th</sup> June, 2016. That ruling arose from a Notice of Motion dated 9<sup>th</sup> October, 2015 which the Ex parte applicants had sought orders of Certiorari and Prohibition against the decision and recommendations of the Inquiry Team formed by the Commissioner for Co-operative Development to look into the conduct of the business of Egerton University SACCO.

In its ruling of 17<sup>th</sup> June, 2016 this court found in favour of the Ex Parte applicants and gave orders accordingly. However, the court qualified its ruling by stating that

***“For clarity and following my earlier findings these orders shall apply in respect of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 22<sup>nd</sup> Ex parte applicants only”***

The applicants herein who were excluded in that decision have now filed this present application seeking a review of the court’s ruling and more specifically a review of the court’s decision to exclude them on the basis that they had not signed any written authority for the 1<sup>st</sup> Ex parte Applicant to plead, act on their behalf.

The applicants assert that the 1<sup>st</sup> Ex parte applicant did in fact have their express authority and consent to act on their behalf. They explain that due to various unavoidable factors they were not all able to sign the written authority in time. The applicants maintained that they had an interest in challenging the recommendations of the Inquiry Team and had full intention to participate in the earlier application.

In his oral submissions Counsel **‘Mr. Aim’** stated that the applicants herein all contributed towards the payment of the legal costs associated with the filing of the application. He further submitted that their omission to sign the written authority ought to be treated as a mere technicality and ought not be elevated to a fetish. Counsel urged the court to exercise its discretion in favour of the applicants and review its orders of 17/6/2016 to include all the Ex parte applicants.

As stated earlier despite having been properly served with this Notice of Motion the Respondent did not file any response to the same.

## **DETERMINATION**

I have carefully considered the submissions of learned counsel in this matter and I have also perused the authorities filed in support thereof. The sole issue before this court for determination is whether there exists sufficient grounds to review the courts ruling dated 17<sup>th</sup> June, 2016 and expand the scope of its orders to apply to the present applicants.

The position in law is that a party cannot purport to act, plead or make any averments before court on behalf of another without their express written authority (see OI r 13 Civil Procedure Rules). Similarly the courts orders cannot be deemed to bind a person who is not a party to the proceedings before it. Proof of authority to act is therefore a substantive issue which goes to the root of the matter as it touches on the all important question of '**locus standi**'. This is not an issue that can be glossed over as a '**mere technicality**' in terms of Article 159 (2) (d) Constitution of Kenya 2010.

The reason why the court excluded the present applicants from the benefit of its orders of 17<sup>th</sup> June, 2016 was that there existed no evidence that they had in fact authorized the 1<sup>st</sup> Ex parte applicant to act on their behalf. The applicants have by this present Notice of Motion confirmed to the court that they were all in fact fully aware of these proceedings and had all consented to being included as parties

The Court of Appeal in **NAKURMATT HOLDINGS Vs COMMISSIONER OF VALUE ADDED TAX [2011] eKLR** held that whereas judicial review is a special jurisdiction, the superior court has the residual power to review its decision. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for the circumstances he finds himself in. It is a jurisdiction that should be used sparingly and only in clear-cut cases.

Odunga, J in **REPUBLIC Vs CHIEF LAND REGISTRAR & 2 OTHERS EX PARTE MICHAEL NJENGA WAWERU [2017] eKLR** held that the court has inherent powers to make such orders as are necessary to ensure that the ends of justice are met in every case or to prevent abuse of its process. The judge relied on **THE MATTER OF THE ESTATE OF GEORGE M'MBOROKI MERU HCSC NO. 357 OF 2004, OUKO, J** where it was held as follows:

*"It is .....accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."*

Also see **REPUBLIC Vs CHAIRMAN PROVINCIAL LAND DISPUTES APPEAL TRIBUNAL RIFT VALLEY PROVINCE, UASIN GISHU DISTRICT, LAND REGISTRAR, CHRISTOPHER CHEBII & BENARD OSEWE ODONGO [2015] eKLR** where the court added that it is this power that the court invokes to administer substantive justice in its adjudication of disputes as required in the new constitutional dispensation.

In its ruling of 17<sup>th</sup> June, 2016 this court found that the recommendation made by the 1<sup>st</sup> Respondents Inquiry team, were made and were going to be enforced without giving the persons affected who included the applicants, an opportunity to be heard. It was on the basis of this finding that that court issued orders of certiorari to quash those recommendations.

Given that the present applicants were specifically excluded from the benefit of those orders of certiorari there exists the very real possibility that, notwithstanding the courts orders, those same recommendations, may be enforced as against them. As such the applicants would stand to be greatly prejudiced if the courts orders were not extended to cover them. Their only resource in such a situation would be to file another suit to challenge the decision of the 1<sup>st</sup> Respondent, which would only cause them to incur greater costs and be a repetition of the first suit, amounting to waste of judicial time and resources.

The only reason this court excluded the applicants from its order of 17<sup>th</sup> June, 2016 was due to lack of evidence that the 1<sup>st</sup> Ex parte applicant had authority to act on their behalf. They have through this present application averred unequivocally that the suit was filed both with their knowledge and consent and have confirmed that the 1<sup>st</sup> Ex parte applicant had full authority from each one of them to act on their behalf. Therefore in the circumstances this is a proper case for this court to invoke its inherent jurisdiction and review its earlier decision in order to administer substantive justice. I therefore allow this application dated 28<sup>th</sup> June, 2016 and review my orders of 17<sup>th</sup> June, 2016 to cover and include all the present applicants. The final orders of the court shall therefore read as follows

***(a) An order of certiorari be and is hereby issued to quash the decision of the Directorate of Co-operative Societies to recommend and order the removal of the following members of the Board of Directors of Egerton University Sacco Society Limited;***

***(i) Florence Wanderi***

***(ii) Chester Everia***

***(iii) Samuel Owidi***

***(iv) Prof. Anthony Mwangi***

***(v) Aggrey Tshombes***

***(b) An order of certiorari be and is hereby issued to quash the decision of the Directorate of Co-operative Societies to recommend and direct the termination of employment of***

***(i) Victor Rutto as the Chief Executor Officer of the Egerton Sacco Society Limited; and***

***(ii) Martha Anunda as the Financial Officer of Egerton Sacco Society Limited.***

***(c) An order of certiorari be and is hereby issued to quash the decision of the Directorate of Co-operative Societies to bar the Ex-parte applicants herein from holding positions in any co-operative societies and/or any public office and also to surcharge the applicants herein on any amounts whatsoever arising from the recommendations of the inquiry it conducted on Egerton University Sacco Society Limited.***

***(d) An order of prohibition be and is hereby issued to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from directing the interested parties herein to hold a board meeting and to co-opt some members of the society to join the board of directors of the Sacco and to carry on with the business and/or to restrain the interested parties herein from co-opting any members of the society to join the board of directors of the Sacco; and***

***(e) An order of prohibition be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein from publishing the names of all the Ex-parte applicants as unfit to hold any public office; and***

***(f) The Ex-parte applicants shall have the costs of the suit***

Dated and Delivered in Nakuru this 28<sup>th</sup> day of March, 2017

**Maureen A. Odero**

**Judge**