REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 142 OF 2017

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

AND

IN THE MATTER OF THE DECISION OF THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT DATED 22ND MARCH 2017 CALLING FOR A SPECIAL GENERAL MEETING OF THE UMOJA INNERCORE TENA MATATU OWNERS SACCO SOCIETY LIMITED (UTIMO) FOR THE 31ST MARCH 2017 AT 10.00 AM AT THENAIROBI COUNTY DIRECTORS BOARDROOM

AND

IN THE MATTER OF THE DECISION DATED 21ST FEBRUARY 2017 BY THE NATIONAL TRANSPORT SAFETY AUTHORITY TO DENY THE APPLICANTS MANAGEMENT BOARD REGISTRATION AND PASSWORD TO ACCESS THE SACCO'S PORTAL AND TO RUN OR OBTAIN THE ROAD SERVICE LICENSES FOR SACCO MEMBERS VEHICLES.

UMOJA INNERCORE TENA MATATU

OWNERS SACCO SOCIETY LIMITED].....1ST APPLICANT

JOSEPH MUTUKU.....CHAIRMAN

WALTER ONYIMBO.....VICE CHAIRMAN

STEPHEN OPIYO.....TREASURER

DUNCAN MAINA.....SECRETARY

ALFRED MUNENE.....ASSISTANT TREASURER

DANCAN OBUON..CHAIRMAN SUPERVISORY COMMITTEE

(suing as officials of UMOJA INNERCORE

TENA MATATU OWNERS

SACCO SOCIETY LIMITED.....2ND APPLICANT

VERSUS

COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....1ST RESPONDENT

NATIONAL TRANSPORT LICENSING

AUTHORITY.....2ND RESPONDENT

AND

1. BONFACE MWONI

2. PATRICK KINYUA

3. KEN NYABERA

4. KENNETH SOI

5. SAMUEL MWANGI

6. PAUL MUIRU

7. STEPHEN OPWAPO

8. EMMANUEL KOSKEI

9. ELIZABETH WAITHERA GITERE

10. JAMES MUCHURA WAMBUGU

11. ERICK BEN ODUOR

12. DICKSON WAHOME

13. CHARLES RIOPA

14. PATRICK KINYUA

15. CATHERINE KARIUKI

16. GEORGE OYUGI

17. ROBERT SANYA

18. JOSEPH NYANGAYA

19. WINCOTE WANJIKU

20. CHARITY WANJIKU

21. ABRAHAM KIMANI

22. CYRUS KATHURI

23. AGNES ERICK

24. JOSEPHSON MWANGI.....INTERESTED PARTIES

RULING

1. By an amended chamber summons dated 7th April 2017, the exparte applicants **Umoja Inner core Tena Matatu Owners Sacco Society Limited** and its officials suing on behalf of the Society seek from this court orders:

A. Spent

B. That leave be and is hereby granted to the applicant to institute Judicial Review proceedings seeking Judicial Review orders of :

a. ***Prohibition*** to stop the 1st respondent from issuing a search certificate pursuant to the decisions and resolutions of the Special General Meeting (SGM) of the Sacco convened by her on the 31st March 2017 and from effecting her decision of 2nd March 2012 calling for a Special General Meeting of the 1st applicant sack, and also therefore stopping her from holding, chairing, authorizing, legitimizing, recognizing the decision and or resolutions of the special general meeting scheduled for/held on 31st March 2017 at the Nairobi County Director's Board Room at 10.00 a.m. and or at any other time.

b. ***Certiorari*** to bring into the court for purposes of quashing, and to quash, the search certificate issued by the 1st respondent on the basis of the Special General Meeting convened by her on 31st March 2017, the 1st respondent's decision dated 22nd March 2017 calling for a special general meeting of the 1st applicant Sacco, and any decision or resolution made and or arrived at that meeting, and the 2nd respondent's decision dated 21stFebruary 2017 making pre conditions to granting a password to the 1st applicant in order to access a Road Service License for its and its members Public Service Vehicles;

c. ***Mandamus*** to compel the 1st respondent to issue a certificate of search for the officials elected in the Sacco's Annual General Meeting held on the 18th February 2017 and letter of introduction to the Sacco's Bankers, and further to compel the 2nd respondent to issue to the 1st and 2nd applicant's its password for the Saco's National Transport and Safety Authority portal in order to access Road Service Licences for its and its members Public Service Vehicles.

C. That leave granted herein do operate as a **stay** of the enforcement, recognition, legitimizing and or application of the decisions and resolutions arrived at the Sacco's special general meeting of the 31st March 2017 called by the 1st respondent and further, stopping the 1st respondent from issuing any search certificate of the said officials and the said officials from managing the Sacco pending

the hearing and determination of the intended judicial review proceedings and or upon further orders of this court.

D. Costs and interest.

2. The application is supported by grounds on the face of the application numbering 17; the applicant's further verifying affidavit of Joseph Mutuku and the statutory statement dated 27th March 2017 accompanying the initial chamber summons dated 27th March 2017.

3. According to the applicant, in a pending dispute at the Co-operatives Tribunal, Nairobi CTC No. 390/2014, the Tribunal, in a decision dated 10th February 2017 confirmed much of the 1st applicants as officials of the 2nd applicant Sacco (**UMOJA INNERCORE TENA MATATU OWNERS SACCO SOCIETY LIMITED)** from the year 2015 subject to any change of mandate in any subsequent meetings; and that there has been no appeal against the said decision or stay of its execution given by any court.

4. It is claimed that the said officials had also called for an Annual General Meeting for the year 2017 which took place on 18th February 2017 where the 2nd applicants were elected or re-elected as the case may have been.

5. That however, the 1st respondent, prompted by the interested parties vide a decision of 22nd March 2017 called for the Sacco's Special General Meeting to be held only 9 days away on 31st March 2017 at the Nairobi's County Director's offices and the agenda was listening to the members grievances, elections and any other business.

6. That the 1st respondent has refused to recognize the decision of the Co-operatives Tribunal dated 10th February 2017 and the resolution of the Annual General Meeting held on 18th February 2017 and prevailed upon the 2nd respondent to deny the applicants the relevant password in order to access the Sacco's portal with it, hence the renewal and application for the Road Service Licences.

7. That the 2nd respondent acting separately and in concert with the 1st respondent has also ignored the Co-operatives Tribunal order and decisions of the Annual General Meeting.

8. It is alleged that the respondent's actions together with the interested parties have infringed on the economic interests of the applicant's members as the Public Service Vehicles that are licensed by the 2nd respondent cannot move and cannot bring revenue to the Sacco and its members owing to the inability to access Road Service Licences.

9. It is also alleged that respondent's actions contravene Section 27(8) of the Co-operative Societies Act. Which provides that (8) The Commissioner may convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting**.**

10. Further, that during the pendency of these proceedings, the 1st respondent convened a meeting on 31st March 2017 thereby usurping the Sacco members' supreme authority to call for a general meeting directly or through their officials without sufficient notice and which meeting imposed some of the interested parties as officials and disregarded the order of 10th February 2017 in the CTC No. 390 of 2014 and the Annual General meeting of 18th February 2017 and failed to justify new elections nearly one and a half months after a previous one had been carried out in the Annual General Meeting; that the said meeting was without quorum, was hurried and meant to defeat these proceedings; that the 1st respondent took sides in the dispute and therefore failed to faithfully carry out her mandate under the Act; and that the 2nd respondent has also failed and refused to carry out its Licencing mandate in a lawful manner as regards the applicants hence this court should intervene to protect the Sacco from being destroyed completely.

11. The application was opposed by the interested parties and the respondents. However, the court was not able to trace the written opposition filed by the respondents at the time of writing this ruling.

12. Nonetheless, the interested parties filed a replying affidavit sworn on 19th April 2017 by Charles Rioba, a member of the Sacco who was elected as its chairman following the disputed elections held on 31st March 2017.

13. In his depositions, Mr Rioba contends that the 2nd applicants are not the 1st applicant's elected officials as there were valid elections held on 31st March 2017 which succeeded any other previous elections hence the applicants cannot claim to be duly elected officials of the Sacco.

14. That there are alternative remedies provided for under Sections 3 and 76 of the Co-operative Societies Act, where there is a dispute involving a registered Co-operative Society and that the alternative course is faster; that the 1st respondent and the Co-operatives Tribunal have relevant persons trained to handle matters; that Judicial Review proceedings are likely to circumvent the statutory framework; and that any leave granted will promote multiplicity of proceedings as there is already Judicial Review 64/2017 which is pending in which the deponent and the interested parties are the applicants.

15. It was further contended that on 31st March 2017 after the 1st respondent had given notice of a meeting whose agenda involved elections and listening to member's grievances as per the minutes attached, elections were held as a way of resolving outstanding issues and disputes amongst members resulting in two divisions of the Sacco with each group claiming to be legally in office.

16. Further, that the newly elected officials (him included) had now been duly registered and acknowledged by the 1st respondent as duly elected officials and that therefore what is being sought herein is to overturn the consent order recorded in Judicial Review No. 64/2017 wherein parties agreed to go for mediation before the 1st respondent.

17. That the meeting of 31st May 2017 did not require quorum or notice of 14 days since it was a special Annual General Meeting organized by the Commissioner; that the orders sought have been overtaken by events and that the orders sought are not available.

18. That Section 27(8) of the Act mandates the Commissioner to convene a special general meeting to elect officials and to remove elected management committee. That the applicants refused to attend the Annual General Meeting on flimsy grounds of insecurity fears which are unfounded.

19. The parties' advocates argued the application orally before me on 8th May 2017 with Mr Ombwayo submitting on behalf of the applicants whereas Mr Munene represented the 1st respondent Commissioner and Mr Orina submitted on behalf of the interested parties.

20. The parties submissions mirror their grounds and a replying affidavit as reproduced above and therefore there would be no need to reproduce them here.

21. However Mr Ombwayo submitted in addition to his client's deposition that the Co-operative Tribunal having delivered a decision on 10th February 2017 leading to an Annual General Meeting held on 18th February 2017 and that as there was no appeal against that decision of the Co-operative Tribunal Committee and or elections held, electing officials of the Sacco, the 1st respondent could not purport to call for another Annual General Meeting to hold other elections otherwise he was usurping powers of members of the Sacco and that therefore those actions are ultra vires and tainted with illegality.

22. According to the applicant, they had established a prima facie arguable case for consideration.

23. On the part of the 1st respondent, it was submitted by Mr Munene counsel that the application is premature as that there are internal mechanisms before Judicial Review can be resorted to as stipulated by

Section 9(2) of the Fair Administrative Action Act and Section 76 of the Co-operative Societies Act which mandates that any grievances should be taken to the Tribunal before coming to court. He urged the court to dismiss the application for leave.

24. On behalf of the interested parties, Mr Orina submitted, opposing the chamber summons and contending that this matter originated from JR 64/2017 where all parties agreed to have the issues raised therein to be resolved through ADR and the mediation was conducted by the Commissioner as mandated by Section 3 of the Act.

25. That when the matter was referred to the Commissioner, the best way to resolve the dispute between the two warring parties was to conduct elections as per the attached minutes. Mr orina concurred with Mr Munene that there are available mechanisms for resolving such disputes under Section 76 of the Cooperative Societies Act hence the application herein is premature as it ought to have been filed before he Tribunal and if one was dissatisfied with the Tribunal's decision, they appeal to the High Court; and that under Section 81 of the Act, on appeal to the High Court, the decision of the High Court is final.

26. It was submitted that it is an abuse of court process to grant leave in this matter since in JR 64/2017 parties agreed to go for mediation and they all participated hence they cannot claim the process was unlawful or unfair.

27. That the decision on elections were made by the members of the Sacco not the 1st respondent.

28. In a rejoinder, Mr Ombwayo counsel for the applicants submitted that the application is not premature and that there was no other recourse to justice but that the applicant and 41 members did not attend the special general meeting. Further, that the report of 31st March 2017 does not qualify as conciliation or mediation by the 1st respondent Commissioner as there was no hearing but elections.

29. It was also submitted that JR 64/2017 is different and that Section 3 of the Act does not allow the Commissioner to violate the law by running the affairs of the Saccos.

DETERMINATION

30. I have considered the chamber summons as amended by the applicants, grounds, further affidavit, statutory statement and the annextures thereto. I have also considered the 1st respondent's response (orally) and the interested parties' replying affidavit and all the parties' counsels' oral submissions and statute law cited. No decided case was referred to.

31. At this leave stage, it is trite law that the applicants are only expected to establish that they have a prima facie arguable case to warrant grant of leave and in the case of stay, that if stay is not granted, the main motion if successful will be rendered nugatory and the applicants will be reduced to mere pious explorers in the judicial process. Therefore, albeit the parties' advocates have delved into the in depths of the dispute hereto, it is not for this court to dig into the merits of the applicants' application but to satisfy itself that the applicant has established an arguable prima facie case for in-depth consideration at a later stage.

32. In this case, the 1st respondent and interested parties have raised the issue of these proceedings being premature as there is a remedy under Section 76 of the Act for disputes to be referred to the Co-Operative's Tribunal.

33. Section 76 of the Cooperative Societies Act relates to settlement of disputes and it stipulates:

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.

34. The main dispute is between the applicants who claim to be the legitimate officials of the Sacco, having been duly elected in office on 18th February, 2017 and the Interested Parties who also claim legitimacy of their being duly elected officials of the Sacco after the SGM of 31/4/2017 convened by the 1st respondent Commissioner of Co-operatives, who is alleged to have usurped powers of the members and called for a Special General Meeting to hold elections yet elections had just been held on 18th February 2017 giving rise to JR 64/2017 and that on 10th February the Cooperatives Tribunal had rendered a decision which culminated in the elections of 18/2/2017 which decision was never appealed against by the parties thereto hence the 1st respondent had no jurisdiction/power to call for elections in the name of mediation, which alleged mediation was never conducted between the parties.

35. This court cannot wish away the serious allegations against the 1st respondent but the law that regulates Cooperative Societies and their affairs and the Saccos relationships ***inter se*** their members is the Cooperative Societies Act Cap 490 Laws of Kenya and the Sacco Societies Act. Section 76 of the Cooperative Societies Act as reproduced above is clear that disputes between or among Saccos and or Saccos and their Members or past members and or between members of a Sacco have to be referred to the Tribunal for resolution. Parties who are dissatisfied with the decision of the Tribunal have a right to appeal to the High Court as stipulated in section 81 of the Act and the decision of the High Court is final.

36. In addition, section **83 of the Act provides that** it shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish any such person for contempt in accordance with the provisions of this Act.

37. If the exparte applicant claims that the Tribunal had made a decision which led to the elections of 18/2/2017 and the Commissioner went against the decision of the Tribunal by calling for other fresh elections instead of recognizing the duly elected officials of the Sacco, no doubt, that is a semblance of contempt of the Tribunal which is punishable under section 83 of the Act and not subject of Judicial review proceedings. It has nothing to do with jurisdictional error for reasons among others, that the Act itself under section 27 (8) of the Act empowers the Commissioner to convene a special general meeting of a society at which he may direct the matters to be discussed at the meeting and at section **93A on other powers of the Commissioner,** the Commissioner may— ***(a) call for elections in any Co-operative Society.***

38. The quorum of a general meeting of a Cooperative Society is stipulated in the by-laws or where the

meeting is called by the Commissioner, then, pursuant to regulation 20 of the Cooperative Societies Rules, (2) Where a meeting is convened by the Commissioner under provisions of section 27(8) of the Act, members present at such meetings shall be deemed to constitute a quorum. It therefore follows that unless there is evidence that the persons who attended the meeting on 31/4/2017 were nonmembers of the Sacco, the question of non-attendance by the applicants is not material as the meeting was called by the Commissioner who had power to call for the meeting and if she did so in error, that error can only be corrected by the Tribunal where evidence would be led to establish the propriety of that meeting.

39. Furthermore It is now settled law and judicial opinion that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That is the effect of Articles 50(1) and 159(2) of the Constitution which stipulates that:

> *""50(1) 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 or impartial tribunal or body."*

40. Under Article 159(2) of the Constitution, –

> *"159(1) ….…....*
>
> *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –*
>
> *(a) justice shall be done to all, irrespective of status;*
>
> *(b) justice shall not be delayed;*
>
> *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
>
> *(d) justice shall be administered without undue regard to procedural technicalities; and*
>
> *(e) the purpose and principles of this Constitution shall be protected and promoted."*

41. In the case of **Samson Chembe Vuko V Nelson Kilumo & 2 Others [2016] e KLR,** the Court of Appeal citing several other decisions with approval among them:

> i. **Speaker of the National Assembly vs Karume [2008] 1 KLR 425** where the Court of Appeal held inter alia:
>
> > "……..***where there is a clear procedure for the redress of any particular grievances prescribe by the Constitution or the Act of Parliament, that procedure should be strictly followed…."***
>
> ii. And in **Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] e KLR** the Court of Appeal reiterated the foregoing as follows:
>
> > ***"…….This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume)(supra), was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution. In granting the order, the court made the often –quoted statement that:***
>
> ***"[W] here there is a clear procedure for the redness of any particular grievances prescribed by***

the Constitution or an Act of Parliament, that procedure should be strictly followed. (see also Kones v Republic & Another exparte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296).

"It is readily apparent that in those cases the Court was speaking to 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. (Emphasis added).

The basis for that view is first that Article 159 (2) © of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)© is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. (Emphasis added).

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.…

*…..**We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)© and the very raison d'etre of the mechanisms provided under the two Acts……"***(emphasis added).

42. In **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others (2013) eKLR as cited in the case of DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) EKLR** it was stated:

"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrarily to the institutional independence of IEBC granted by Article 249 of the constitution." Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted….."(*Emphasis added).*

43. **In Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** it was held that:-

"…where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's

process."

44. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

> ***"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".***

45. In PETER OCHARA ANAM & OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND CDF BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eKLR, Hon Mr. Justice Makhandia, (as he then was) stated:

> ***"The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as the constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose..."***

46. From the above decisions and others, it is clear that as recent as 27th day of May 2016 when the Court of Appeal rendered the decision in **Samson Chembe Vuko V Nelson Kilumo** (supra), parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanism established by an Act of Parliament and which is efficacious.

47. In this case, and after reviewing the Cooperative Societies Act and the Sacco Societies Act, Iam persuaded that except where expressly specified, all disputes arising between and among Sacco members and or relating to the conduct of the Commissioner of Cooperatives are to be referred to the Tribunal as the first port of call and are appealable as of right to the High Court. For example, section 67 (3) of the Sacco Societies Act which imports into the Act the application of the Cooperative Societies Act stipulates that All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.

48. Emukule, J in **Revital Healthcare (EPZ) Limited & another v Ministry of Health & 5 others [2015] eKLR** at paragraph 10 cited with approval the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

> ***"…where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."***

49. In the instant case, whereas the court is not expected to delve into the ,merits of the intended application, and even if the applicant's application as intended was arguable, nonetheless, the parent statute governing the parties to this application expressly provides for an alternative dispute resolution mechanism which the parties must first exhaust before resorting to court for intervention, having regard to the nature of the dispute herein.

50. In addition, Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, expressly prohibits the courts from reviewing matters where there is an alternative remedy provided. The section is clear that ***the High Court or a subordinate court under Subsection (1) (2) "shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted***.

> ***(3) The High court or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Subsection (1)***
>
> ***(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice…."[emphasis added].***

51. From the above provisions of the law, it is clear that even the Fair Administrative Action Act which implements Article 47 of the Constitution mandates that an applicant in judicial review proceedings must show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to the court for judicial review remedies. However, there is a window of opportunity for an applicant to be considered for judicial review in exceptional circumstances and on application. The onus is on the applicant to demonstrate to the court in an application for exemption that they deserve exemption from resorting to the available remedies.

52. In the instant case, no application for exemption to exhaust the alternative remedies was made by the exparte applicants and neither has it been demonstrated that the alternative route provided under the Cooperative Societies Act and the Sacco Societies Act is ineffective or not beneficial.

53. Accordingly, this court has no alternative but to abide by the law and proceed, at stage, without considering the merits of the application as to whether it raises arguable prima facie case or not, to find and hold that the application is improperly before the court and for want of jurisdiction, I strike out the application for leave to institute judicial review proceedings.

54. I make no orders as to costs

Dated, signed, delivered in open court at Nairobi this 23rd day of May 2017.

R. E. ABURILI

JUDGE

In the presence of:

Mr Ombwayo for the exparte applicants

Mr Orina for interested parties

N/A for Respondents

CA: George