



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 353 OF 2015

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE OF JUDICIAL
REVIEW PROCEEDINGS**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE BOARD OF DIRECTORS,

KENYA POLICE SACCO.....RESPONDENT

EX-PARTE

CHARLES MAIGENI MEMUSI

JUDGMENT

Introduction

1. By a Notice of Motion dated 2nd November, 2015, the ex parte applicants herein, **Charles Maigeni Memusi**, seeks the following orders:
 1. That an order of Certiorari be issued bringing into this honourable court for purposes of quashing and to quash the Respondent's letter dated 7th October 2015 suspending the ex-parte Applicant as the branch official of the Kenya Police Sacco at Wajir branch in his capacity as the elected member delegate.
 2. That the order of prohibition be issued bringing into this honorable court for purposes of prohibiting and to prohibit the Respondent from disciplining, suspending, dismissing and or

in any other way interfering with the ex-parte Applicant in his capacity as a duly elected branch official of the Kenya Police Sacco at Wajir branch and more specifically as the delegate member.

3. **That costs of this application and the interest thereon be provided for by the Respondent.**
4. **Any other and further relief this honourable court may deem fit and just to grant in the circumstances.**

Applicants' Case

2. According to the applicant, he is a Police Constable No. 96793 based at Wajir County and by dint of his employment with the Kenya Police Service, he joined and is therefore a *bona fide* member of the Kenya Police Sacco (hereinafter referred to as "the Sacco").
3. The applicant averred that in or around the January 2014 and by operation of section 30.1 of **Kenya Police Sacco By-Laws Amendment Act, 2013**, he was elected as a Member Delegate and thereby a branch official of Wajir branch of the Kenya Police Sacco and throughout his tenure as the Member Delegate of the Wajir branch of the Kenya Police Sacco, he discharged his duties diligently and to the satisfaction of the members of the Kenya Police Sacco Wajir branch who duly elected him as the Member Delegate. He also averred that he always conducted his statutory duties diligently and to the satisfaction of the Members of Wajir branch of Kenya Police Sacco who elected him to serve them and more importantly in accordance with section 33 of the Kenya Police Sacco By-Laws Amendment, 2013.
4. However, by a letter dated 15th September 2015, the Respondent's chairman summoned him to show cause why disciplinary action should not be taken against him for alleged acts during the Kenya Police Sacco branch Seminar held between 20th and 24th August 2015 at Mombasa. Pursuant thereto, on 28th September 2015, he did appear before the Respondent and instead of the issues raised in their letter being discussed, the Respondent informed him that they had called the applicant for a "fatherly advice" which they compelled the applicant to heed.
5. The applicant averred that in response to the said "fatherly advice", he denied the said allegations of disruption of the Delegates Seminar at Mombasa and further challenged the Respondent's power to discipline him. However, on 7th October 2015, he received the Respondent's letter purportedly written pursuant to the provisions of Articles or sections 40 and 42 of the Kenya Police Sacco By-Laws Amendment, 2013, suspending him from his position as a Wajir branch Delegate Member and thereby a branch official which suspension apart from being arbitrary, was indeterminate.
6. In the applicant's view, the Respondent's decision to summon him and consequently suspending him as a Branch Official was arbitrary, malicious and a blatant contravention of the express provisions of the law as neither section 40 nor section 42 of the Kenya Police Sacco By-Laws Amendment 2013 mandates and or empowers the Respondent to summon, suspend and or discipline delegates of the Kenya Police Sacco.

Respondent's Case

7. The Respondent's case was that the Kenya Police Sacco is a limited liability Co-operative registered under and governed by the **Co-operative Societies Act** (Cap 490) of the Laws of Kenya and registered as such by the Commissioner for Co-operative Development. To the Respondent, the said Act prescribes the convening of a Board of Directors which has the powers to run the affairs of the society to promote the welfare and economic interests of its members. The said Board of Directors as convened is subject to the **Co-operative Societies Act** and its by-laws. It was disclosed that the said Board is elected at the annual delegates meeting which is the supreme authority of duly elected delegates of the society whose function includes getting a full report of all the society's activities in the course of the year including suspension.
8. The Respondent asserted that any decision made by the Board of Directors, are made in accordance with the **Co-operative Societies Act, Co-operative Societies Rules** and its By-laws (as approved by the commissioner for Co-operative Development) and is reported to the Annual Delegates Meetings which has the final word. Further all business of the Sacco is governed by the Kenya Police Sacco Society Limited bylaws amended 2013 and as such, any member of the board or

- branch official/delegate or a member who demonstrates unbecoming behaviour has to be sanctioned in accordance with the bylaws.
9. According to the Respondent, the Applicant was elected as a delegate member in the annual delegates meeting in accordance with Co-operative Societies rules and by its by-laws. However, since his election as a delegate member, the Applicant had demonstrated all sorts of impropriety leading to his suspension from office. It was elaborated that on one occasion, during a Branch Official Seminar at Mombasa held between 20th and 24th August 2014, the Applicant misbehaved and attempted to stop the meeting before the chief guest who was the commissioner of co-operative development.
 10. To the Respondent, the procedure of the Applicant's suspension from office was in no way unprocedural or unwarranted as the same was done in accordance with the Kenya Police Sacco Society Limited by laws amended 2013 which suspension is warranted as it is the mandate of the board of directors to take action on errant members, branch officials/delegates, board of directors and even the staff of the society.
 11. It was however contended that any member so suspended can at any time apply to the board for clearance and demonstrate that he/she has reformed before assuming leadership position.
 12. The Respondent stated that the suspension of the Applicant was unanimous by the Board of Delegates, and according to the Kenya Police Sacco Society Limited by laws amended 2013, the proper forum to address any dissatisfaction of a decision of the board is the Society's annual delegates meeting or otherwise reference to the Co-operative tribunal hence this application ought to be dismissed.

Determination

13. I have considered the issues raised herein. The main issue for determination in this matter is whether the Respondent had the power to suspend the applicant. According to the applicant, the Respondent had no power to do so while the Respondent contends that it had the said powers.
14. However before dealing with the issue, the Court has to deal with the issue whether this matter is properly before this Court. Section 76 of *Co-operative Societies Act* provides:

(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.

15. Under the definition clause of the Act "member" includes a person or a co-operative society

joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws. In interpreting statutes it is now well recognized that the Court ought to adopt a purposive approach. As was held by **Justice Nyamu** in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728:**

“It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach.” In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision...It is no longer necessary for the judges to wring their hands and say: “There is nothing we can do about it”. Whatever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy...by reading words in, if necessary - so as to do what Parliament would have done, had they the situation in mind...The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give “force and life” to the intention of the Legislature.”

16. What then is the purpose of section 76 of the Act? The rationale for this provision was underscored by **Tsekooko, JSC** in his dissenting opinion in **Kameke Growers Co-Operative Society Limited & Others vs. North Bukedi Cooperative Union SCCA No. 8 of 1994**, where he expressed himself as follows:

“Arbitration proceedings are not just an alternative method of dispute resolution to a trial by High Court of disputes mentioned in section 72(1) of the Statute. The Cooperative Societies Statute 1991 like its predecessor Acts, is a special law, which governs the relationship between individual members or group members of Cooperative Societies. The institution of Cooperatives is peculiar institution in the society. The Act is supposed to deal with peculiarities of the co-operators and one of such peculiarities is to promote resolution of disputes as cheaply as possible and this is obvious from the provisions of section 75 of the statute. The exclusion of lawyers in arbitration under the Statute is intended to minimise costs as well as to exclude technicalities attendant to the High Court litigation and in that regard the original jurisdiction of the High Court was deliberately precluded by section 72(1).”

17. The dispute herein is clearly between the Sacco and what the applicant calls a delegate member. To the applicant the Board is only empowered to suspend a member and not a delegate member and has relied on rule 16 of the bylaws. The dispute herein clearly fell within the ambit of section 76(1)(b) such dispute therefore ought to have been referred to the Tribunal pursuant to the aforesaid section. In **Adero & Another vs. Ulinzi Sacco Society Ltd [2002] 1 KLR 577**, **Ringera, J** (as he then was) held that:

“As the subject matter of the suit was a dispute between a registered Co-operative Society and its members, the dispute should not have been filed in the High Court by dint of the provisions of Section 76 of the Cooperative Societies Act, 1997. The forum with jurisdiction was the Co-operative Tribunal. The High Court has no jurisdiction to entertain a dispute between a society and its members concerning the business of the society.”

18. In my view a dispute arising from a decision by the Sacco to suspend a member or a delegate

member as the applicant contends falls within section 76 of the Act since section 76(2) is not exclusive and only gives some of the examples. This is due to the fact that the word used is “includes” as opposed to “means”.

19. In the premises, it is my view that the applicant ought to have resorted to the alternative dispute resolution mechanism by way of the Tribunal. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

20. It is now a ‘cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

21. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

22. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) 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.

23. Subsection (3) thereof provides:

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 sub-section (1).

- 24.. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a 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.

25. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.
26. In this case, as no reason has been advanced for the failure to invoke the Tribunal's jurisdiction before coming to Court, this application is in my view misconceived and incompetent and the same is struck out but taking into account the fact that the dispute revolves around the affairs of a co-operative union and as the substantive matter remains unresolved there will be no order as to costs.

Dated at Nairobi this 24th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwai for the Applicant

Mr Nderitu for Miss Nduta for the Respondent

Cc Mutisya