**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW AND CONSTITUTION DIVISION**

**MISC. CIVIL APPLICATION NO. 405 OF 2014**

**ALPHONSE KONDI RIAGA…….…….....…….APPLICANT**

**VERSUS**

**THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT……...RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Notice of Motion dated 17th November, 2014, the applicant herein, **Alphonse Kondi Riaga,** seeks the following orders:

1. **Prohibition directed at the Commissioner of Cooperatives by himself, agents, servants or otherwise from surcharging the application (sic) in terms of the Notice of surcharge dated 24th of October 2014 or in howsoever manner.**
2. **Mandamus compelling the Respondent either by himself, agents or servants to rescind the decision made on 15th March 2013 based on the purported meeting of UNSACCO on 15th March 2013.**
3. **That commencement of the proceedings act as a stay of enforcement of the Respondent or any other action found upon the alleged in inquiry Report of 24th October 2013.**
4. **That the costs of the application be in the cause.**
5. **That there be such other or further orders as the court deems fair and expedient to grant in the circumstances.**

**Applicants' Case**

2. According to the applicant, he became a staff/employee of UNSACCO Ltd (hereinafter referred to as "the Sacco" or "UN Sacco") on or about years 2009 until 11th July2011 when he was arrested from his office while on duty and charged in Chief Magistrates Court at Nairobi, Milimani in Criminal Case No. 975 of 2011 – Republic vs. Alphonse Kondi Riaga. According to him, he had no role in the management of the Sacco after 11th July 2011. He averred that he had never appeared before any investigating team in connection with alleged loss of Kshs 43,540.725.
3. The Applicant asserted that he was entitled to a fair hearing if the Inquiry Panel believed that he was responsible for the alleged loss of funds, which would include the panel giving him a notice containing all allegations against him, availing to him all the documents in their possession and further giving him reasonable time to prepare for his response. However, he did not receive any further draft or otherwise from the inquiry panel which demonstrates ill motive and malice on the

part of the Respondent until on 24th September 2014 when he received a letter dated 24th October 2013 surcharging him for sum of Kshs 43,540,725 allegedly in pursuance of the Sacco's member's resolution at a general meeting.

4. The applicant contended that he was surprised upon reading the notice for the following reasons:

   i. He had never, during his tenure as a staff, participated in any fraud against the Sacco and could not understand how the panel arrived at the figure of Kshs 43,540,725.

   ii. He was not aware of any general meeting where the members of the Sacco were invited and a report read and adopted since as a member of the Sacco and staff, he was entitled to receive a notice calling for the meeting.

   iii. The said letter dated 24th October 2013 states that the Sacco general meeting adopted findings and recommendations of an inquiry report instituted under section 58 of the Cooperative Societies Act which in his view was highly irregular and below the expected standards and practice. To him, the accepted practice obliges the investigations to come up with a draft report and invite him to offer an explanation thereto before compiling the final report which would have contained his responses thereto.

5. The Applicant added that on 24th September 2014, he received a surcharge vide dated 24th October 2013 notifying him that the Respondent had found him liable under section 73 of the Act and ordering him to pay a sum of Kshs 43,540,725 within 30 days failure to which the Respondent would take action against him.
6. The Applicant was however aggrieved by the said decision since according to him, he did not defraud the Sacco as alleged or at all. He averred that it was doubtful whether the Respondent considered his letter dated 21st June 2013.
7. In his view, the Respondent's action contained in the Notice dated 24th October 2013 is unlawful, illegal, unconstitutional and should be quashed by an order from this honourable court for the following reasons

   i. The Respondent has no power to issue surcharge orders against him pursuant to section 58 of the Act. Being a creature of a statute, the Respondent can only perform his duties in accordance with the stipulations of the Act and any decision in contravention of the law is illegal, null and void

   ii. The decision contained in the said notice is in violation of Article 47(1) of the Constitution of Kenya 2010 which grants him a right to an administrative action that is lawful, reasonable and procedurally fair. To the extent that the decision is not supported by law, it is unlawful. Further, the procedure that was followed by the panel in compiling the report did not adhere to the rules of natural justice and hence it is procedurally unfair.

   iii. The Respondent has further contravened Article 10 of the Constitution which requires public officers like the Respondent to observe natural values and principals of governance such as adherence to the rule of law and good governance. Rule of law contemplates an environment where the Respondent executes his statutory functions within the confines of the law as established.

8. The applicant averred that he had a right to move this Court by way of judicial review and ask for a review of the decision to surcharge him on the basis that the Respondent had abused powers bestowed upon his office by the law. He reiterated that he had not been furnished with a copy of the inquiry report nor the resolution of the Sacco which are referred to in the surcharge.
9. It was submitted on behalf of the applicant that he was not given a fair hearing contrary to the rules of natural justice. In support of this position the applicant relied on **Ridge vs. Baldwin [1964] AC 40** and **B vs. Attorney General Misc. Appl. No. 1609 of 2003**.
10. It was submitted on the strength of Article 50 of the Constitution that the applicant had a right to

be informed of the charge with sufficient detail to answer it. In this case however there was no evidence that the applicant was served with the notice of the allegations made against him. Similarly there was no evidence he was notified of the decision to enable him appeal.

11. In the absence of proof that the applicant was served, it was submitted that the bare allegation to the contrary does not suffice as the onus was on the Respondent to prove service. In the absence of proof of service, it was submitted that the Respondent breached the rules of natural justice.
12. It was further submitted that the Respondent failed to follow the procedure. In his view section 58 of the ***Co-operative Societies Act***, Cap 490 Laws of Kenya (hereinafter referred to as "the Act") is inapplicable as it does not apply to a staff of the Cooperative Society. In his view the relevant provision is section 73 of the said Act and that the inquiry contemplated under the two provisions are different in terms of the bases and grounds for establishing them as well as the consequences that flow from the reports generated from each.
13. According to the Applicant an inquiry instituted under section 58 aforesaid is irregular, null and void. It was submitted that in acting under section 58 the Respondent in excess of its powers. In support of his position the applicant relied on **Rita Biwott vs. The Council of Legal Education Misc. Civil Case No. 1122 of 1994**.
14. To the Applicant the Respondent (hereinafter referred to as "the Commissioner") blatantly disregarded the guiding principles of leadership and integrity premised under Article 10 of the Constitution hence the action offended Articles 47(1) and 232(1) of the Constitution.
15. It was further submitted that the impugned action violated the applicant's legitimate expectations of a fair hearing and relied on **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240**.

**Respondent's Case**

16. On the part of the Respondent, it was contended that following an inquiry in the governance affairs of the UN Sacco and specifically under which UN Sacco lost money from July 2009 to December, 2011, it was established that the Sacco indeed lost money through fraud cleverly crafted and executed by the systems administrator, the Applicant herein. It was averred that the fraud took place between June 2009 and December, 2011 through use of ATM Machines, Msacco facility and cash withdrawal.
17. It was disclosed that the inquiry report was read during the Annual General Meeting held on 15th March 2013 at the UN Sacco Complex which recommended that the money lost should be recovered from the Applicant. According to the Respondent, the applicant was duly served with a Notice dated 23rd April 2013 to show cause why an order of surcharge order should not be issued against him to which the Applicant had 6 months to answer to respond. This was from 23rd April 2013 when the notice was served to 24th October 2014 when the surcharge order was served. However, even after the notice the applicant herein did not respond. It was therefore contended that the Applicant was given a chance to be heard before the surcharge order could issue but refused and or neglected to give his explanation if any thereby showing guilt.
18. According to the Applicant, the provisions of section 73 of Cap 490 Laws of Kenya grants the Applicant the right of Appeal, a right the Applicant has not exercised. It was the Respondent's case that the Applicant's allegation that he was not accorded a chance to defend himself is untrue since he was given the opportunity but he decided not to offer and explanation. In the Respondent's view, section 58 of the ***Co-operative Societies Amendment Act of 2004*** applies to all members of a co-operative society including the Applicant herein. It was the Respondent's position that section 73 of the ***Co-operative Societies Act*** is relevant to the issuance of the surcharge order since it talks about any person who has taken part in the organization or management of a co-operative society and the Applicant herein was the systems administrator at the Sacco.
19. It was therefore the Respondent's case that the surcharge order herein is not unprocedural and unconstitutional as alleged by the Applicant as due process was followed.
20. It was submitted on behalf of the Respondent that the Applicant was notified of the intention to be surcharged and was accorded a hearing. He was served with the notice to show cause but instead

of doing so wrote a letter dated 21st June, 2013 to the Commissioner for Cooperative hence cannot claim that he was condemned unheard.

21. It was the Respondent's case that based on sections 58 and 73 of the Act, the Commissioner acted within the law and that the notice to show case and the surcharge were under both sections. It was accordingly submitted that there was no violation of the applicant's legitimate expectations.
22. According to the Respondent the prayer seeking to prohibit the Respondent from surcharging the applicant cannot be granted as the surcharge has already been made and prohibition looks at the future. In this respect the Respondent relied on **Mureithi & 2 Others vs. Attorney General & Others Nairobi HCMA No. 158 of 2005**, **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** and **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572**.
23. Based on **Pastoli vs. Kabale District Local Government Council and Ors [2208] 2 EA 300**, it was submitted the grounds upon which the instant application is based does not warrant the orders sought
24. According to the Respondent, the Applicant having been served with the notice to show cause ought to have appealed against the decision to surcharge him pursuant to section 74(1) of the Act as read with section 9(2) of the ***Fair Administrative Action Act***.
25. The Respondents also cited *inter alia* **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** and **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary Ministry of Nairobi Metropolitan Development & Another (2014) eKLR** in support of its case and submitted that unless that restriction on the power of the court is observed the court will, under the guise of preventing abuse of power, be itself guilty of usurpation of power.
26. The Respondent urged the Court in the exercise of its discretion not to grant the orders sought herein.

**Determination**

27. I have considered the pleadings, the issues raised by the respective parties and this is the view I form of the matter.
28. Before dealing with the issues raised herein, I must point out that the manner in which the Motion was intituled was improper. In this case the person who appears as the applicant is not the Republic but **Alphonse Kondi Riaga**. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
29. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

**"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

30. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

**"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is:-**

**"REPUBLIC……....……..……..APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.**

**EX PARTE**

**JOTHAM MULATI WELAMONDI"**

31. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

**"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

32. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.
33. Judicial review, it is trite, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and not to ensure that the authority, after according fair treatment reaches a decision on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285andChief Constable of the North Wales Police vs. Evans (1982) I WLR 1155
34. The Applicant contends that he was not afforded an opportunity of being heard before the impugned decision was made. Article 47 of the Constitution provides:

***(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.***

35. The right to be heard is therefore not just a common law requirement but is under our current Constitution, a constitutional requirement as well. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

**"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if**

**there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*."** [Emphasis mine].

36. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

**"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

37. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

**"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

38. In this case, it was contended that the applicant was served with a Notice to Show Cause on 23rd April, 2013 but instead of doing so wrote a letter dated 21st June, 2013 addressed to the Commissioner for Cooperatives. The respondent exhibited a copy of the said notice dated 23rd April, 2013, which notice the applicant contended was not issued to him. However, in his advocate's letter dated 21st June, 2013, which the applicant himself exhibited, reference was made to the Commissioner's letter dated 23rd April, 2013 in which the advocates acknowledged that the letter dated 23rd April, 2013 had been placed into their hands. Instead of dealing with the issues raised in the notice, the applicant chose to request the Commissioner to hold his horses and await for the court process to run its course.
39. It is therefore very clear that the applicant was afforded an opportunity of being heard. However, as was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

**"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

40. The applicant has not explained why he did not deem it necessary to utilise this opportunity. In **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of law. That issue was

answered as follows:

**"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."**

41. As is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007:

**"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

42. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

**"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."**

43. In **R vs. Aga Khan Education Services *ex parte* Ali Sele& 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

**"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition indecision making far outweighs the need to**

**hear the other side and in such situations, the court has to strike a balance."**

44. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

**"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

45. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

**"The *audialterampartem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."**

46. From the record it is therefore clear that the Applicant was afforded an opportunity of being heard. It cannot therefore be successfully contended that his rights to be heard were violated.

47. It was contended that was exhibited the Respondent ought not to have proceeded under section 58 of the Co-operatives Societies Act as that provision is inapplicable to the applicant. According to **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** in which the Court cited **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

**"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...Illegality is when the decision-making authority commits an error of law in the process of taking 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...Procedural Impropriety is when there is a 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."**

48. Similarly, in **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3**, **Lord Denning** expressed himself as follows:

**"'If it appears to the Secretary of State'? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the**

**facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong."**

49. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**
50. Therefore if the Respondent applied the provisions which he ought not to have applied in arriving at his decision, the same decision can be successfully impugned on the grounds of being unlawful and based on irrelevant and extraneous considerations.
51. Section 58 of the ***Co-operatives Societies Act*** provides as follows:

***(1) The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.***

***(2) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.***

***(3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.***

***(4) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—***

***(a) dissolve the Committee; and***

***(b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.***

***(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.***

52. Under section 58, therefore the Commissioner may act on his own motion, or on the direction of the Minister or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised. In case of the Minister's direction or application by the requisite number of members, the Commissioner has no choice but to hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society. In this case, from the replying affidavit, the Respondent seems to have acted on own motion since there is no indication that he was either directed by the Minister or that there was an application from the said members. However the sanctions which the Commissioner is empowered to imposed are, pursuant to section 58(4) directed only to the Committee of a co-operative society. It is therefore clear that the Commissioner has no powers to impose surcharge under section 58 of the Act. Where a body or authority purports to exercise discretion under a provision which does not permit it to do so, the

resultant decision will be rendered unlawful for lack of jurisdiction. This was the position in **Republic vs. County Council of Murang'a Ex Parte Makuyu Transporters Self Help Group & Others Nyeri HCMCA No. 40 of 2009** where **Sergon, J** expressed himself as follows:

**"The main argument of the applicant is that the Respondent had no discretion to increase fees under section 18 of the Local Government Act. It is also stated that the Respondent did not consult the applicants as required under rules 8 and 9 of the Local Government (Single Business Permit) Rules, 2008. This submission is correct since the Respondent purported to exercise discretion under the wrong provisions of the law. The Respondent had no jurisdiction to do so under section 18 of the Local Government Act and therefore acted outside the law. The best thing the respondent could have done was to withdraw the gazette notice but it opted to soldier on. Consequently on this account alone the motion is found to be with merit."**

53. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.
54. Section 73 of the Act, on the other hand provides as follows:

***(1) Where it appears that any person who has taken part in the organization or management of a co-operative 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 Commissioner 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 Commissioner may, if he 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 Commissioner thinks just or to contribute such sum to the assets***

***of the society by way of compensation as the Commissioner 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.***

55. Similarly, under this provision the Commission may act on his own motion. In its notice to show cause dated 23rd April, 2013, the Respondent clearly expressed himself that he was acting pursuant to section 73 of the said Act. Although the subsequent surcharge dated 24th October, 2013, cited sections 58 and 73 of the Act, in its body it was clear that the surcharge was pursuant to section 73 of the Act. The applicant does not dispute that under section 73 of the Act the Respondent Commissioner had the powers to surcharge him. In the circumstances, I disagree with the applicant's contention that the Respondent's action was ultra vires his powers under the Act. I also disagree with the contention that the surcharge was unprocedural.
56. In the foregoing premises, I find that the allegation of the violation of the applicant's legitimate expectations have no basis.
57. It follows that the Motion dated 17th November, 2014 is unmerited.

**Order**

58.Consequently, the said Motion fails and is dismissed with costs to the Respondent.

**Dated at Nairobi this 18th day of May, 2016**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

**Mr Munene for the Respondent**

**Cc Mutisya**