Republic v Commissioner for Co-operative Development & 2 others; Otieno & 22 others (Exparte Applicant); Chairman Egerton University Sacco Limited (Interested Party) (Judicial Review Application 21 of 2015) [2016] KEHC 7273 (KLR) (17 June 2016) (Ruling)

Republic v Commissioner for Co-operative Development & 3 others Ex-Parte Elisha Otieno and 22 others [2016] eKLR

Neutral citation: [2016] KEHC 7273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

JUDICIAL REVIEW APPLICATION 21 OF 2015

MA ODERO, J

JUNE 17, 2016

IN THE MATTER OF APPLICATION FOR CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF 58 AND 60 OF THE CO-OPERATIVE SOCIETIES ACT

IN THE MATTER OF RULE 23 AND 46 OF THE CO-OPERATIVE SOSCIETIES RULES OF 2004

IN THE MATTER OF THE INQUIRY REPORT OF THE EGERTON UNIVERSITY SACCO LIMITED

BETWEEN

REPUBLIC .... APPLICANT

AND

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

COUNTY CO-OPERATIVE COMMISSIONER .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

AND

ELISHA OTIENO AND 22 OTHERS .... EXPARTE APPLICANT

AND

THE CHAIRMAN EGERTON UNIVERSITY SACCO LIMITED ... INTERESTED PARTY

RULING

1. Before this court is the Notice of Motion Application dated 9th October, 2015 which was filed pursuant to the leave of court granted on 1st October, 2015. By way of that Notice of Motion the Ex parte applicants Elisha Otieno And 22 Others sought inter alia the following orders:-

   (a) That this honourable court be pleased to grant the applicants an order of certiorari to quash the decision of the Directorate of Co-operative Societies to recommend and order the removal of the following members of the board of Directors of Egerton University Sacco society Limited;

      i) Florence Wanderi

      ii) Chester Everia

      iii) Samuel Owidi

      iv) Prof. Anthony Mwangi

      v) Aggrey Tshombes

   (b) This honourable court be pleased to grant the applicants an order of certiorari to quash the decision of the Directorate of Co-operative Societies to recommend and direct the termination of employment of –

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

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

   (c) This honourable court be pleased to grant the applicants an order of certiorari to quash the decision of the Directorate of Co-operative Societies to bar the ex-parte applicants herein from holding positions in any co-operative societies and/or an public office and also to surcharge the applicants herein on any amounts whatsoever arising from the recommendations of the inquiry it conducted on Egerton University Sacco Society Limited;

   (d) This honourable court be pleased to grant the applicants an order of prohibition to restrain the 1st and 2nd respondents from directing the interested parties herein to hold a board meeting and to co-opt some members of the society to join the board of directors of the Sacco and to carry on with the business and/or to restrain the interested parties herein from co-opting any members of the society to join the board of directors of the Sacco; and

   (e) That this court do issue an order of prohibition restraining the 1st and 2nd respondents herein from publishing the names of all the ex-parte applicants as unfit to hold any public office; and

   (f) That the costs of this application be provided for

2. The application was opposed by the Respondent, who filed their Grounds of Opposition dated 7th December, 2015.

Background

3. The brief facts of this case are as follows. The Ex Parte Applicants all served as members of the Board of Directors of the Egerton University Sacco Ltd. The 9th and 10th ex-parte applicants were the Chief

Executive Officer and Financial Officer respectively of said Sacco. The 1st, 3rd – 10th , 12th – 15th , 17th – 21st and 23rd Ex-Parte Applicants are all former members of the University of Egerton.

4. On 8th June, 2015 the Commissioner for Co-operative Development (herein after referred to as 'the Commissioner') pursuant to powers conferred upon him by section 58 (1) of the Co-operatives Society Act, Cap 490, Laws of Kenya issued an inquiry order directing that an inquiry be conducted into the by-laws working and financial conditions and conduct of the management committee and past and present members or officers of the Egerton University Society Limited. The said inquiry order was duly gazetted on 12th June, 2015. An inquiry team was appointed to conduct this inquiry consisting of the Deputy Commissioner for Co-operatives, the Deputy Director of Audit and the Chief Co-operative Officer. This inquiry team proceeded with the task and finally came up with their report dated August 2015. Amongst others this report made the following recommendations.

   (a) That the Ex parte applicants. (Save for the 1st, 10th, 12th, 16th and 19th ex-parte applicants) all be surcharged for misappropriating the funds set aside for the renovation of the banking hall of the Sacco's Nyahururu Branch and for a further Ksh 1.75 million being payment that were made to TKM contractors for work that was not done

   (b) That the 2nd, 11th, 16th 20th and 22nd exparte applicants be relieved of their duties as members of the board of directors of the society.

   (c) That all the ex parte applicants be barred from holding any positions in any co-operative societies in the country.

5. This inquiry report was adopted in its entirety at a Special General Meeting of the Sacco which was held on 25th September, 2015. Following this meeting the chairman of the Board of Directors was directed by the inquiry team to terminate the employment of the 2nd, 9th, 10th, 11th, 16th, 20th and 22nd ex-parte applicants.

6. The Exparte Applicants then moved to court to challenge the recommendations made by the inquiry team. They argued that the inquiry team failed to follow due process the manner in which they conducted their inquiry. The Ex-parte applicants contended that they were not granted an opportunity to be heard before the inquiry team proceeded to make adverse findings of misappropriation of funds and mismanagement of the SACCO against them.

7. The Exparte Applicants further argued that the recommendations made by the inquiry team were irrational and unreasonable given that there was ample evidence to vindicate them of any wrong doing in the conduct of the projects. As such there was no sufficient basis for the teams finding that they had misappropriated the funds in question.

8. Finally the Exparte applicants argued that the report was not properly adopted by the Special General Meeting and as such its recommendations could not lawfully be implemented. They contended that the inquiry team proceeded to implement its recommendations 'suo moto' as no proper general meeting was convened as required by the Co-operatives Act and the rules made thereunder. They accused the inquiry team of acting 'ultra vires' in directing the board to convene a Special General Meeting and in setting the agenda of the meeting and officiating at the same, and in directing the Board Chairman to terminate the employment of the affected members. They further complained that the inquiry report was only presented to members in the general meeting and members were not given a chance to debate the report and adopt its recommendations.

9. On their part in opposing this Motion the Respondents contended that due process was followed by the inquiry team in the conduct of its mandate. The respondents maintained that the Ex parte

applicants were given a hearing as they were all interviewed before the inquiry team made their decision. The Respondents also argued that the recommendations made by the inquiry team were lawful.

10. Section 28 (4) (k) of the Co-operatives Act bars any person who has been adversely mentioned for mismanagement and/or concept practices in an enquiry report adopted by the general meeting from continuing as a committee member. Once the officers had been found guilty of mismanagement then by statute they were not eligible to continue holding office.

11. The Respondents denied the allegations that the powers of the general meeting had been usurped as the Act does empower the commissioner to conduct an inquiry upon his own initiative.

12. The Respondents also contended that the suit was defective for the reason that it was a representative suit with 23 applicants yet only the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th ex-parte Applicants had given the requisite authority to sue. Finally Respondents maintained that the whole inquiry was properly conducted. The recommendations were made without bias and after according all affected parties a hearing and that those recommendations were properly adopted by the Special General Meeting.

13. The Application was disposed of by way of written submissions and both parties did indeed file their written submissions. The matter then came up on 28th January, 2016 for highlighting of the written submissions Mr Aim Advocate appeared for the Ex-Parte Applicants while Mr Wachira represented the Hon. Attorney General for the Respondents. Counsel for the Exparte Applicants submitted that the recommendations made by the inquiry team were evidently adverse to his clients. As such they were entitled to Fair Administrative Action before those adverse recommendations were reached. The Ex Parte Applicants had a legitimate expectation that they would be given a hearing before any recommendation adverse to themselves was made.

14. Counsel for the Ex Parte Applicants argued that being invited for an interview does not amount to being heard. He submitted that the right to be heard is only upheld where a person is informed of the charge against him and is given reasonable time and facilities to respond.

15. Mr. Aim further submitted that the recommendations reached by the inquiry committee were both irrational and unreasonable. He cited Section 58 of the Act which he stated allowed the commissioner to dissolve the entire Sacco upon findings of mismanagement. The commissioner had no power to decide which members should be surcharged and who should be declared unfit to serve. No judicial or quasi judicial process had been undertaken therefore the finding of guilt for misappropriation of funds against the Ex Parte applicants was invalid. Lastly counsel submitted that the inquiry report was not properly ratified as it was merely tabled during the Special General Meeting of 25th September, 2015. The report was neither debated nor ratified and on this ground alone the decisions contained in the report could not be implemented.

16. Mr. Wachira for the Respondent submitted that the High Court was not the proper forum to determine this matter. He argued that the court had no jurisdiction as the matter ought to have been filed before the Co-operatives Tribunal established under section 76 of the *Co-operative Societies Act*.

17. Counsel also submitted that the matter ought to be dismissed for non-disclosure on the part of the Ex Parte applicants whom he accused of omitting certain relevant pages in the enquiry report which was filed in court and also of failure on the part of the Ex Parte applicants to disclose that they had been interviewed by the inquiry team before the report was finalized.

Determination

18. I have carefully considered the submissions made by learned counsel in this matter. I have read the inquiry report as well as all affidavits authorities and accompanying documentation. I find that the following issues arise for determination in this case.

    (i) Jurisdiction

    (ii) Authority by the 1st Ex Parte Applicant to file suit on behalf of the 2nd and 23rd Ex Parte Applicants.

    (iii) Are the orders of Judicial Review sought in this case merited?

Jurisdiction

19. The Respondents submitted that this court did not have requisite jurisdiction to hear and determine this matter. Mr. Wchira argued that the dispute ought properly to have been placed before the Co-operatives Tribunal which was established under section 77 of the *Co-operative Societies Act*. In any case where question of jurisdiction is raised the court must determine that question at the earliest opportunity. This is because jurisdiction is everything. In the absence of requisite jurisdiction a court or tribunal must down its pen immediately. Therefore it is imperative that this question of jurisdiction be determined before this court may proceed to consider the other issues raised in this application

20. The mandate of the Co-operatives Tribunal is set out under section 76 of the Act as follows

    (a) A claim by a co-operative society for any debt or demand due to it from a members 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, where such debt or demand is admitted or not;

    (c) A claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.

    Section 74 of the same Act provides that –

    (i) "Any person aggrieved by an order of the Commissioner under Section 73 (1) (this section provides for the powers of the commissioner to surcharge the officers of a co-operative society) may within thirty days appeal to the Tribunal.

    (ii) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on a matter of law".

21. In this case the Ex parte applicants are aggrieved by the actions of the Directorate of Co-operative Development particularly with the activities of the team set up to inquire into the business of Egerton University SACCO. The Ex-parte applicants allege that the inquiry team has acted ultra vires its powers, have acted illegally, unreasonably and irrationally both in the manner of conducting the inquiry and in the manner of adopting their report. Such a dispute is not one between the society and its members nor is it a dispute between two societies neither does the dispute concern the refusal or grant of a permit by the commissioner. Thus it is clear that the dispute herein does not fall under the nature of disputes contemplated by Section 76 to be placed before the Co-operative Tribunal.

22. However the inquiry team did in its final report make a recommendation for some of the Ex parte applicants found culpable for misuse and/or misappropriation of funds be surcharged by various amounts. Section 74 of the Act requires that this decision (to surcharge members) be challenged at the first instance before the Tribunal. Be that as it may the existence of an alternative remedy (in this case the Co-operatives Tribunal) does not amount to an absolute bar to a party from seeking remedy by way of Judicial review orders.

23. In the case of Republic –vs- National Evironmental Management Authority [2011] eKLR. The Court of appeal held that

> " The principle running through these cases (the court was referring to the English cases of Republic –vs- Birmingham City Council, ex parte Ferraro LTD [1993] 1 ALL E. R 530. Harsham District Commission, ex parte Wenham [1955] 1 WLR 680; Harley Devt Ic Vs Commission of Inland Revenue [1996] 1 WLR 727; Republic –vs-Wandsworth County Court [2003] 1 WLR 475 and the local case of James Njenga Karume Vs Cr, 192/1992) is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that is determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

24. The Tribunal had powers to determine one aspect of this dispute being the decision to surcharge members. However, other aspects of the dispute being questions concerning the legality of the decision of the inquiry team to recommend termination of the employment of the Ex Parte applicants and to further bar them from holding office in any other Society can only be determined by the High Court. As such the most appropriate forum for this matter would be the High Court as it would not serve any purpose to sever one issue from the rest. Therefore I find that the High Court does indeed have proper jurisdiction to hear and determine this matter and I dismiss the Respondents objections on the basis of jurisdiction.

(i) Does the 1st Applicant have valid authority to file suit on behalf of the other Ex Parte Applicants?

25. The first Applicant herein Elisha Otieno purported to file this suit on behalf of the 2nd to 23rd Ex Parte Applicants. The 1st Ex Parte applicant annexed to his verifying affidavit dated 29th September, 2015 an authority given by the 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 22nd Ex Parte applicants for him to plead, swear and sign documents on their behalf. No such authority was annexed in respect of the 3rd, the 10th to 21st and 23rd applicants.

26. In order for one party to plead on behalf of others, there must exist and be exhibited to the court valid authority given by All litigants in this respect. This is provided by order 1 r 12 Civil Procedure rules. In John Kariuki & 347 Others – Vs- John Mungai Njoroge & 8 Others. Nakuru HCCC NO. 152 OF 2003 (unreported) the court held that

> " The plain reading of the above rule (Order 1 rule 12 Civil Procedure rules) is that where a party requires another party to appear, plead, or act on his behalf he has to give the authority in writing before such a person filing suit can claim to be representing such person. The said written authority has to be signed by the person giving the authority and must be filed in court where the suit is to be filed. The mischief that the said rule was meant to address, in my

humble view, is to prevent a situation where a party may become bound by a court decision without his having any knowledge of the suit that led to the said decision. The court can envisage a scenario, where let's say, after the dismissal of a suit, such a plaintiff whose name has been included declines to settle the costs on the pretext that he did not authorize the suit to be filed in his name. In my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit from a court process without his say so".

27. A similar finding was made my Munyao Sila, J in Republic Vs Musanka Ole Runkes Tarakwa & 5 others Ex Parte Joseph Lesalol Lekitio & others [2015] eKLR where the court refused to consider the case by the 2nd to 8th applicants on the grounds that there was no evidence that they had authorized the 1st applicant to act on their behalf yet it was a representative suit. The court held-

> " Authority in case where there are several litigants is critical, for it is the only way that others can be bound by what one person files. It is not a matter to be taken casually. One cannot purport to bind others unless with their authority" (own emphasis).

28. I am guided by the law and the above authorities and find that the 1st Ex parte applicant does not have valid authority to plead on behalf of the 3rd, 10th to 21st or the 23rd Ex Parte applicants. As such he cannot purport to make any allegations on their behalf. Therefore the claims made in respect of the 3rd, 10th to 21st and the 23rd Ex Parte applicants will not be considered by this court and any decision of this court will have no effect with respect to the right duties and/or obligations of the 3rd, 10th to 21st or the 23rd Ex Parte applicants.

(ii) Are Judicial Review Orders Merited?

29. This basically is the substance of the application. The scope of the remedy of judicial review was aptly stated in the English case of Chief Constable Of North Wales Police –vs Evans 1822 3 ALIER 141 as follows

> " The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of remedy itself is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters in question. Thus, a decision of an inferior court or public authority may be quashed (by an order of certiorari) where that court or authority acted without jurisdiction, or exceeded its jurisdiction or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense. The court will not, however, on a judicial review application ct as a 'court of appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing abuse of power, be guilty itself of usurping power" (own emphasis)

30. In Republic –vs- Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR Hon, Justice Nyamu summarized the grounds upon which an application for judicial review will be allowed to

include but not be limited to abuse of discretion, irrationality, excess of jurisdiction, improper motives, failure to exercise discretion, abuse of the rule of natural justice, fettering of discretion and error of law.

31. At no time at all did the Ex Parte applicants dispute the fact that the commissioner had powers granted under section 58 of the Co-operatives *Societies Act* to conduct an inquiry into the conduct of the Egerton University SACCO. The court is only being asked to examine and pronounce itself upon the legality of the recommendations made by that inquiry team, whether said recommendations were irrational and/or unreasonable and whether the Ex Parte applicants were heard before those recommendations were made. Secondly this court is being asked to examine and pronounce itself regarding the process of adoption and implementation of the recommendations made by the inquiry team. Was the inquiry report properly adopted by the Special General Meeting and was the decision to remove the Ex Parte applicants implemented in accordance to law.

32. Article 47 of *the Constitution* of Kenya provides that every person is entitled to administrative action that is "expeditious, efficient, lawful, reasonable and procedurally fair". Procedural fairness means that the rules of natural justice must be adhered to. In Pastoli –vs- Kabale District Local Government Council And Others [2008] E. A 300, it was stated that

> "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 instruments by which such authority exercises jurisdiction to make a decision"

33. The *Co-operative Societies Act* does not make provision for the procedure to be adopted in conducting an inquiry – these details are left to the inquiry team. All that is required under Article 47 is that the inquiry board adopts an open fair, objective and transparent procedure, which accords with constitutional and statutory requirements. In any statute where an administrative or judicial function is required to be exercised then unless expressly excluded, the rules of natural justice will apply. In the case of Onyango Oloo –vs- Attorney General [1986 – 1989] E. A 456 it was held that –

> "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.... 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..... 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.... Denial of the right to be heard renders any decision made null and void ab initio."

34. Also in Msagha Vs Chief Justice & 7 Others Nairobi HCMCA NO.1062 OF 2004 [2006] 2 KLR 553, the court held:

> " All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather that a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (nemojudex in sua causa) and in respect of] the right to a fair hearing [audi alteram partem]."

35. The mandate of the enquiry team was to "investigate into the conduct of past and present society's officers in carrying out the society's functions". Following their enquiry in exercise of this mandate the team found that the Ex Parte applicants had "Misappropriated and misused funds" belonging to the society and had generally mismanaged the society.

36. On this basis the inquiry team recommended that the persons concerned be surcharged, relieved of their positions in the Society and be barred in future from holding offices in other co-operative societies.

37. These recommendations were undoubtedly serious and far reaching. The implementation of the same would certainly alter the legal position of the Ex Parte applicants to their detriment. The amounts to be surcharged were not small (some Ksh. 1.75 million) and would be recoverable as a civil debt. Therefore it behoved the inquiry team to adopt a procedure which would accord the Ex Parte applicants a fair hearing. According to their report the methodology adopted by the inquiry team to carry out its task was to examine all relevant documents as well as to 'interview' past and present members of the society. The respondents insisted that this 'interview' of the Ex Parte applicants amounted to a 'hearing' and therefore they were duly accorded their right to be heard. The Ex Parte applicants acknowledged having been invited to appear before the inquiry board for an 'interview' and they conceded to having signed the acknowledgements annexed to the Respondents Replying affidavit. However the Ex Parte applicants maintain that at said interviews no charges and/or allegations were leveled against any of them. They were only asked to shed light on the running of the Society and were not asked to explain any instances of mismanagement and/or missing funds.

38. The questions arise therefore is does this 'interview' amount to a 'hearing', Counsel for the Ex Parte applicants gave the definition of 'interview' as per the Oxford Advanced Learner's Dictionary as follows

> " a face to face meeting especially for consultation"

39. A glimpse into the manner in which a 'fair hearing' is achieved was provided in the case of Onyango Oloo –vs- Attorney General 1986 – 1989 E A 456, as follows

> " To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion... in the course of decision making, the rules of natural justice may required an inquiry, with the person accused 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"

40. In the Msagha –vs- Chief Justice Case, the case of Republic –vs- Race Relations Board Ex Parte Setrarajan [1976] All ER 12 was cited wherein it was held that a person who faces administrative action

> " Shall be told of the case against him and be afforded a fair opportunity of answering it"

41. Similarly in the case of Grace Kazungu & Another –vs- Nssf Cause No. 703 of 2010 U/R it was held that

> " The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered second they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly they will be given an opportunity to make submissions to the case"

42. Therefore it is clear that for one to be said to have been accorded a fair hearing, he/she must be informed of the specific particulars of the case against him and be allowed reasonable time to prepare and submit a response (defence) and submit the same for consideration before a decision can be made. Was this procedure followed by the inquiry team? It seems unlikely. The respondents have only tendered evidence of having invited the Ex Parte applicants for an 'interview'. There is no evidence that they were given specifics and/or particulars of the allegations/accusations against them. They were not invited to prepare submissions/responses for consideration by the inquiry team before the recommendations were made. The inquiry team only summoned the Ex Parte applicants to appear before them for an 'interview' as the team believed that they had information necessary to assist the team fulfill its mandate. The Ex Parte applicants were invited to bring along to this interview only documents or information they deemed necessary for the purposes of the inquiry. Without having been given the specifics of what the inquiry was to cover, without having been told of the specific accusations against them the Ex Parte applicants would have no way of knowing which documents or information was necessary for them to present before the inquiry team.

43. The Ex Parte applicants were facing (and indeed were eventually found culpable for) very serious allegations of mismanagement of the society and the society's funds. Not only is there no indication that the inquiry team informed them of the specific nature of the allegations against them, there is no evidence that any Ex Parte applicant was invited to or gave any explanation, mitigation or input before the team came up with its recommendations. If indeed this crucial procedure had been adhered to – if indeed the Ex Parte applicants had been properly informed of the allegations against them and had been allowed an opportunity to respond to those allegations nothing would have been easier than for the Respondents to tender tangible proof to the court that this was done. Their failure to tender such evidence means this procedure was not followed.

44. Once the inquiry team presented its report to the Board of Directors the report was only for adoption and implementation by the Board. The Ex Parte applicants would not have a chance to appeal and make interventions before the Board prior to adoption of the inquiry report. The only opportunity the Ex Parte applicants had in the process to make any interventions was before the Inquiry Team. This opportunity was grudgingly accorded them in the form of an 'interview'. This interview as I have

shown earlier did not meet the threshold of a fair hearing. Their right to a fair hearing was not in my view accorded to them.

45. A decision which is made without adhering to the right to be heard is void and cannot be allowed to stand. Even the fact that it is shown that a strong case had already been made out against the affected party and his defence would not alter the decision of the body conducting the inquiry would not be relevant in determining the validity of that decision. In the case of Onyango Oloo –vs Attorney General (Supra) it was held that

> " A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right if the principle of natural justice is violated, it matters not that the same decision would have been arrived at "

46. Therefore notwithstanding the correctness of the decisions made by the inquiry the fact that due process was not accorded to the Ex Parte applicants renders said decision null and void.

47. The Ex Parte applicants also took issue with the process of the adoption and implementation of the inquiry report submitting that they were improperly removed from office. The decision to remove them was made based on the recommendations of the inquiry team. Having found that those recommendations were null and void any actions premised on those recommendations would also be unlawful and cannot be upheld by this court.

48. Finally and in summary I do find that the right of the Ex Parte applicants to be heard was infringed in that recommendations were made against them, without their being properly informed that they had been found culpable for misappropriating funds and mismanaging the society and without the Ex Parte applicants being given a fair chance to answer to those allegations. Accordingly I do allow the Notice of Motion dated 9th October, 2015 and I make orders as follows

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

        (i) Chester Everia

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

        (ii) Victor Rutto as the Chief Executive Officer of the Egerton Sacco Society Limited; and

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

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

    (e) An order of prohibition be and is hereby issued restraining the 1st and 2nd Respondents herein from publishing the names of the ex-parte applicants as unfit to hold any public officer; and

(f) The ex-parte applicants shall have the costs of the suit.

49. For clarity and following my earlier finding these orders shall apply in respect of the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 22nd Ex Parte Applicants ONLY.

DATED IN NAKURU THIS 17TH DAY OF JUNE, 2016.

MAUREEN A. ODERO

JUDGE