



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 576 OF 2016

**IN THE MATTER OF THE 1ST SPECIAL GENERAL MEETING OF THE CBET
MATATU OWNERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED
HELD ON THE 29TH AUGUST, 2016**

AND

**IN THE MATTER OF THE REFUSAL BY THE COMMISSIONER FOR THE CO-
OPERATIVE DEVELOPMENT TO RECOGNIZE THE RESOLUTIONS OF THE AGM
HELD ON 29TH AUGUST 2016 TO ISSUE A LETTER OF INTRODUCTION FOR OPENING
BANK ACCOUNT AND OFFICIAL SEARCH ON SACCO OFFICIALS**

BETWEEN

HENRY MATHEMBO MUINDI (CHAIRMAN)

TOM OLWE AKETCH (SECRETARY)

WILSON GITAHIMUCHOKI (TREASURER) OF

CBET MATATU OWNERS SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITEDAPPLICANTS

VERSUS

COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENTRESPONDENT

RULING NO.1

1. Vide an application under certificate of urgency dated 6th December 2016 the interested parties sought from this court orders:

1. Spent

2. Spent

3. Pending hearing and determination of this application this Honourable court be pleased to stay Order No. 3 issued on 24th November 2016 and Order No. 2, issued on 25th November 2016.

4. Spent

5. The interested parties be at liberty to apply for further orders and or directions as the Honourable court may deem fit to grant

2. The application is predicated on the 14 grounds on the face of the notice of motion among them and more importantly, that the interested parties are the incumbent executive committee members of CBET Matatu Owners Savings and Credit Co-operative Society Ltd duly elected at the special general meeting of 22nd July 2016; that the ex parte applicant's chamber summons dated 8th November 2016 and notice of motion dated 25th November 2016 sought orders that are adverse to the interests of the intended interested parties including the question as to who are bona fide officials of CBET Matatu Owners Savings and Credit Society Ltd; That the orders were obtained without material disclosure that the applicant sought similar orders against the intended interested parties at the Cooperative Tribunal Cause (Nairobi) No. 456 of 2016- Henry Mathembo Muindi Vs Francis M. Muchiri & 4 Others; Tribunal Cause (Nairobi) 421/2016 - CBET matatu Owners Sacco Society Ltd Vs Francis M. Muchiri & 4 Others and Tribunal Cause No. 518/2016 CBET Matatu Owners Sacco Society Ltd vs Francis M. Muchiri & 4 Others; That the applicant failed to disclose to this court that the Co-operatives Tribunal made a ruling in Tribunal case No. 528/2016, and that there are pending proceedings between the applicant and the interested parties; among other grounds which support the prayer No. 4 for enjoining of the interested parties to these proceedings and which prayer for joinder was granted by consent of both applicant and interested parties' counsels on 7th December 2016.

3. The application is further supported by the sworn affidavit of Joseph Muchiri Gitonga on 6th December 2016 annexing several exhibits including ruling of 20th August 2016 in Tribunal Cause No. 518/2016; minutes of Cbet Sacco meeting held on 22nd July 2016, letter to Director General of NTSA submitting resolution of meeting held on 22nd July 2016; CBET Sacco members list cheques drawn on Chase Bank in favour of Henry Mathembo Muindi; letter from DCI to co-operatives Tribunal on the ongoing investigations against Henry Muindi for alleged theft (dated 5th October 2016; bank statements from chase Bank- for Cbet Sacco; audited accounts for Cbet Sacco; letter of 3rd August 2016 recognizing the interested parties – by the Sub county Co-operative Officer; list of vehicles in CBET Sacco; Order of the Tribunal dated 10th November 2016 lifting the registration of Henry Muindi, Tom Olwe Akech and Wilson G. Muchoki as elected Chairman, Secretary and Treasurer, with in National Transport Safety Authority; and profile for issuance of National Transport Safety Authority Road Service Licence for CBET Saccos pursuant to the annual general meeting held on 29th August 2016.

4. The application was opposed by the ex parte applicants who filed their replying affidavit sworn by Henry Mathembo Muindi on an undated day but filed in court on 19th December 2016 wherein the deponent deposes that he is the chairman of Cbet Sacco having been elected on 29th August 2016 as per the attached minutes.

5. Further, that the interested parties never held any meeting on 22nd July 2016 at Rainbow Hotel as shown by letter from the said hotel, dated 18th August 2016 disowning that meeting; that the Tribunal disallowed their application in Tribunal Cause No. 518/2016 because the respondent gave a search recognizing the interested parties as officials of the Sacco based on the meeting of 22nd July 2016; that these proceedings are compelling the respondent to perform a public duty of recognizing the

applicants; that proceedings before the tribunal are distinct from those proceedings; that the interested parties have not challenged the meeting of 29th September 2016 wherein the applicants were elected as officials of Cbet Sacco; That the interested parties are mere impositors seeking to lead the Sacco without the mandate; That Tribunal case No. 421/2016 and 456/2016 were withdrawn; that it was falsely alleged that he defrauded Cbet Sacco since Joseph Muchiri Gitonga was the Treasurer thereof and signatory to the account at Chase Bank which is inoperative; that the respondent must explain why it has not recognized the meeting of 29th August 2016; and that the application dated 6th December 2016 lacks merit and should be dismissed with costs.

6. The parties' advocates argued the application orally this morning and therefore this expeditious ruling. Mr Omollo counsel for the interested parties/applicants submitted, relying on the grounds, supporting affidavit and annexures thereto and urged the court to allow the motion and stay the orders issued by this court *ex parte*. Counsel for the interested parties emphasized that the applicants came to court with unclean hands and failed to disclose that they had been denied orders by the Co-operatives Tribunal hence they were undeserving of the orders sought from this court.

7. Further, that there is tremendous hardship as the orders of this court put in office people who were not elected to hold office by Cbet members of Cbet Sacco. Further, that it is the interested parties who were elected in office, and were recognized by the respondent.

8. Mr Omollo submitted that the test as to materiality of what is to be disclosed is that had the court known of the officials being in office and the pending Tribunals cases, it would not have issued the orders that it did.

9. In response, Mr Ombwayo submitted *inter alia*, that there was full disclosure of all material before the court and that what was not disclosed was not material. He relied on HCC 125/2015. Counsel for the applicant further maintained, relying on his client's replying affidavit that it was his clients who were elected into office but that the respondent refused to recognize them and gave no reasons. That only this court can give the remedy of *mandamus* to compel a public body to perform a public duty. That the interested parties never held any meeting as alleged on 22nd July 2016 as Rainbow Hotel since the hotel disowned that meeting and that there is no evidence of banking of funds in Chase Bank by the interested parties since May 2016.

10. Further, that there is no prayer for setting aside orders of this court or for stay until the proceedings herein are heard and determined. That the applicants notified of withdrawal of Tribunal cause and that the interested parties were never enjoined because they were never officials of Cbet Sacco as the alleged meeting that elected them into office never took place. Mr Ombwayo urged the court to disallow the interested parties' motion with costs.

Determination

11. I have carefully considered the interested parties' notice of motion dated 6th December 2016. I have also considered the opposition thereto through a replying affidavit of the *ex parte* applicants and the parties' advocates respective rival submissions. What is not in dispute is that there are two factions of Cbet Sacco, each of whom claim to be bona fide elected officials and each have minutes showing when they were elected in office.

12. However, when the *ex parte* applicant approached this court with chamber summons dated 18th November 2016, they never disclosed to this court that they had not been recognized by the respondent because there was another faction which is the interested parties herein who were in office, whether legally or illegally. They withheld that material from this court.

13. Further, the *ex parte* applicants never disclosed to court that vide an order of 10th November 2016 the Co-operatives Tribunal in Tribunal Case No. 518/2016 had dismissed the *ex parte* applicants' application and lifted the registration of the *ex parte* applicants by the National Transport

Safety Authority as officials of the Cbet Sacco.

14. Although the ex parte applicants claim that they did not enjoin the Interested parties because the latter were not officials of Cbet Sacco and that because the alleged meeting that put the interested parties into office never took place, with utmost respect, I find that the applicants were mischievous before this court. The applicants having been deregistered by the Tribunal, they ought to have disclosed those proceedings before this court.

15. Furthermore, as the ex parte applicants' dispute was with the interested parties, there is no reason why the applicants failed in the first instance to enjoin the interested parties and or disclose the existence of that dispute. In my humble view, the dispute is not between the applicants and respondents, but with the interested parties as to who is lawfully in office as officials of Cbet Sacco. The fact that the issue of who is lawfully in office is subject of the Cooperative Tribunal proceedings was not placed before this court. Had those facts and the ruling of 10th November 2016 been placed before me, I would obviously not have granted the orders of 24th November 2016 and 25th November 2016. Those orders were issued per incuriam or in ignorance of material facts which have now been fully disclosed before me.

16. In addition, the ruling of 10th November 2016 was amenable to an appeal before this Honourable court as stipulated in Section 76 of the Co-operative Societies Act Cap 490 Laws of Kenya but the applicants instead came before this court by way of Judicial Review, and failed to disclose those proceedings. They instead enjoined the Commissioner of Co-operatives who was never a party in the Tribunal Case 528/2016 and who was only acting on advice of the Tribunal to recognize the interested parties as the duly elected officials of the Cbet Sacco Society Limited.

17. Judicial Review remedies are discretionary and therefore parties seeking discretionary orders must fully disclose all material before the court. Failure to disclose invites the court to invoke its inherent powers to vacate the orders issued in favour of the guilty party even if the court is not moved. The court can on its own motion act to ensure that court process and legal process is not abused.

18. In this case, I have no doubt in my mind that the ex parte applicants have abused court process and although the prayers by the interested parties in the application are generalized this court finds that generalization to be a procedural technicality which is curable by application of Article 159(2) (d) of the Constitution.

19. A party who lies to the court to grant its orders cannot be allowed to continue enjoying those orders. The court, on discovery that it was misled into issuing such substantive orders which have the effect of creating confusion among Cbet Sacco membership and to embarrass the court, must of necessity vacate those orders.

20. This court has been embarrassed by the orders of 24th November 2016 and 25th November 2016 which as I have stated herein, were made per incuriam.

21. In the premises, I find the notice of motion dated 6th December 2016 merited. And on my own motion, I would, in the circumstances proceed to vacate and set aside the orders of this court made on 24th November 2016 and on 25th November 2016, specifically relating to the prayer for the leave operating as stay and for the assistance of police in the enforcement or implementation of the said stay.

22. The prayer for leave to apply for Judicial Review as granted on 24th November 2016 was conditional upon the substantive motion being filed and served within 10 days from that date. Ten days lapsed on 4th December 2016 and no such substantive motion has been filed and served upon the respondents. Accordingly, that leave as granted has lapsed automatically and therefore there are no more pending proceedings before this court for consideration at the substantive stage.

23. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of December, 2016.

R.E. ABURILI

JUDGE

IN THE PRESENCE OF;

Mr Omollo for the applicant interested parties

Mr Ombwayo for the exparte applicant

CA: Lorna