



**Kipkemboi v Sacco Societies Regulatory Authority & another (Constitutional  
Petition 5 of 2013) [2014] KEHC 3414 (KLR) (4 August 2014) (Judgment)**

*Silas Kipkemboi v Sacco Societies Regulatory authority & another [2014] eKLR*

Neutral citation: [2014] KEHC 3414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION 5 OF 2013**

**K KIMONDO, J**

**AUGUST 4, 2014**

**BETWEEN**

**SILAS KIPKEMBOI ..... PETITIONER**

**AND**

**SACCO SOCIETIES REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NANDI HEKIMA SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner was employed as the Chief Executive Officer of the 2<sup>nd</sup> respondent under a two year contract. The contract was to terminate on 5<sup>th</sup> September 2013. On 3<sup>rd</sup> August 2012, the 1<sup>st</sup> respondent wrote a letter to the petitioner suspending him from office. The petitioner claims that the 1<sup>st</sup> respondent placed a cordon of police officers around the office making it impossible for the petitioner to pick his personal effects or carry out his duties. The 1<sup>st</sup> respondent does not deny deploying armed security around the premises: it justifies it on grounds that the 2<sup>nd</sup> respondent carries on sensitive banking business of a deposit-taking Sacco.
2. The petitioner has thus brought this petition dated 12<sup>th</sup> March 2013 challenging the actions of the 1<sup>st</sup> respondent. The petitioner contends that the action was unlawful; that it was against the tenets of natural justice; that he was denied a fair administrative action and fair labour practice; and, that it contravened his rights enshrined in the Constitution.
3. Those matters are buttressed by two depositions: the supporting affidavit of the petitioner sworn on even date; and, a brief further affidavit of the deponent sworn on 12<sup>th</sup> June 2014. It is averred at paragraph 21 of the supporting affidavit that the actions of the 1<sup>st</sup> respondent violated articles 27, 28, 39, 43 and 50 of the Constitution. The petitioner does not seek to be reinstated into office: he only



prays for declarations that his rights were violated; and, for an award of general and punitive damages. The petitioner also claims costs of the suit.

4. The petition is contested by the 1<sup>st</sup> respondent. There is a detailed replying affidavit sworn by Carlus Ademba, the Chief Executive Officer of the authority. In a synopsis, the 1<sup>st</sup> respondent's case is that it exercises regulatory authority over the 2<sup>nd</sup> respondent; that the suspension of the petitioner was in accordance with section 51 (c) of the *Sacco Societies Act* (hereinafter the Act); and, that the removal was a fair administrative action. The 1<sup>st</sup> respondent also attacks the petition as an abuse of court process because the petitioner failed to disclose the existence of other pending or previous suits over the same subject matter. Those proceedings were in Judicial Review Case No. 20 of 2012, Eldoret and a previous action in Nairobi. The 1<sup>st</sup> respondent contends that the petition does not disclose violations of articles 27, 28, 39, 43 and 50 of the *Constitution*.
5. The 2<sup>nd</sup> respondent has not filed an answer to this petition. It is the petitioner's position that the true respondent is the 1<sup>st</sup> respondent and that the 2<sup>nd</sup> respondent should not be condemned with damages. On 17<sup>th</sup> June 2014, learned counsels for the petitioner and the 1<sup>st</sup> respondent addressed me on their cases. I have considered the petition, the depositions on record and the rival submissions.
6. The 2<sup>nd</sup> respondent is a fringe party. There is no material in the petition disclosing it violated any rights of the petitioner. As I stated, the petitioner is not seeking to be reinstated to the board of the 2<sup>nd</sup> respondent. The learned counsel for the petitioner submitted that the petitioner does not even seek damages against the 2<sup>nd</sup> respondent. The true disputants in this action are thus the petitioner and the 1<sup>st</sup> respondent. I thus find that the 2<sup>nd</sup> respondent was not a necessary party; and, more importantly, no claim lies against it in this action. I have no hesitation in dismissing the petition against the 2<sup>nd</sup> respondent. As the 2<sup>nd</sup> respondent did not answer to the petition, I will not make an order on costs.
7. I will now return to the merits of the petition against the 1<sup>st</sup> respondent. The petitioner seeks prayers and declarations set out at length at paragraph 21 of the petition. They are largely repetitive but I will reproduce them verbatim-
  - a) A declaration that the petitioner is entitled to the enjoyment of the rights enshrined in articles 41, 47 and 50 of the *Constitution* and that the action taken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents impair and / or threaten the enjoyment of these rights.
  - b) A declaration that the petitioner's removal from the employment of the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent was unconstitutional and in breach of principles of natural justice, fair administrative action and fair labour practice.
  - c) The 2<sup>nd</sup> respondent to be ordered and compelled to review their decision and accord the petitioner a fair and lawful for hearing.
  - d) A declaration that the removal from office, by the regulatory authority of the petitioner, was in breach of fair labour practices as enshrined in Article 41 of the Constitution.
  - e) A declaration that the act of forcefully evicting the petitioner, from his workplace, using a heavy police force, and barring the petitioner from ingress (sic) and egress from his work place violated the petitioner's rights to dignity and fair human treatment and breach of protection from inhuman treatment.



- f) By condemning the petitioner using unsubstantiated claims and without a hearing and or a fair administrative action was in violation of articles 47, 39, 43, 28, 27 and 50 of the Constitution.
  - g) A declaration that the right to a fair hearing as enshrined in article 50 of the Constitution was breached by the respondent, by an illegal exercise of authority.
  - h) A declaration that the removal of the petitioner by the 1<sup>st</sup> respondent from the performance or his duties with the 2<sup>nd</sup> respondent was an abuse of statutory authority, usurpation of authority, false assumption of power and unconstitutional.
  - i) The Court be pleased to assess general and punitive damages arising from the violation of the fundamental rights as enshrined in the Constitution and to order and compel the 1<sup>st</sup> and 2<sup>nd</sup> respondent to pay the same jointly and severally.”
8. The 1<sup>st</sup> respondent is a statutory authority created by section 4 of the Sacco Societies Act, Number 14 of 2008. The 2<sup>nd</sup> respondent is a deposit-taking Sacco business licensed by the authority under section 24 and 25 of the Act. I have seen the licence marked as exhibit CA1A in the replying affidavit. By virtue of conducting deposit-taking business, the 2<sup>nd</sup> respondent falls under supervisory regulation of the 1<sup>st</sup> respondent. That supervision may extend to the business of the Sacco or conduct of its board. By virtue of also being a cooperative society, the 2<sup>nd</sup> respondent is also subject to the Cooperative Societies Act. For example, the directors of a Sacco are required by both Acts and Regulations to exercise prudence and diligence of ordinary men of business. See Regulation 59 of the Sacco Societies (Deposit-taking Sacco Business) Regulations 2010. This petition must thus be determined with that legal framework in mind.
9. Section 51 of the Sacco Societies Act gives the Sacco Societies Regulatory Authority the following powers-
- “ 51. Where the Authority determines that a Sacco society conducts its business in a manner contrary to the provisions of this Act or of any regulations made thereunder or any other Act or in any manner detrimental to or not in the best interests of its members or members of the public, or a Sacco society is undercapitalized, the Authority shall—
- (a) restrict, suspend or prohibit the payment of dividends by the society;
  - (b) prohibit the conversion of any profits of the society into capital;
  - (c) direct the suspension or removal of any officer involved in such conduct from the service of society;
  - (d) require the society to reconstitute its board of directors;
  - (e) withhold branch or other corporate approval with respect to such society;
  - (f) undertake regular inspections of that society;



- (g) order the society to submit to the Authority within forty-five days a capital restoration plan to restore the society to capital adequacy as prescribed in section 29 or in the case of issues unrelated to capital such as violations of law, a plan to resolve all deficiencies to the satisfaction of the Authority; .....

10. The section authorizes the authority to suspend an officer from management or to reconstitute the board. There are then Regulations 67(4) and 72(6) of the *Sacco Societies (Deposit-taking Sacco Business) Regulations 2010*. Regulation 67(4) states-

- “(4) Where the Authority has reasonable grounds to believe that an officer of a Sacco Society is engaged or is likely to engage in any act or practice which has occasioned or is likely to occasion a contravention of the provisions of the Act or any regulations or any other law in any manner detrimental to or not in the best interest of its members or of the members of the public, or the survival of the Sacco Society, or has committed an offence, the Authority shall issue administrative directions regarding measures to be complied with or impose such sanctions to be taken against the said officer as it may deem fit as provided for under these Regulations.”

11. Regulation 72 (6) gives either the Sacco or the Authority power to remove an officer from office if the officer-

- “(a) directly or indirectly violates the Act, these Regulations or the Sacco societies bylaws;
- (b) engages or participates in any unsafe or unsound practice in connection with the Sacco Society;
- (c) has a non-performing loan or becomes a bad debtor; and
- (d) commits any act, or practice or fails to take appropriate action, thereby committing a breach of fiduciary responsibility, resulting in or likely to result in—
  - (i) a Sacco Society suffering financial loss or other damage;
  - (ii) members’ interest being prejudiced; or
  - (iii) any party receiving unfair financial gain or other benefit.”

12. Sections 50 and 51 of the Act as read with Regulations 67 and 72 thus grant the authority enormous powers over the management of Saccos. This power has to be understood in the context of prudent management of Saccos and the security of depositor’s funds. Those powers range from inspection, revocation of the operating licence, removal from the board to re-organization of the board altogether. I have studied the inspection report annexed to the replying affidavit and marked CA2 and the findings at pages 14 to 16. In a synopsis, all was not well with the business and financial management of the Sacco.

13. I have then looked at the allegations made by the authority against the petitioner or conduct of the business of the Sacco. They are contained in the letter dated 3<sup>rd</sup> August 2012 suspending the petitioner



from office. That letter was preceded by the inspection carried out by the authority that I referred to. The letter was issued under section 51(c) and Regulations 67 and 72. The key accusations against the petitioner were that he had caused to be incorporated a private company known as Hekima Cooperative Holdings Limited. The two subscribers to the memorandum of the company were Robert Seroney and John Korir. They held all the authorized shares. The petitioner was alleged to have transferred Kshs 5,000,000 from the 2<sup>nd</sup> respondent to the new entity. Loans were also granted to the new company from the 2<sup>nd</sup> respondent amounting to Kshs 8,500,000 and overdrafts of Kshs 4,000,000 in the years 2010 and 2011. Members of the public were invited to take shares in the new company when no such shares were available. It was also alleged that the petitioner had failed to provide a full account for those transactions. A title deed number 1181/117 used to secure some lending was missing from the Sacco's custody. Those appear to me to be serious allegations.

14. It is common ground that the letter containing those and other charges was delivered to the petitioner. He was given 15 days to respond. Although the petitioner contended that his version of the letter did not contain the 15 days' notice, the evidence is to the contrary. Paragraph 8 of his supporting affidavit of states as follows-

“The said letter purported to suspend (sic) for 60 days and require sufficient cause to be shown within 15 days, failing which the petitioner could be removed”

15. Clearly, the detailed allegations or charges were presented to the petitioner. He concedes he was given fifteen days to show cause. The petitioner did not do so. As a result, on 26<sup>th</sup> September 2012, the 1<sup>st</sup> respondent served another letter removing the Petitioner from employment. Granted those circumstances I find that the claim of failure of natural justice is without foundation.

16. I am satisfied that the removal of the petitioner from the board constituted an administrative action. The term administrative action is wider than the final decision. See *Orion East Africa Ltd v The PS Ministry of Agriculture & another*, Nairobi High Court 100 of 2012 [2012] eKLR. Accordingly, the 1<sup>st</sup> respondent was enjoined by the Constitution and the Sacco Societies Act to employ fair, efficient, lawful and expeditious procedures. Article 22 of the constitution entitles the petitioner to approach this Court to enforce his fundamental freedoms in the Bill of Rights. Under article 41, the petitioner has a right to fair labour practices. The petitioner is also entitled to a fair hearing before an independent or impartial tribunal by dint of articles 50 and 159 of the Constitution.

17. Article 47 of the *Constitution* is particularly relevant to the present proceedings. It provides as follows-

“(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.

(3) .....

18. The key question is whether the petitioner was treated fairly by the 1<sup>st</sup> respondent or got a fair hearing or at all. The petitioner was entitled to receive prior notice of the charges or accusations. The right is well explained in *Halsbury's Laws of England*, 5<sup>th</sup> Edition, 2010, Vol. 61 at para. 639 -

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule)



is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

19. There is a plethora of decisions holding that an administrative tribunal must apply the principles of natural justice. See *Onyango Oloo vs. Attorney General* [1986-1989] EA 456, *Joseph Mbalu Mutava v Attorney General & another*, Nairobi, High Court petition 337 of 2013 [2014] eKLR, *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2009, *Florence Moschion v Director of Public Prosecutions & 5 others* Nairobi High Court Petition 341 of 2012 [2013] eKLR, *Ezra Kaibuta v Attorney General*, Nairobi High Court petition 13 of 2013 [2013] eKLR, *Isabel Njoroge v PS Ministry of State for Provincial Administration & 4 others*, Nairobi ELC 745 of 2013 [2014] eKLR, *Republic v Registrar of Societies ex parte Joseph M'bataru* Nairobi High Court JR 451 of 2013 [2014] eKLR.
20. I think the key principles to be distilled from all these authorities are: that there are no hard and fast rules on the procedure to be adapted by various bodies; however, the administrative tribunals must achieve a reasonable degree of fairness throughout their investigations, proceedings and final decisions. If that threshold is not met, then the High Court will be entitled grant appropriate reliefs. The onus to prove the violation of rights rests squarely with the petitioner.
21. From my analysis up to this point, I find that the 1<sup>st</sup> respondent had oversight powers over the 2<sup>nd</sup> respondent; that it had power to remove the petitioner from the management of the Sacco or to reconstitute the board. The petitioner was notified in writing of the charges, he was granted adequate notice of fifteen days to respond, and that he failed to respond. The Sacco Societies Regulatory Authority then became entitled to remove him from the board for failure to show cause. The letter of removal dated 26<sup>th</sup> September 2012 was also served upon the petitioner by a court process server on the 27<sup>th</sup> September 2012. I am also satisfied that it was the suspension of the petitioner which was to last for a period of sixty days, while the period within which the Petitioner was to respond to the issues against him in the letter of 3<sup>rd</sup> August 2012 was fifteen days.
22. I observed earlier that the petitioner conceded in his affidavit that he knew he had fifteen days to show cause. He did not do so. I have laid the background to the removal of the petitioner from management. There were serious allegations of mismanagement or financial impropriety. I am unable to say the removal was arbitrary or capricious. I find the action of the authority was well within its mandate under section 51 (c) of the *Act*, as read with Regulations 67 and 72 of the *Sacco Societies (Deposit-taking Sacco Business) Regulations 2010*.
23. The petitioner slept on his rights. It cannot now fall from his lips that his rights under articles 22, 27, 28, 39, 41, 43, 47 and 50 were violated. He became the author of his own misfortune. It was not exactly clear why the authority picked on the petitioner or two other directors for removal from the board. It may well be that some of the actions were sanctioned by the board or the general meeting. But the petitioner sat at its apex; he was a leader. He was personally served with the charges from the authority. In matters of this nature, it behoved the petitioner to be diligent in pursuit of his own rights. I would not say that his rights to equal protection and equal benefit of the law enshrined in article 27 of the *Constitution* were thus violated.
24. I have also studied the petitioner's further affidavit sworn on 12<sup>th</sup> June 2014. The primary complaint is that the 1<sup>st</sup> respondent has continued to hound the petitioner. When the petitioner was shortlisted for a County Executive's position in Vihiga in 2013, the 1<sup>st</sup> respondent wrote a letter dated 2<sup>nd</sup> July 2013 objecting to the appointment. I have noted that the County had placed a notice in the Daily Nation newspapers of 1<sup>st</sup> June 2013 inviting comments from the public on the suitability of the candidates.



The 1<sup>st</sup> respondent had noted that the petitioner was described in the advertisement as the general manager of the 2<sup>nd</sup> respondent. That was not so in view of his removal, the subject matter of this petition. The 1<sup>st</sup> respondent, as a legal person, was entitled to make those comments. They might have gone overboard but I am unable to hold they violated the petitioner's rights under articles 41, 27, 28, 39, and 43 of the Constitution. In the very end, I find that the petitioner has failed to discharge his onus of proof that the 1<sup>st</sup> respondent has violated any of his rights under the Constitution. In the result, the Court cannot issue any of the declarations sought in the petition.

25. I stated that the petitioner is not seeking to be reinstated into leadership of the 2<sup>nd</sup> respondent. What the petitioner seeks are general and punitive damages for breach of his fundamental rights. Having found that the respondents did not commit such breaches; and having found no evidential foundation for the declarations sought in the petition, it must follow, as a corollary, that the claim for damages is on a legal quicksand. It is also dismissed.
26. Lastly, the petitioner conveniently omitted to plead in the petition that there were other proceedings between the parties over the same subject matter. When the petitioner was served with the letter of suspension dated 3<sup>rd</sup> August 2012, he and three other directors of the Sacco filed an application for judicial review against the 1<sup>st</sup> respondent being Judicial Review Case No. 20 of 2012 at the High Court of Kenya in Eldoret. The matter was last scheduled for hearing on 27<sup>th</sup> November 2012. Learned counsel for the petitioner opined that since this is a constitutional petition, there was no requirement for such disclosure. I disagree. It was material non-disclosure. Learned counsel for the 1<sup>st</sup> respondent stated there were still other proceedings filed in Nairobi. The filing of parallel applications seeking near similar reliefs in different courts amounted to an abuse of court process. It has not also been lost on me that this petition was not presented to Court until 13<sup>th</sup> March 2013 long after the material complaint and subsequent to those other court actions.
27. The upshot is that the entire petition is devoid of merit. It is dismissed with costs to the 1<sup>st</sup> respondent. It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 4<sup>th</sup> day of August 2014.**

**GEORGE KANYI KIMONDO**

**JUDGE**

Judgment read in open Court in the presence of:-

Ms. R. Tum for Mr. Magare for the petitioner instructed by Magare & Musundi advocates.

No appearance for the 1<sup>st</sup> respondent.

No appearance for the 2<sup>nd</sup> respondent.

Mr. Kemboi, Court Clerk.

