



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**JR MISC. APPL. NO 119 OF 2011**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COMMISSIONER OF  
CO-OPERATIVE DEVELOPMENT ..... RESPONDENT**

**AND**

**MAWASILIANO SACCO  
SOCIETY LIMITED ..... INTERESTED PARTY**

***EX PARTE***

**TELKOM KENYA LIMITED**

**RULING**

**Introduction and background**

1. The issue for consideration in this decision is which party is liable to settle costs after the determination of a judicial review application.
2. The judgment was delivered pursuant to a Notice of Motion filed in court on 19<sup>th</sup> May 2011 in which Telkom Kenya, the *ex parte* applicant (“Telkom”) had sought various orders against the Commissioner of Co-operative Development (“the Commissioner”). At the centre of the controversy was the deduction and submission of co-operative loan dues owed by Telkom’s employees to the Mawasiliano Sacco Society Limited (“Mawasiliano”), the interested party herein, on account of their employees.
3. On or about 6<sup>th</sup> May 2011, P.N. Gichuhi acting on behalf of the Commissioner issued a Notice under the *Co-operative Societies Act (Chapter 490 of the Laws of Kenya)* requiring Telkom to

make an appropriate proposal on how to pay Kshs 51,062,660.00 owed to Mawasiliano on account of monies deducted from its employees. The notice was followed by agency notices issued to Telkom's bankers requiring the Telkom to pay the Commissioner. Telkom contested the notices by urging that there was no basis for the issuing the notices by the Commissioner on behalf of Mawasiliano and further stating that it did not have any instructions to deduct any monies from its employees' emoluments.

4. After weighing the parties arguments, Githua J., ruled in favour of Telkom by a judgment issued on 26<sup>th</sup> March 2012. She concluded that, "*In the end, the Notice of Motion dated 18<sup>th</sup> May 2011 succeeds and it is hereby allowed in terms of prayers (b) and (c) as stated herein above with costs to the Applicant.*"
5. Following the decision, Telkom presented its bill of costs for taxation. The bill is now pending before the Deputy Registrar of this court.
6. Since the order on costs did not specify whether it is the respondent or the interested party who should pay the costs. Mawasiliano therefore moved the Court by a Notice of Motion filed on 25<sup>th</sup> July 2013 seeking, *inter alia*, the following orders:

*[2] THAT this Honourable court be pleased to determine who is liable to pay costs awarded by this court on the 26<sup>th</sup> March, 2012 to the applicant.*

*[3] THAT pending the hearing and determination of this application there be a stay of the taxation of the applicant's bill of costs dated and filed in court on the 5<sup>th</sup> day of June 2013."*

### **The arguments**

7. Mawasiliano submitted that in judicial review cases, if costs are awarded to the *ex parte* applicant, they can only be paid by the respondent being the body responsible for the infraction and that the interested party should not be burdened with the costs as it only appeared in the matter due to the interest it had in the outcome of the case. It further argued that costs follow the event but where there are three parties such as obtains in this case, the court should specify who should pay costs. In judicial review matters, it argued, the contest was between the *ex-parte* applicant and the respondent and that the interested party is merely affected but the decision impugned is that of the respondent who should bear the burden of costs.
8. The Commissioner however rejects this line of argument. It argues that in judicial review proceedings any party is liable to pay costs. Its position is that the respondent was not a mere spectator to the suit as it had actively participated in the proceedings as such it cannot distance itself from payment of costs. The Commissioner states that he was acting on behalf and for the benefit of the Mawasiliano in issuing the agency notices which led to the filing of these proceedings. The respondent urges the court to clarify that the costs were payable by the interested party.
9. The beneficiary of the costs order, Telkom, left the issue to the court.

### **Determination**

10. This application is in the nature of a review and since Githua J., has been transferred to another station, I am obliged to hear it.
11. The general rule, which is set out in **section 27** of the **Civil Procedure Act** is that costs follow the event. Who to pay costs is dependent on the circumstances of each particular case. In the present matter, the Commissioner was purporting to exercise a statutory power in accordance with **section 35** of the **Co-operative Societies Act** which permits him to institute legal proceedings in court on

behalf of a co-operative society for recovery of the sum owing under that section. The respondent, the Commissioner for Co-operative Development, is established under **section 3** of the Act and is responsible for, “(3)...*the growth and development of co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.*”

12. The decision impugned by the judicial review proceedings is that of the Commissioner and since the Commissioner was exercising a statutory power, it was under the duty to satisfy itself of the legality or propriety of the act. While it is correct to state that Mwasiliano was the ultimate beneficiary of the exercise of that power, the Commissioner was responsible for exercise of that power. This does not stop the Commissioner from demanding indemnity from the interested party. The interested party in this case does not bear responsibility for the decision challenged. While there may be circumstances that an interested party may be liable to pay costs, the learned judge did not address the issue in the judgment and I would not hazard a guess as to what she intended. I therefore find and hold that the interested party is not liable for the applicant's costs in the circumstances of this case.

### **Disposition**

13. My final orders are as follows;

- a. The Judgment dated 26<sup>th</sup> March 2012 is reviewed to the extent that respondent shall bear the costs of the Notice of Motion dated 18<sup>th</sup> May 2013.
- b. There shall be no order as to costs for the application.

**DATED** and **DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of August 2013.

**D.S. MAJANJA**

### **JUDGE**

Ms Mbabu instructed by P. K. Mbabu and Company Advocates for the ex- parte applicant.

Mr Maina, Advocate instructed by the Commissioner for Co-operative Development.

Mr Ombete instructed by L. M. Ombete and Company Advocates for the interested party.