REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 280 OF 2012

REPUBLIC…….....APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....RESPONDENT

KENYA INSURERS SACCO LIMITED……..INTERESTED PARTY

EXPARTE:

MOSES KAMAU MAINA &

DUNCAN MUCHINA KAMAU

JUDGEMENT

Moses Kamau Maina and Duncan Muchina Kamau are the 1st and 2nd ex-parte applicants respectively and will henceforth be simply referred to as the 1st Applicant and the 2nd Applicant. The Commissioner for Co-operative Development is the Respondent. This is an office created under Section 3 of the Co-operative Societies Act Cap 490 (the Act) and the Respondent is by Section 3(2) mandated to "**be responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.**"

Through a ruling delivered by this court on 29th November, 2012 the Kenya Insurers Sacco Limited was allowed to participate in these proceedings as an Interested Party. The Interested Party (the society) is registered as a society under the provisions of the Act and is therefore governed by the provisions of the Act.

According to the papers filed in court by the applicants, the applicants are former officials of the management committee of the society. The management committee is made up of nine members and of these members four of them being the Chairman, Vice-Chairman, Secretary and Treasurer constitute the Executive Committee. The 1st Applicant served in the Executive Committee between 2nd April, 2005 and 10th May, 2008 whereas the 2nd Applicant served in the same Committee between 10th May, 2008 and

13th April, 2011.

By way of a letter dated 31st August, 2010 the Executive Committee requested the Respondent to conduct an inquiry into the financial affairs of society. This decision had been sanctioned by the members of the society through a resolution in an Annual General Meeting. The Respondent subsequently conducted the inquiry and the applicants were indeed asked to provide information on the affairs of the society to the Respondent's officers. On or about 19th January, 2012 the applicants separately received letters dated 5th January, 2012 forwarding notices of intention to surcharge dated 22nd December, 2011. The decision to surcharge them was allegedly in pursuance of a resolution of the members of the society in a special general meeting. The applicants submitted their replies as required by the notices. Through letters dated 3rd June, 2012 forwarding notices dated 31st May, 2012, the applicants were informed by the Respondent that they had been found liable for mismanagement of the society and they were ordered to pay Kshs.802,087/= and Kshs.714,416/= respectively within 30 days.

The applicants were dissatisfied with the decision to surcharge them and that is why they moved to this court on 12th July, 2012 to seek leave to commence these judicial review proceedings. Pursuant to the leave granted on the same day, the applicants filed the notice of motion dated 25th July, 2012 in which they seek orders as follows:-

> **"1. That an order of certiorari do issue to quash the decision by the Commissioner for Co-operative Development, the Respondent herein, contained in a Notice dated 31st May, 2012 and communicated to the Applicants vide a letter dated 3rd June, 2012 pursuant to the findings of an inquiry of the Kenya Insurers Sacco Limited instituted under Section 58 of the Co-operative Societies Act purporting to surcharge the applicants.**
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> **2. THAT an order of prohibition do issue to prohibit the Commissioner for Co-operative Development whether by himself or any of his agents or through any other persons from effecting or enforcing the surcharge orders against the Applicants contained in a Notice dated 31st May, 2012 and communicated to the Applicants vide letter dated 3rd June, 2012 on the basis of an Inquiry Report dated June, 2011 and the Kenya Insurers Sacco Limited members' resolution at a special meeting or any other meeting thereof and further to prohibit the Respondent whether by himself or any of his agents or through other persons from further relying on the Inquiry Report dated June, 2011 against the 1st and 2nd Applicants.**

3. Costs of these proceedings.

The Respondent Mr. Fredrick F. Odhiambo opposed the application through a replying affidavit sworn on 23rd October, 2013. The application is also opposed by the society through a replying affidavit sworn by its Chairman, Mr. Philip Masinde on 22nd January, 2013.

The applicants' case is that the Respondent had no authority to surcharge them for any loss suffered by the society since the powers given to the Respondent by Section 58(4) of the Act does not include the power to surcharge.

At this juncture I reproduce the entire Section 58 of the Act since the applicants' case revolves around it. The said Section provides that:

> **"58. Inquiry by Commissioner**
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> **(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."

It is the applicants' case that the decision to surcharge them was therefore *ultra vires* the Act and hence illegal, null and void. The applicants further argue that any decision to surcharge them could only be made under Section 73 of the Act and that particular Section clearly provides for an inquiry before a decision to surcharge is made. Section 73 provides that:

"73. Power to surcharge officers of co-operative society

(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."

The applicants asserted that the officers appointed to conduct the inquiry exceeded their mandate by making a decision to surcharge them yet Section 58 clearly restricts any inquiry under that Section to an inquiry into the by-laws, working and financial conditions of a co-operative society. The applicants submitted that by failing to comply with the provisions of sections 58 and 73 of the Act, the Respondent contravened Article 10 of the Constitution which requires public officers, to among other things, comply

with the laws of this country. The applicants also submit that the Respondent acted unreasonably, irrationally and unlawfully by taking into account irrelevant matters before reaching his decision thereby contravening Articles 47(1) and 232 of the Constitution.

In furtherance of this argument the applicants referred this court to the decision of H. M. Okwengu, J (as she then was) in **REPUBLIC v REGISTRAR OF CO-OPERATIVE SOCIETIES & ANOTHER EX-PARTE JOHN GITHINJI WANGONDU & 8 OTHERS [2005] eKLR** where after quoting Section 58 of the Act she held that:-

> **"It is apparent from the above provisions that an inquiry instituted under Section 58 of the Act has no reference to Section 73 of the Act and cannot result in a surcharge of the officials but can only lead to a dissolution of the committee and an appointment of the interim committee....."**

The learned Judge then proceeded to consider Section 73 of the Act and concluded that:

> **"It is apparent from the above that the Commissioner can only order surcharge against any person who has misapplied, retained or misappropriated the society's money or property or has been guilty of misfeasance or breach of trust in relation to the society after inquiring into the conduct of the specific person or persons.**
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> **A general enquiry into the by-laws, working and financial conditions of any co-operative society carried out under Section 58 of the Act cannot therefore be the basis for an order of surcharge by the Commissioner but can only lead to further inquiry into the conduct of the specific persons under Section 73 of the Act.**
>
> **The order of surcharge of the applicants made by the Commissioner based on an inquiry of the society's affairs carried out under Section 58 of the Act was therefore made without jurisdiction and was an abuse of the powers of the Commissioner under the Act."**

Secondly, the applicants attacked the impugned decision on the grounds that the Respondent breached the rules of natural justice and the duty to act fairly by failing to consider whether the applicants were given an opportunity to be heard before the Inquiry Report was compiled. It is the applicants' case that failure by the Respondent, at the stage of compiling the report and at the stage of making the surcharge decision, to take into account their representations amounted to a breach of the rules of natural justice and can only lead one to conclude that the decision was informed by malice and unlawful motive.

Thirdly, the applicants submitted that their legitimate expectation was violated and breached due to the Respondent's failure to scrupulously adhere to the provisions of Section 58 of the Act as read together with Articles 10 and 47 (1) of the Constitution.

Finally, the applicants argued that the Respondent frustrated and thwarted the legislative purpose by acting in excess of the authority and power conferred upon his office by the Act.

In response to the submissions of the applicants, the Respondent asserted that once the inquiry was completed and the Inquiry Report read and adopted by the members of the society, the Inquiry Report passed to the hands of the society and no action can lie against the Respondent in respect of the report.

The Respondent contended that after giving the applicants the notices of intention to surcharge they responded to the allegations in the said notices and after considering the responses which amounted to mere denials he made a decision to surcharge them. The Respondent submitted that if the applicants were indeed aggrieved by his decision to surcharge them then they ought to have appealed to the Co-operative Tribunal instead of resorting to the judicial review process which is not available to them considering the circumstances of this case.

The society's attack on the application was premised on grounds similar to those of the Respondent. It is

the society's case that the Respondent complied with the law prior to arriving at the decision to surcharge the applicants. The society's replying affidavit is very detailed on the steps taken by the Respondent in connection with this matter. As to the scope of sections 58 and 73 of the Act, the Chairman of the society averred at paragraphs 10 and 11 of his replying affidavit as follows:

> **"10. THAT there is nowhere in the inquiry order that the Respondent intended that surcharge be enforced under Section 58 of the Co-operative Societies Act as alleged by the Applicants.**
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> **11. THAT I have further been advised by my Advocate on record Mr. T.M. Getange and I verily believe it to be true that the Applicants' view that Section 58 and 73 of the Co-operative Societies Act operate independently is baseless for the following reasons.**
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> **(a) There cannot be a surcharge issued without previous inquiry under Section 73 of the Co-operative Societies Act.**
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> **(b) Surcharge must be hinged on the inquiry report.**
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> **(c) The Applicants have not demonstrated the inquiry contemplated by Section 73 of the Act is done under what provisions of the Co-operative Societies Act other than under Section 58.**
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> **(d) There is absolutely no basis for the reasoning that the inquiry conducted under Section 58 of the Act cannot be used as a basis for surcharge under Section 73 of the Co-operative Societies Act."**

I believe I have sufficiently captured the positions taken by the respective parties in this case. In my view the deciding question is whether the Respondent acted within the law in arriving at the decision to surcharge the applicants.

I have been confronted with two conflicting decisions as regards the application of Section 73 of the Act. In the already cited case of **REPUBLIC V REGISTRAR OF CO-OPERATIVE SOCIETIES & ANOTHER EX-PARTE JOHN GITHINJI WANGONDU & 8 OTHERS [2005] eKLR** H. M. Okwengu, J (as she then was) appeared to have held the view that in order for a person to be surcharged, a separate inquiry ought to be conducted under Section 73. This is the position the applicants align themselves with. The Respondent referred me to the decision of Warsame, J (as he then was) in the case of **MENELIK MAKONNEN & ANOTHER v COMMISSIONER OF CO-OPERATIVE SOCIETIES & ANOTHER AND BALOZI HOUSING CO-OPERATIVE SOCIETY LTD, Nairobi H.C. Misc. Application No. 158 of 2011** where the learned Judge was of the view that once an inquiry report is adopted by a society under Section 58 of the Act, then an opportunity given to those implicated to respond to the findings of the inquiry will suffice for purposes of Section 73 of the Act. This is what the Judge said:-

> **"The evidence available is that the applicants were given an opportunity to rebut the contents of the report and show cause why they should not be surcharged for the amounts misappropriated."**

The learned Judge went ahead and dismissed the applicants' attempt to quash the decision made by the Commissioner for Co-operative Societies to surcharge them.

In my view, the facts in the case of **MENELIK MAKONNEN,** supra, are closer to the facts of the case before me.

Let me step back from these two cases and consider what, in my understanding, is the correct interpretation of sections 58 and 73 of the Act. Under Section 58 (1) the Respondent can on his own accord or as directed by the Minister or on the application of not less than one third of the members of a

co-operative society, conduct an inquiry into the by-laws, working and financial conditions of any co-operative society. After the inquiry the Respondent shall make a report of his findings at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report. That means the report ought to come up with solutions for any problems or challenges a society may be undergoing. Under Section 58(4) the Respondent is expected to carry out a further inquiry and if satisfied that the committee of a co-operative society is not performing its duties properly, he may dissolve the committee or cause to be appointed an interim committee.

On the other hand under Section 73 the Respondent may on his own accord or on the application of a liquidator or of any creditor or member inquire into the conduct of any officer, member or person who has taken part in the management of a society where it is alleged the person has misapplied or retained money or property of the society or has been guilty of misfeasance or breach of trust in relation to the society. In my view, the two sections envisage different inquiries. An inquiry under Section 58 is an all-purpose inquiry. It seeks to find the root cause of whatever hails a given society.

On the other hand, Section 73 is targeted at particular individuals who are managers, officers or members of a society. Section 73 is meant to provide a solution in a situation where the answer is almost obvious. In such situations it is known that a committee member, an officer or a member of society has misappropriated certain money or property. The Respondent only goes in to confirm if the allegation is true and then goes ahead to recover the money by way of surcharge. That is why Section 73 is titled **"power to surcharge persons of registered society."** In my view, the said Section was purposely inserted in the Act to ensure that any misappropriated money or property of a society can be quickly recovered without resorting to long-winding procedures. It is one of the most powerful tools that the Commissioner can use to protect co-operative societies.

The question therefore is whether the two sections should operate independent of each other. In my opinion, the answer is in the negative. If, from an inquiry conducted under Section 58, the Commissioner discovers that a member of the management committee or an officer or member of a society has misappropriated the society's money, the Commissioner needs not institute another inquiry under Section 73. The inquiry carried out under Section 58 will suffice. The only thing the Commissioner needs to do is to ensure that the rules of natural justice are complied with. This is important because an inquiry under Section 58 is not targeted at a particular individual. Once the Commissioner decides to exercise the power of surcharge he must ensure that the identified individual is given an opportunity to respond to the findings contained in an inquiry report.

Did the Commissioner/Respondent comply with the law in the instant case? The Respondent and the society submit that he did so. The applicants say he did not. The starting point is the Inquiry Order. The Order dated 23rd May, 2011 was issued under the hand of the Respondent and it states that:

> **"WHEREAS I have on my own accord, decided that an Inquiry be held into the –**
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> i. **by-laws;**
> ii. **working and financial conditions; and**
> iii. **the conduct of the management committee, and past or present members or officers of KENYA INSURERS SACCO SOCIETY LTD-CS/4515 and in accordance with Section 58 as read together with Section 73 of the Co-operative Societies Act Cap 490 Laws of Kenya.**
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> **Now therefore, I authorize (1) Mr. F. M. Maina – Co-operative Officer – Kajiado District (2) Mr. Elijah Njoroge Nyinya Co-operative Auditor – Muhoroni District to hold an Inquiry within (5) days at such place and time as may be expedient and duly notified by them.**
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> **The attention of all officers and members of the society is directed to the following Sections of the Co-operative Societies Act.**
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> **Section 60(1) – Cost of Inquiry**

Section 60 (2) – Recovery of Costs of Expenses

Section 94 – Offences

Section 73 – Surcharges."

From the beginning, the Respondent was clear that the inquiry was twin-pronged. Officers and members of the society were put on notice through the said Inquiry Order. There is evidence that the applicants having participated in the management of the society were interviewed on 2nd June, 2011. At that stage they were not being accused of anything. They were being asked to give information that could assist in the probe into the affairs of the society.

The applicants submitted that the Inquiry Notice was published in the Kenya Gazette of 24th June, 2011 long after the inquiry had been concluded. Nowhere in their court papers did the applicants raise this issue. The Respondent and society did not therefore respond to the same. It would be unfair to the Respondent and society for me to make any finding on this issue since they were never given an opportunity to respond to it. I will however state that the fact that the Inquiry Order was published on 24th June, 2011 did not in any way prejudice the applicants. They were all along aware of the inquiry. They attended the Annual General Meeting that recommended that the Respondent be asked to conduct an inquiry. The applicants participated in the inquiry. After the Inquiry Report was prepared the Respondent gave the applicants an opportunity to respond to his intention to surcharge them. The verifying affidavit sworn by the 2nd Applicant on 11th July, 2012 clearly indicates that the 2nd Applicant responded through an advocate to the notice of intention to surcharge.

By asking the applicants to show cause why they should not be surcharged, the Respondent was conducting an inquiry for the purposes of Section 73 of the Act. The Respondent was in the process of implementing the Inquiry Report and in particular the 1st Resolution by the Special General Meeting of 27th August, 2011 to the effect that those mentioned in the Inquiry Report be surcharged. The Inquiry Report needed to be implemented and the applicants could only be surcharged under Section 73 of the Act. Even if, as averred by the applicants, the Inquiry Order had not mentioned Section 73, I am of the view that the Respondent was still entitled, to proceed with the surcharge process as he did. In my view what he did amounted to an inquiry under Section 73 of the Act.

The applicants were given an opportunity to present their side of the story and they did so. The Respondent was not satisfied about their explanations and he exercised the powers conferred upon him by Section 73 and went ahead to surcharge them. The next port of call for the applicants was the Co-operative Tribunal as Section 74 of the Act provides that:-

"74. Appeal against order

(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

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

The applicants having been taken through a fair process had no reason for resorting to the judicial review mechanism. They were heard before they were surcharged and their legitimate expectation to a fair and legal process was met. If indeed they were not given particulars and the copy of the report as they alleged, then they were entitled to call for these documents before proceeding to respond to the notice of intention to surcharge. I, however, do not believe that they were not supplied with particulars of the allegations against them. I do not see how their advocate could have responded to the notices of intention to surcharge if he had no particulars of the allegations against them.

The summary of it all is that the Respondent complied with and acted within the provisions of sections 58

and 73 of the Act. He also gave the applicants an opportunity to defend themselves before surcharging them. That being so, their application fails and the same is dismissed with costs to the Respondent and the society/Interested Party.

Dated, signed and delivered at Nairobi this 5th day of December , 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT