



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION 37 OF 2009

1. JAMES OTARI MUHANJI

2. ALFRED KHADAMBI

3. OBWOLI KAVELI OBWOLI

4. JOHN K. KIDAKE

5. WILSON MATENDECHERE

6. ZABLON MUSUMBA

7. THOMAS ANDALA.....APPLICANTS

VERSUS

THE COMMISSIONER FOR CO-OP.....RESPONDENT

R U L I N G

In July, 2008 the Commissioner for Co-operative Development appointed Esmail B. Mengich and Charles M. Mugwika to inquire into the by laws, working and financial conditions of Vihiga Teachers Sacco Society Limited CS/No: 7366. The report was to be compiled within 30 days from 24th July, 2008. As a result of that inquiry the ex-parte applicants were issued with surcharge notices for various amounts as follows:

	Kshs
JAMES OTARI MUHANJI	1,240,609.20
ALFRED KHADAMBI	1,230,609.20
JOHN KIDAKE	1,230,609.20
OBWOLI KAVELI OBWOLI	1,164,518.30
JOHN KIDAKE	1,230,609.20
WILSON MATENDECHERE	89,590.85

ZABLON MUSUMBA

89,590.85

THOMAS ANDAHA

23,500.00

Surcharge orders were later issued by the Commissioner for Co-operative Development on 4th June, 2009 demanding payment within 30 days. This led to the filing of this application whereby the ex-parte applicants are seeking an order of certiorari to issue directed at the decision by the respondent to surcharge the applicants and have it quashed:

The applicants contend that the respondent used the wrong procedure. The investigation of the Sacco was conducted under the provisions of **Section 58** of the Co-operative Societies Act and not under **Section 73** of that Act; that they were not accorded the right to respond to the allegations and were therefore condemned unheard. Further that there were disputes involving leadership of the Sacco and at one time they were removed from office. The applicants maintain that a surcharge can only be made after an inquiry has been made on the conduct of a specific person which was not the case: The applicants rely on the case of **REPUBLIC VS THE REGISTRAR OF CO- OPERATIVE SOCIETIES** and the **Commissioner of Co-operative Society exparte Peter Githinji & others: Misc Civil Application number 23 of 2005, NYERI.**

In reply to the applicant's contentions, the respondent maintains that the application is fatally defective and that the applicants did not exhaust the avenue of redress available to them. The respondent contends that he was not served with the notice to the Registrar as well as the statutory statement and that the applicants could have lodged an appeal to the Co-operative Tribunal under **section 74(1)** of the Co-operative Societies Act. Further, the appellants could still have another avenue by appealing to the High court after a decision of the Co-operative Tribunal was made. The applicants were surcharged after the inquiry observed that the Sacco had been embezzled and that that decision was unanimously adopted by the members of the Sacco. The respondent relies on the case of **Josephat Omune & 10 others - Vs- Commissioner of Co-operative Societies & another, Civil Appeal No. 35 of 2007, Kisumu, Kenya Telecommunications Investment Group Limited Vs Telecommunications Commission of Kenya, Miscellaneous Application No. 1267 of 2003, Nairobi, speaker of the National Assembly Vs Karume. Civil Application No. Nairobi 92, 1992 and Birmingham City Council ex parte Ferrero Limited (1993) 1 All ER- 530.**

Order LIII Rule (3) of the old Civil Procedure rules provided that an applicant for judicial review orders had to give notice of the application for leave at least one day before lodging the application to the registrar. There is no provision that the notice must be served upon the respondents. The record shows that the applicants gave notice on 18th September 2009. Leave to file a substantive application was issued on 25/9/2009. I do find that the issue raised by the respondent relating to service of the notice has no effect on the application herein. The applicants contend that the respondents were served. The substantive application was filed on 12th October, 2009.

The main issue is whether the applicants deserve the orders being sought. Did the respondent exceed his powers or acted in excess of his powers.

Section 58 of the Co-operative Societies Act No. 12 of 1997 provide as follows:-

58 (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, account books documents and securities of the society and furnish such information in regard to the affair 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 recommendation 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:

(a) Dissolve the committee

(b) Cause to be appointed an interim committee consisting of not more than five members of the society for a period not exceeding 90 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.”

The report by the two investigators appointed by the respondent give the description and terms of reference as follows:-

2: DESCRIPTION OF ASSIGNMENT-

Whereas the Commissioner for Co-operative Development, on his own accord decided that an inquiry be held into the by-laws, working and financial condition of Vihiga Teachers SACCO Society Ltd, CS/NO.7366, in accordance with section 58 of the Co-operative Societies Act, Cap 490 Laws of Kenya, he therefore proceeded to authorize the assignees to hold an inquiry within 30 days from the date of 24th July, 2008 at such time and place as may be expedient to the Inquiry Officers.

3. TERMS OF REFERENCE

The terms of reference, as communicated to Inquiry Officers are to inquire into the By-laws, working and financial condition of Vihiga Teachers SACCO Society Ltd, CS/No: 7366- Vihiga District.

The report recommended that the sitting Board members who were adversely affected by the report were to be barred from seeking re-election.

It is clear that the respondent appointed the two investigators under **Section 58** of the Cooperative Societies Act: under those provisions there is no room for appeal and the only powers the Commissioner can exercise after due inquiry is made is to either:-

a) Dissolve the Committee, or

b) Cause to be appointed an interim Committee consisting of not more than five members of the society for a period not exceeding 90 days.

The contentions by the respondent that the applicants did not exhaust the available remedies is not supported by the provisions of section 58 of the Act:

Section 73 of the Co-operatives Societies Act number 12 of 1997 provide as follows:

73 (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 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 likely to be prosecuted.”

On 4th June 2009 the respondent issued a surcharge order. The title of the order shows that it was issued under **Section 58** and **73** of the Co-operative Societies Act (Cap 490). By that time that Act had been repealed. The notice states as follows:-

“This is to forward to you surcharge order for a sum highlighted against your name in accordance with Section 73 of the Co-operative Societies Act.”

This order is signed by one Fondo Nzovu for the Commissioner. On the same date, 4th June 2009 the Commissioner of Co-operative Societies himself signed surcharge orders requiring the applicants to pay the surcharged amount within 30 days failing which legal proceedings were to be instituted against them. That order ends as follows:-

“Please take further notice that the provisions of Section 73 regarding costs and right of appeal shall apply.”

A surcharge is equivalent to being indebted. The applicants herein are in the position of being indebted to the Vihiga Teachers Co-operative Society. The investigation report purportedly found that they did not handle their respective judiciary roles as expected of them and either had caused loss of the amounts they are surcharged or unfairly benefited from the transactions of the SACCO.

From the provisions of **Sections 58** and **73** of Act number 12 of 1997, it is clear that an inquiry conducted under Section 58 does not require the investigators to investigate a specific individual and that the outcome of the investigation does not lead to a surcharge. On the other hand, an inquiry under Section 73 of the Act enables the investigators to inquire into the conduct of a specific member of a SACCO and depending on the outcome of the inquiry, the commission can require the investigated member to restore or repay any misappropriated funds or property. An inquiry under Section 73 enables the person being investigated to defend himself and give his explanation to the investigators.

To this end, I do entirely agree with the holding of Justice H.M. OKWENGU in the case of **Ex-parte John Githinji Wangondu & Others, Nyeri Miscellaneous Application Number 23 of 2005**. The applicants herein were not accorded the right to defend themselves. They were condemned unheard. Having conducted an inquiry under **Section 58** of the Co-operative Societies Act, there was no legal basis to surcharge the applicants. Such an action was in excess of the Commissioner’s powers. However, that does not absolve the applicants from blame as the Commissioner is free to either conduct an inquiry under Section 73 of the Act or the Sacco members can invite the police to make investigations.

The upshot is that the applicants’ application dated 12th October 2009 is allowed. An order of certiorari shall issue as prayed. The respondent shall meet the costs of this application.

Delivered, dated and signed at Kakamega this 27th day of March 2012

SAID J. CHITEMBWE

J U D G E