



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW 239 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS BY CAPT.  
FRANCIS E. K. HINGA**

**AND**

**IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COMMISSIONER FOR CO-OPERATIVES  
DEVELOPMENT AND**

**MARKETING.....1<sup>ST</sup> RESPONDENT**

**ANNE OCHOKI .....2<sup>ND</sup> RESPONDENT**

**VINCENT NYONGESA.....3<sup>RD</sup> RESPONDENT**

**EX-PARTE.....CAPTAIN FRANCIS E K HINGA**

**INTERESTED PARTY...AMBASSADOR NJUGUNA NGUNJIRI**

**JUDGMENT**

The Commissioner for Co-operatives Development and Marketing (the 1<sup>st</sup> respondent) through an inquiry order dated 30<sup>th</sup> November, 2010 appointed Mrs. Anne Ochoki (the 2<sup>nd</sup> respondent) and Mr. Vincent Nyongesa (the 3<sup>rd</sup> respondent) to inquire into the affairs of Balozi Housing Co-operative Society Limited (hereinafter simply referred Society). At the time of the inquiry Captain Francis E. K. Hinga (the ex-parte applicant) and Ambassador Njuguna Ngunjiri (the interested party) were among the members of the Management Committee of the Society.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents upon conclusion of the inquiry came up with a report dated 28<sup>th</sup> December, 2010 titled "INQUIRY REPORT INTO THE AFFAIRS OF BALOZI HOUSING CO-OPERATIVE

GS/NO.6080” (hereinafter simply referred to as the report). At pages 5 and 6 of that report the 2<sup>nd</sup> and 3<sup>rd</sup> respondents made comments as follows:-

**“There was a strong feeling that two members of the committee whose ownership of their houses is questionable (in that they acquired their houses in lieu of payment for services rendered, while there is little evidence to show they rendered services of that magnitude) were working for the previous committee. As such, the two Captain Hinga and Ambassador Ngunjiri were always bringing quarrels and arguments in the committee, thereby derailing the purposes of the committee.”**

The 6<sup>th</sup> recommendation at page 16 of the report states that:-

**“The two committee members Ambassador Njuguna Ngunjiri and Captain Kaphian Edward Hinga should be removed from the management committee.”**

The ex-parte applicant was not amused by the contents found in pages 5 and 6 of the report and on 17<sup>th</sup> October, 2011 he moved to court and obtained leave to commence judicial review proceedings. Through a notice of motion dated 19<sup>th</sup> October, 2011 the ex-parte applicant seeks orders against the respondents as follows:-

- 1. An ORDER of CERTIORARI removing into this court and quashing part of the inquiry report by the respondents on the affairs of Balozzi Housing Co-operative Ltd dated 31<sup>st</sup> December, 2010 at page 5 thereof that states “there was a strong feeling that two members of the committee whose ownership of their houses is questionable (in that they acquired their houses in lieu of payment for services rendered, while there is little evidence to show they rendered services of that magnitude) were working for the previous committee. As such, the two Captain Hinga were always bringing quarrels and argument in the committee, thereby derailing the purposes of the committee.”**
- 2. An ORDER of MANDAMUS compelling the Respondents to make full disclosure of the names and/or identities of the person(s) upon whose information the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their inquiry on the affairs of Balozzi Housing Co-operative Ltd dated 31<sup>st</sup> December, 2010 arrived at the decision that “there was a strong feeling that two member of the committee whose ownership of their houses is questionable (in that they acquired their houses in lieu of payment for service rendered, while there is little evidence to show they rendered services of that magnitude) were working for the previous committee. As such, the two Captain Hinga were always bringing quarrels and argument in the committee, thereby derailing the purpose of the committee”.**
- 3. An ORDER that the cost of these proceedings be borne by the Respondents.**

The application is supported by a statutory statement dated 12<sup>th</sup> October, 2011 a verifying affidavit sworn on 12<sup>th</sup> October, 2011 by the ex-parte applicant and annexures thereto.

On 18<sup>th</sup> January, 2012 this court allowed the notice of motion dated 17<sup>th</sup> January, 2012 brought by Ambassador Njuguna Ngunjiri and as a consequence the said applicant was made an interested party in these proceedings. The interested party supports the ex-parte applicant’s application as can be seen from the supporting affidavit he swore on 17<sup>th</sup> January, 2012 in support of the application for enjoinder to these proceedings.

The respondents opposed the application through a replying affidavit sworn on 16<sup>th</sup> December, 2011 by Anne Ochoki (the 2<sup>nd</sup> respondent) and a statement of grounds of opposition dated 16<sup>th</sup> December, 2011.

The ex-parte applicant and the interested party claim that the respondents made an adverse comment about them in their inquiry report without giving them an opportunity to give their side of the story. The respondents’ reply is that the comments found in the report were factual since the same were made after a

thorough enquiry into the affairs of the society. It is the respondents' case that they "applied evidence gathering techniques that included desk research, observation and interviews" in reaching their decision.

The main issue for determination by this court is whether the respondents complied with the rules of natural justice in carrying out the inquiry. One of the cardinal principles of natural justice is that of *audi alteram partem* which means that no man shall be condemned unheard. At page 180 paragraph 1 of the 4<sup>th</sup> Edition, Volume 1(1) of Halbury's Laws of England it is stated that:-

**"A person or body determining a justifiable controversy between the parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to his view. A corresponding duty may rest upon an authority notwithstanding that its enquiry or decision relates to the affairs of one party only, or that the controversy lies between itself and a single party. In some situations fairness will require a deciding body to take the initiative in inviting the interested parties to submit representations to it."**

The Kenyan Constitution has clearly provided for fair administrative action through Article 47 which states that:-

**"47.(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 a right to be given written reasons for the action.**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –**

**(a) provide for the review of administration action by a court or, if appropriate, an independent and impartial tribunal; and**

**(b) promote efficient administration."**

The right to a fair administrative action is not only a requirement of the rules of natural justice but is now also a right protected by the Constitution. This is not a right to be trifled with. Any public body which sets out to adjudicate on matters that may result in adverse comments being made about a citizen of this country should ensure that the citizen is given an opportunity to present his side of the story before any adverse comments are made. Without such an opportunity being afforded the citizen, the likely conclusion is that the citizen has been taken through an unfair administrative process.

The evidence placed before this court shows that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents prepared a report in which the ex-parte applicant and the interested party are mentioned adversely. In fact the report had recommended their removal from the management committee of the Society. The ex-parte applicant and the interested party had however resigned before the inquiry report was unveiled at the Annual General Meeting of the Society which was held on 28<sup>th</sup> May, 2011. The respondents admit that the ex-parte applicant and the interested party were never informed about the adverse evidence gathered against them and neither were they given an opportunity to respond to the evidence that formed the basis of the report.

One can say that the inquiry report did not prejudice the ex-parte applicant and the interested party because they had left the management committee of the Society before the report was unveiled. This line of argument would however be misleading. The report depicts the ex-parte applicant and the interested party as untrustworthy persons. This is a report that was prepared without the comments of the ex-parte applicant and interested party on the material that had been gathered against them by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is immaterial that the respondents may have received concrete evidence showing that the ex-parte applicant and the interested party got their houses through dubious means. The issue here is that the process used to reach that decision breached the rules of natural justice and it is the duty of this court

to protect the rights of parties who have been made to undergo unfair administrative action by administrative bodies.

The ex-parte applicant and the interested party have clearly demonstrated that they were treated unfairly by the respondents. The respondents are public officers and they are subject to the supervisory jurisdiction of this court by way of judicial review. The application therefore succeeds so that an order of certiorari is issued removing to this court the inquiry report and quashing the part in pages 5 and 6 which adversely refers to the ex-parte applicant and the interested party. Having quashed the part of the report that adversely mentions the ex-parte applicant and interested party, I find it superfluous to issue an order directing the respondents to reveal the names of the people who gave them the information which led to their making adverse comments about the ex-parte applicant and the interested party. I therefore decline to grant the 2<sup>nd</sup> prayer in the application. The ex-parte applicant and the interested party will get costs from the respondents.

Dated and signed at Nairobi this 20th day of March, 2012.

**W. K. KORIR, JUDGE**