



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**Miscellaneous Civil Application 49 of 2010**

**IN THE MATTER OF AN APPLICATION FOR ORDER OF JUDICIAL REVIEW**  
**AND**

**IN THE MATTER OF THE DECISION BY THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT TO ORDER ATTACHMENT OF THE BANK ACCOUNTS OF MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY AND HAVE THE FUNDS HELD THEREIN TO THE TUNE OF KSHS.83,675, 974.95 PAID TO WECO SACCO SOCIETY LTD. VIDE HIS AGENCY NOTICE DATED 31/1/2011**

**AND**

**IN THE MATTER OF SECTION 35 OF THE CO-OPERATIVE SOCIETIES ACT 2004**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

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

**AND**

**WECO SACCO SOCIETY LTD. .... INTERESTED PARTY**

**EX PARTE – MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY**

**JUDGMENT**

The Notice of Motion dated 9th December 2010 is premised on the Provisions of Order 53 and rule 3 Civil Procedure Rules. The *ex parte* applicant seeks the following orders:-

“1. That an Order of Certiorari do issue to remove into this Honourable Court and quash the Decision and or Order of the Commissioner of Co-operative Development (the Respondent herein) (vide Agency Notice dated 15/6/2010) directing **M/S Kenya Commercial Bank Ltd. Kakamega Branch** to transfer a sum of **Kshs.83,675,974.95** from the accounts of the Exparte Applicant herein **M/S MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY** into the account of **WECO SACO SOCIETY LTD.** held at the same Branch.

2. That an Order of Prohibition do issue to stop and prohibit the Respondent or any other person acting under his or purporting to act on his instructions from enforcing, executing and or attempting to enforce or execute the said decision and or order with regard to the account(s) of the Exparte Applicant’s funds

wherever they may be lawfully held.

3. That the costs of these proceedings be provided for.”

The genesis of this matter is an Agency Notice dated 15th December, 2010 issued by the Respondent (Commissioner of Co-operative Development) and addressed to Kenya Commercial Bank. The said Notice read:-

***“In exercise of the powers conferred upon me by Section 35 of the Co-operative Societies Act, I hereby declare you to be an Agent of the above Organization and require you to pay the above Society’s A/C No. 1101010531 held at Kenya Commercial Bank – Kakamega Branch the Principal sum of Kshs.83,675,974.95 being remittances withheld by Masinde Muliro University of Science and Technology. This should be from main Account No. 1101811331 held with you or any other account, Current, Deposit or Savings. If the funds held are not sufficient, then from all future credits that may become available within twelve months from the date of this notice.***

***Please note that subsection (7) of Section 35 provides that in default of payment being made by you in accordance with this notice, the amount owed may be recovered from you under provisions of the Act relating to the collection and recovery of Co-operative Societies dues.”***

The **exparte** applicant (MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY) was aggrieved by the said notice, hence these proceedings. The **exparte** applicant was the successor of Western University of Science & Technology which was a successor of Western College of Arts and Applied Sciences.

Amongst the liabilities said to have been inherited by the **exparte** applicant was a debt of Kshs.122,327/=, owed to WECO SACCO Society Ltd., the Interested Party herein. According to the **exparte** applicant the said debt was duly paid. The **exparte** applicant denied owing the sum of Kshs.83,675,974.95 or any part thereof claimed by the Interested Party as having accrued from the sum of Kshs.122,327 together with interest. The **exparte** applicant’s contention is that the Interested Party does not have members who are employees of the **exparte** applicant as the employees of the **exparte** applicant belong to WEVARSITY SACCO SOCIETY LTD.

According to the **exparte** applicant, all debts owed to its predecessors were paid and as at 31st December, 2008, the balance sheet of the Interested Party did not reflect that the **exparte** applicant owed it any money.

According to the **exparte** applicant, the Interested Party never supplied it with the details of how the sum of Kshs.83,675,974.95 was arrived at. The **exparte** applicant saw the issuance of the Agency Notice as unlawful, unprocedural, arbitrary, unconscionable and against the principles of natural justice.

The application is opposed to as per the replying affidavit sworn on 21.2.11 by JAPHETH MAKOKHA, the Chairman of the Interested Party (SACCO). According to the Chairman, the Interested Party (SACCO) members were originally employees of Western College of Arts and Applied Sciences, the predecessor of Western University of Science & Technology, the predecessor of the **exparte** applicant. That the **exparte** applicant took over the assets and liabilities of its predecessors, among them the debt of Kshs.122,327/= which the Western College of Arts & Applied Sciences owed the Interested Party. That the said debt remains unpaid hence the issuance of the Agency Notice by the Commissioner. According to the Chairman, the Principal sum of Kshs.122,327/= with compound interest at 5% per month from June 2002 and brings the total sum owing to Kshs.83,675,974.95. It is the Chairman’s contention that the Commissioner acted within the law and the **exparte** applicant was informed of how the debt arose and cannot allege to have been condemned unheard.

The Respondent (Commissioner of Co-operative Development) opposed the application as per the affidavit sworn by its Commissioner, Mr. Fredrick F. Odhiambo on 27.5.2011. In the said affidavit, it is stated that the matter is incompetent and incurably defective in that it has breached section 8 & 9 of the

Law Reform Act, Cap 26 Laws of Kenya and in breach of Rules 1 (2) and 4 (1) (2) of Order 53 CPR. That in exercise of powers conferred under S. 35 of the Co-operative Societies Act, the Commissioner issued the Agency Notice dated 15.06.2010 declaring Kenya Commercial Bank Ltd. Kakamega branch to be an agent of the Interested Party herein for the purpose of paying the Interested Party Kshs.83,675,974.95 which money was being held by the bank on behalf of the exparte applicant.

According to the Commissioner's affidavit, the Kshs.83,675,974.95 is made up of deductions made from salaries of the employees of the exparte applicant (University) who are also members of the Interested Party (SACCO). That the said debt has attracted compound interest at the rate of 5% since June 2002. According to the Commissioner, the University filed Kakamega HCCC 86 of 2010 over the same subject matter for orders of injunction which application was dismissed rendering this matter *res-judicata*.

That the University was aware of the debt and had been constantly notified of the same by the SACCO and the Commissioner and therefore the issue of the University being notified or consulted did not arise. That the University was issued with demand notices which specified the nature of the claim but the University never approached the Commissioner to seek the best way possible to resolve the matter.

The University was represented by the firm of SHITSAMA & CO. Advocates. Nandwa & Co. Advocates appeared for the SACCO while Mr. Abuta Tom, Senior State Counsel appeared for the Commissioner

All the parties filed written submissions which I have duly considered.

It was submitted against the motion that Order 53 rule 1 (2); 4 (1) and 4 (2) Civil Procedure Rules were circumvented by the *exparte* applicant. That the supporting affidavit filed on 9.12.10 accompanying the motion was not a verifying affidavit and should be struck out.

When the application to seek leave was made on 22.11.10, it was accompanied by a statement which set out the name and description of the *exparte* applicant, reliefs sought, facts upon which the reliefs sought were premised and the grounds upon which the reliefs were sought. There was also a verifying affidavit sworn on 22.11.10. There was therefore compliance with Order 53 rule 1 (2) which states:-

***“An application for such leave as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”***

When the motion was filed on 9.12.10, it was accompanied by a statement, verifying affidavit and a supporting affidavit. Order 53 rule 3 (1) provides for the filing of the application by way of Notice of Motion.

Order 53 rule 4 (1) provides for copies of the statement accompanying the application for leave to be served with the Notice of Motion.

The case of ***R. vs Chairman, Land Disputes Tribunal & 2 Others exparte SHIUMA JACOB MUKALAMA [2006] e KLR*** cited by the Respondent is distinguishable from the case at hand. In the said authority, there was no statement and no affidavit verifying the facts that accompanied the Chamber Summons application for leave. The motion herein can therefore not be said to be “completely muddled in form and thus incompetent and also misconceived in substance” as was held in ***R. V Chairman, Electoral Commission of Kenya – exparte Welamondi [2008] 2 KLR***.

The Respondent has contended that the *exparte* applicant opposed the same agency notice dated 15.06.2010 in Kakamega HCCC No. 86 of 2010 though an application for injunction which was dismissed and therefore that this matter is *res-judicata*. That the *exparte* applicant has moved to court again through HCC. Misc. Application No. 6 of 2011 seeking the same orders as sought herein which is an abuse of the court process. I am however in agreement with the submissions by the *exparte* applicant's counsel that Order 53 rule 2 does not bar Judicial Review applications where there is pursuit of other

legal remedy.

Order 53 rule 2 states:-

**“..... and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”**

The existence of any other suit is recognized by the said provision and this matter cannot be termed as **res-Judicata**.

As was held in **R. V Chairman Electoral Commission of Kenya** (supra) on page 401 “Judicial Review proceedings under Order 53 Civil Procedure Rules are a special procedure. The provisions of the order are invoked wherein orders of **certiorari mandamus** and Prohibition are sought.” The Agency Notice dated 31.1.11 is different from the Agency Notice herein dated 15.6.10 in that the notices were issued on different dates. There is therefore no abuse of the court process as the **exparte** applicant is at liberty to protect his interest against any other Agency Notices issued.

One of the areas of contention in these proceedings is the scope of powers of the Commissioner under section 35 of the Co-operative Societies Act, 2004.

Section 35 (1) of the said Act states:-

**“Where an employer of a person who is a member of a co-operative Society, has under instructions of the employee, made a deduction from such employee’s emoluments for remittance to the co-operative society concerned but fails to remit the deductions within seven days after the date upon which the deduction was made, the employer shall be liable to pay the sum deducted together with compound interest thereon at the rate of not less than five percent per month.”**

Section 35 (3) of the Act states:-

**“The Commissioner may, by a written notice, appoint any person, bank or institution to be an agent of the society for the purpose of collection and recovery of a debt owed to the society.”**

There is no doubt that the Commissioner has powers as stipulated in the said Provisions of the Co-operative Societies Act.

The arguments by the **exparte** applicant that the 1997 Co-operative Societies Act was the operational one taking into account that the debt accrued in the year 2002 cannot be correct. The interest continued to accrue and the notice cannot be issued through the repealed 1997 Act.

The bone of contention as per the **exparte** applicant’s case is whether in the instant case it was crystal clear that the employer made a deduction from the employees emoluments but failed to remit the same to the SACCO. The **exparte** applicant has denied owing any sum of money to the Interested Party and asserted that any sum of money owed to the Interested Party by the predecessor of the **exparte** applicant was duly paid.

This to my mind boils down to the issue of ascertainment of the debt. From the correspondence between the parties, it is clear that the Commissioner made several demands to the **exparte** applicant for the payment of the alleged dues. The **exparte** applicant resisted the demands and requested for further and better particulars of the debt including the membership, deductions and remittances relating to the claim as per their letter dated 18<sup>th</sup> July 2007 (annexure “PKSM5”). There is no evidence that the **exparte** applicant was heard and the debt ascertained as per the request for the particulars. The move by the Commissioner to issue the Agency Notice in the circumstances cannot be said to be within the powers donated by Section 35 (1) of the Co-operative Society’s Act when there was no ascertainment of the deductions made and not remitted to the Sacco.

Failure to accord the *ex parte* applicant a hearing was a breach of the rules of natural justice. Demand notices and exchange of correspondence do not amount to a hearing. The reliefs sought by the *ex parte* applicant are appropriate. The *ex parte* applicant seeks an order of **certiorari** to quash the decision of the Commissioner in issuing the agency notice in question and also seeks the order of prohibition to stop the Commissioner or any other person acting under him or under his instructions from executing the said decision.

The application has merits and is allowed with costs.

*Delivered, dated and signed at Kakamega this 24<sup>TH</sup> day of May, 2012*

**B. THURANIRA JADEN**  
**JUDGE**