



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 431 of 2009

REPUBLIC

AND

THE CHAIRMAN, CO-OPERATIVE TRIBUNAL AT NAIROBI .....1<sup>ST</sup> RESPONDENT

THE REGISTRAR OF CO-OPERATIVE SOCIETIES .....2<sup>ND</sup> RESPONDENT

COMMISSIONER FOR CO-OPERATIVE SOCIETIES .....3<sup>RD</sup> RESPONDENT

TETU DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED....4<sup>TH</sup> RESPONDENT

*EX-PARTE*

SAMUEL KINGORI ..... APPLICANT

JUDGMENT

**Introduction and background**

1. The *ex-parte* applicant, herein ('the applicant') at the material time was a member of the Tetu Dairy Farmers Cooperative Society ("the Society") and was employed as its secretary Manager. Sometime in 2003, due to allegations of serious mismanagement, an inquiry was instituted and conducted into the affairs of the Society and as a result the applicant was surcharged by the Commissioner for Co-operative Development ("the Commissioner").

2. The applicant complains that the inquiry was conducted in breach of the rules of natural justice and that he was never served with an order of surcharge as required by **section 58 and 73** of the ***Co-operative Societies Act*** ("the Act").

3. After the order of surcharge was issued, the Society moved the Co-operative Tribunal ("the Tribunal") to enforce the surcharge order by filing a suit against the applicant being, ***Nairobi Tribunal Case No. 212 of 2006, Tetu Dairy Farmers Cooperative Society Limited v Samuel Kingori***.

4. The applicant duly defended the said suit. At the first opportunity he raised a preliminary objection regarding the fact that the inquiry was conducted in breach of the rules of natural justice and that no basis of surcharge had been established and that the matter should not proceed. After hearing the objection, the Tribunal dismissed the objection on 21<sup>st</sup> February 2008.

5. The Society thereafter lodged an application for summary judgment. The applicant duly opposed the same on the ground that there were triable issues including the fact that the Commissioner and inquiry team had overstepped their mandate. After hearing the matter, the Tribunal, in an Award dated 31<sup>st</sup> March 2009 entered judgement for the sum of Kshs. 936,547/00 with costs and interest thereon.

### **The Applicant's Case**

6. It is this Tribunal's judgment that has precipitated these proceedings and pursuant to leave granted on 22<sup>nd</sup> July 2009 by Justice Dulu, the applicant moved the Court by a Notice of Motion dated 28<sup>th</sup> July 2009 in which he sought the following orders;

- (1) *That this application be certified urgent and be heard on priority basis.*
- (2) *That the applicant be granted leave to apply for Judicial Review Order by Certiorari to move into the High Court for purposes of quashing the entire proceedings, judgments, decisions and/or Rulings of the Corporative Tribunal at Nairobi in Tribunal Case No. 212 of 2006.*
- (3) *That the applicant be granted leave to apply for Judicial Review order of prohibition, prohibiting the Chairman of the Co-operative Tribunal at Nairobi from issuing a Decree on the summary Judgment entered against the applicant on the 31<sup>st</sup> March 2009 and from enforcing and or executing such a decree thereof as per the provisions of section 58 and 73 of the Co-operative Societies Act.*
- (4) *That the grant of leave herein do operate as a stay of execution of the summary judgment issued against the applicant on 31<sup>st</sup> March 2009 until the hearing and determination of the substantive application.*
- (5) *That the costs of these proceedings be borne by the respondents.*

7. The application is supported by the applicant's affidavit sworn on 10<sup>th</sup> August 2009 and a further affidavit sworn on 2<sup>nd</sup> December 2009. Mr Murage, the applicant's counsel, submitted that the gravamen of the applicant's case was that the inquiry and surcharge by the Commissioner was done contrary to **sections 58 and 73** of the Act and also in breach of the rules of natural justice. In Counsel's view, the judgment of the Tribunal is the fruit of a poisonous tree and ought to be set aside. Counsel relied on the decision of Justice Okwengu in ***R v Registrar of Co-operative Societies and Another ex-parte John Githinji and Others Nyeri HC Misc. 23 of 2005 (Unreported)***. Counsel noted that even though his client had the right of appeal, leave to commence judicial review proceedings had been granted and a case for orders of judicial review made out.

### **Respondent's Case**

8. The respondents opposed the application. The Commissioner, Mr. F Odhiambo, swore an affidavit on 13<sup>th</sup> November 2009 while Mr Francis Kamweru, Wamugunda, the Chairman of the Society, swore an affidavit on 23<sup>rd</sup> March 2010 on behalf of the Society. The thrust of the respondents case was the subject of the application was a matter properly within the purview of the Tribunal and that the judgment was appealable as of right under the provisions of **section 81** of the Act. Mr Maina, counsel for the Commissioner, noted that the applicant ought to invoke specific procedures provided in the Act noted of applying for judicial review Counsel relied on several authorities namely; ***Speaker of the National Assembly v Karume (2008) 1 KLR (EP) 425*** and ***Kenya Telecommunications Investment Group Limited v Telecommunication Commission of Kenya HC Misc. No. 1267 of 2003 (Unreported)***.

9. Mr Muriuki, counsel for the Society supported the position taken by the Commissioner. He noted that the decree had been issued but for the stay issued by the Court, it would have been executed. That it was proper for the applicant to follow the procedure set out in the Act as was held in the case of ***Thande and Others v Montgomery and Others [1970] 341***.

## **Determination**

10. I have considered the pleadings depositions and arguments and the issue is whether the court should grant the orders of certiorari to quash the Tribunal award.

1. A substantial part of the applicant's case is pointed to the inquiry and notice of surcharge, yet these proceedings and order were not challenged either in accordance with the Act or by way of judicial review. What the Court is being asked to quash is the Tribunal judgment and in order to succeed, the applicant must show that the Tribunal acted *ultra vires*, or that it acted in breach of the rules of natural justice or that its decision was ***Wednesdaybury*** unreasonable to attract orders of judicial review (See ***R v Judicial Service Commission ex-parte Pareno [2004] I KLR 203***).

11. The applicant admits that he participated in the proceedings before the Tribunal, he raised a preliminary objection, it was heard and equally the summary judgment application was contested, heard and determined. In the circumstances, I find and hold that the proceedings before the Tribunal were conducted in accordance with the rules of natural justice. I am satisfied that the applicant had the full opportunity of being heard and presenting his case before the Tribunal before the judgment was made.

12. The case of ***R v Registrar of Co-operative Societies and Another ex-parte John Githinji and Others (Supra)*** cited by the applicant is distinguished on the ground that in that case, the order was directed against the decision of the Registrar of Co-operatives made to surcharge upon an inquiry conducted under the Act. The present case is in respect of the Tribunal and nothing has been said against it to implicate its process in such a manner as to attract orders of certiorari or prohibition.

13. I also hold that the issues of the inquiry and surcharge order were placed before the Tribunal. It considered them and dismissed the objection. The Tribunal had jurisdiction in terms of **sections 74 and 76** of the Act to deal with the matters and as such the issue of *ultra vires* cannot arise.

## **Disposition**

14. The decision and process therefore of the tribunal cannot be faulted and in the absence of such a case, the application lacks merits. It is therefore dismissed with costs to the respondents.

**DATED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of December 2012

**D.S. MAJANJA**  
**JUDGE**

Mr Murage instructed by Mugambi and Kariuki Company Advocates for the ex-parte applicant.

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

Mr Muriuki instructed by Gitonga Muriuki and Company Advocates for the 4<sup>th</sup> respondent.