



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.158 OF 2011

1. MENELIK MAKONNEN
2. WILSON MUTERO.....APPLICANTS

VERSUS

1. COMMISSIONER OF CO-OPERATIVE SOCIETIES
2. CHAIRMAN COOPERATIVE TRIBUNAL.....RESPONDENTS

AND

BALOZI HOUSING CO-OPERATIVE SOCIETY LTD.....INTERESTED PARTY

RULING

The application for my determination is the Notice of Motion dated 14th October 2011 by the applicants. There are four prayers sought by the applicants which are as follows;

1. THAT this Honourable Court be pleased to issue an order of Certiorari to remove into the High Court and quash the inquiry report prepared by the Commissioner of Cooperative Development being Inquiry Report No.CS/No.6089, which inquiry was done without the applicants being given an opportunity to be heard and defend themselves, contrary to Section 58(2) of the Cooperative Societies Act, Chapter 490 of the Laws of Kenya and the rules of natural justice.

2. THAT this Honourable Court be pleased to issue an Order of Certiorari to remove into the High Court and quash the proceedings of The Cooperative Tribunal in CTC Nos. 230 of 2010, 232 of 2010, 10 of 2010 and 16 of 2010, which proceedings were based entirely on the Inquiry Report No.CS/No.6089.

3. THAT this Honourable Court be pleased to issue an Order of Prohibition to prohibit the Cooperative Tribunal from issuing Orders for execution in respect of the ex parte judgements that were entered in the Cooperative Tribunal in CTC Case Nos. 230 of 2010 and 232 of 2010 wherein the Applicants and the Interested party are the litigants.

4. THAT this Honourable Court be pleased to issue an Order of Mandamus to compel the 1st Respondent, The Commissioner of Cooperative Development to supply the Applicants with the Report of the Inquiry conducted on the accounts of Balozzi Housing Cooperative Society which Report formed the basis of the Cooperative Tribunals Case in CTC Nos. 230 of 2010 and 232 of 2010.

5. THAT the costs of this Application be provided for.

There is no doubt that the applicants were former chairman and treasurer of Balozzi Housing Cooperative Society Limited. On 21st October 2008, the Commissioner for Cooperative Development and Marketing appointed **Aggrey Wamocho** and **Daniel Mutai** to conduct an inquiry into the By-laws, workings and financial condition of the said society. It is the position of the applicants that they were not given an opportunity to be heard and defend themselves contrary to section 58(2) of the Cooperatives Societies Act Cap 490. And that the rules of natural justice were not followed. The applicants confirmed the findings of the inquiry were made available at a General Meeting of the society which was held on 29th January 2009. The said special general meeting was held in accordance with section 58(3) of Cap 490. At the time the said report was made available, the applicants were the officials of Balozzi Housing Cooperative Society Limited.

After the report was made available, it was found the applicants had incurred an unaccounted expenditure of Ksh.6,478,000/= in respect of the 1st applicant and Ksh.393,600/= in respect of the 2nd applicant. It was agreed unanimously that all persons or members who had incurred unauthorized expenditure be surcharged and ordered to refund the amount outstanding. The report was adopted and the applicants were removed as officials of the society. Thereafter the Commissioner citing section 73 of Cap 490 wrote to the concerned parties including the applicants requiring them to show cause why they would not be surcharged. The applicants made representations which was considered and determined against them. The commissioner being satisfied proceeded to issue surcharge orders against various members including the applicants.

Under section 74(1) of Cap 490 any aggrieved person in respect of a surcharge order must within 30 days appeal to the tribunal. Such appeals were filed by the applicants and eventually dismissed due to the failure of the applicants to comply with the said section. It is important to observe that the appeals were fully argued and a decision rendered.

It is also important to observe that order 53 rule 2 of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act and Order 4 an order of certiorari shall not be granted unless the application for leave is made not later than six months after the date of the judgment, order, decree, convictions or other proceedings to be quashed. The inquiry which the applicants are seeking to have quashed was made back in the year 2008 and the same was read and adopted through a special general meeting held on 29th January 2009 at Muthaiga North Gardens. It was discovered that 17 members had incurred unaccounted or unauthorized expenditure amounting to over 12 million. It was also recommended that elections should be carried out immediately and that members adversely mentioned should be barred from holding office in the society. A new management committee for the society was elected together with a supervisory committee. The applicants did not contest the findings and the recommendations contained in the report. On 18th March 2009 the Commissioner for Cooperative Societies notified 23 members and called upon them individually to show cause within 14 days from that day why they should not be surcharged in accordance with section 73 of the Act. Both applicants made representations as earlier indicated which was adequately considered.

On 24th March 2010 the Commissioner for Cooperatives Development gave 23 members including both

applicants notice that they had been found liable for mismanagement of funds belonging to Balozi Housing Cooperative Society Limited. He then ordered them pay the amount against their names within 30 days from that date. He also notified them that failure to do so would be an automatic indication of refusal and that he shall institute legal proceedings against them. The applicants made appeals to the tribunal which was rejected. They also filed appeals to the High Court being appeals Nos.507 and 508 of 2010. The applicants obtained interim orders which has since lapsed. They have not pursued the appeals. The interested party also filed CTC No.230 and 232 of 2010 before the Tribunal to enforce the surcharge orders. It is contended that the applicants having been served with the summons failed to file any defence and naturally judgement in default of appearance was entered in both cases. The applicants filed applications to set aside the judgement obtained interlocutory interim orders and went to sleep in a characteristic fashion. Their applications were subsequently. The interested party was given leeway to proceed with the execution.

The question therefore that arises is whether the applicants are entitled to the orders sought. An order of certiorari is being sought to quash the inquiry report No.6089. The report was done in 2008 and read to special general meeting on 29th January 2009 and unanimously adopted. The report has been implemented and some of the members implicated have paid back to the society what had been misappropriated. The applicants have not challenged the contents of the report which was available to them from 29th January 2009. There is no indication that in preparing the report there was a violation of the rules of natural justice. 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 applicants have also sought an order of certiorari to remove into the High court and quash the proceedings of the Cooperative Tribunal in CTC No.230, 232, 10 and 16 of 2010 which proceedings were based entirely on inquiry report No.6089. The proceedings in CTC Nos. 10 and 16 of 2010 were at the instance of the applicants. However, this court is being asked to quash proceedings instigated by the applicants. Concerning CTC No.230 and 232 of 2010 orders of execution have been issued and the applicants have gone to the High Court for appeals. It has been contended, orders of execution having been issued, there is nothing to prohibit since, prohibition looks at the future. Under section 74(1) of Cap 490, any person aggrieved by the order of the Commissioner under section 73 may within 30 days appeal to the tribunal. Section 74(2) also states that a party aggrieved by the decision of tribunal may within 30 days appeal to the High court on matters of law. The applicants had and exercised their right of appeals to the Cooperative Tribunal which right was actually exercised. They filed their appeals No.10 and 16 of 2010 which appeals were dismissed because they were filed out of time. They also filed appeals Nos.507 and 508 of 2010 to the High Court being aggrieved with the ruling of the tribunal. The law is that where an alternative remedy in terms of an appeal to the High court has been exercised, judicial review process cannot be invoked. The applicants decided first to submit themselves to the remedy under section 74 of Cap 490, then the process of judicial review cannot be available to them as there is no question of challenge on the process by the tribunal or otherwise. Where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

It is therefore my decision that the applicants having willingly subjected themselves to the alternative remedy provided under section 74 of Cap 490 and having exhausted the mechanisms therein, they cannot now come back and claim they were not given an opportunity to be heard. In any case judicial review concerns itself with the process of the decision making and not the merits of the decision. The *ex parte* applicants are seeking to quash the rulings and orders of cooperative tribunal but they have not brought any evidence or material to show the 2nd respondent acted in excess or out of jurisdiction to warrant the granting of the orders being sought. It is also clear that under section 58 of Cap 490 the Commissioner for Cooperatives has power to order for an inquiry into the activities of any Cooperative Society. It is clear in my mind the Commissioner duly acted within the law in ordering for an inquiry. The said inquiry was conducted and the report recommended that the *ex parte* applicants among other persons be surcharged. The report was read and unanimously adopted through a special general meeting which resolved that the individuals mentioned be surcharged.

I am satisfied the respondent and interested party complied with all the relevant provisions of the law and procedures in all the processes conducted against the applicants herein. There is nothing illegal about the actions of the respondent. The applicants cannot be heard at this juncture to question a process that has been conducted in accordance with the law and within the purview of boundaries of the rules of natural justice. They were aware and participated in the whole process and did not provide any documentary evidence or material to contradict the report and the recommendations therein. They also did not avail any evidence when they were given an opportunity by the Commissioner to show cause. All in all there is no evidence to show that the appeals tribunal made any errors or acted in excess of its jurisdiction.

Having taken into consideration all the available material in respect of this matter, I am satisfied that the applicants are not entitled to the orders sought. The application has no merit and it is dismissed with costs to the respondents and the interested party.

Dated, signed and delivered at Nairobi this 28th day of October 2011.

M. WARSAME
JUDGE