



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Misc Civ Appli 70 of 2006

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS & PROHIBITION BY CHRISTOPHER SIMIYU**

AND

IN THE MATTER OF CO-OPERATIVE SOCIETIES ACT 1997

AND

**IN THE MATTER OF SECTIONS 58 AND 73 OF THE CO-OPERATIVE
SOCIETIES ACT AS AMENDED BY ACT NO.2 OF 2004**

AND

IN THE MATTER OF BUNGOMA TEACHERS SACCO LTD

BETWEEN

**REPUBLIC.....
APPLICANT**

VS

**THE COMMISSIONER FOR CO-OPERATIVE
DEVELOPMENT.....RESPONDENT**

EX PARTE

**CHRISTOPHER
SIMIYU.....APPLICANT**

RULING

By an application by way of Chamber Summons, pursuant to the Provisions of Order LIII, Rule 1 (1) (2) and 4 of the Civil Procedure Rules, the applicant seeks orders:

- 1. That leave be granted to the applicant herein to apply for orders of certiorari to remove into this court and quash the decision of the respondent herein to surcharge the ex parte applicant a sum of Ksh.342,404/= as communicated vide the letter dated 11th December 2005 and fortified by the Notice***

dated 6th December, 2005.

- 2. That leave be granted to the ex parte applicant to apply for judicial review orders of prohibition directed at the respondent prohibiting himself or any of his agents or persons acting through or under him or under his directives from enforcing the surcharge orders purportedly issued under the provisions of sections 58 and 73 of the Co-operative Societies Act and communicated vide letters dated 11th December 2005 and Notice dated 6th December 2005, surcharging the applicant a sum of Ksh.342,404/=.*
- 3. That leave be granted to the exparte applicant to apply for judicial review orders of mandamus directing and or compelling the respondent to recall, cancel, invalidate and annul the surcharge orders communicated vide his letter of 11th December 2005 and the notice dated 6th December 2005, surcharging the applicant of a sum of Ksh.342,404/=.*
- 4. That the grant of the leave aforesaid do operate as a stay of enforcement of the said orders and/or any proceedings founded thereon until the determination of the application.*
- 5. That costs of this application be provided for.*

The application is based on the grounds:

- I. The purported surcharge was based on and/or is premised on a report which was never adopted by the society as by law then envisaged.*
- II. The purported surcharge is based on the provisions of section 73 of the Co-operative Societies Act (as amended) 2004, which Act has no retrospective operation.*
- III. The purported surcharge is based on a report which was irregularly arrived at and was consequently not a report as by law envisaged.*
- IV. The powers to surcharge are based on unreasonable considerations.*
- V. The powers to surcharge are being exercised illegally and have no force of law.*
- VI. The powers to surcharge are being exercised capriciously and/or maliciously.*
- VII. The respondent is acting in excess of jurisdiction.*
- VIII. The powers to surcharge are being exercised in flagrant breach of the rules of natural justice.*
- IX. The legal prerequisites for the exercise of such powers have not been complied with.*

The application is predicated upon the annexed affidavit of Christopher Simiyu sworn on the 1st day of March 2006, and the statement filed herein.

For the applicant, it was argued that in January 2006, the applicant came to learn of the contents of a letter dated 11th December 2005, instituting discharge orders under section 58 and 73 of the Co-operative Societies Act Amendment 2004 and Co-operative Societies Rules Amended. The said letter is exhibited as "CS1".

That in terms of the said letter and/or notice, the applicant was surcharged a sum of Sh.342,404/= pursuant to Bungoma Teachers Sacco Society Ltd members resolution reached in a special meeting held on 14th November 2003.

That on the basis of the said notice and accompanying notice dated 6th December 2005, exhibited as

“CS2”, the applicant is required to pay the said sum of money within a period of 7 days failing which legal proceedings would ensue.

In terms of the by laws of Bungoma Teachers’ Sacco Ltd., the supreme authority is vested in the Annual Delegates Meeting duly convened by the management Committee of the Society. The by-laws are exhibited as “CS3”. That pursuant to the Notice issued by the District Co-operative Officer, two meetings – Annual and Special Delegates Meeting of Bungoma Teachers’ Sacco Ltd, were scheduled to be held on 14th and 11th November 2003. That the same never took off and its place an inquiry report was read to the members. The said inquiry report was never adopted by the members. A copy of the minutes as confirmation of this fact is exhibited as “CS5.”

That the said enquiry report does not hold the applicant liable in the sum of Sh.342,404/= as alleged or any other sum or at all. In any event, there was neither a properly convened general meeting on 14th November 2003 nor any resolutions made as by law enjoined. Furthermore, the Notice of surcharge is defective in that it does not take into account the amendments to the Co-operative Societies Act vide No.2 of 2004. The said amendments were to come into force on 5th November 2004 while the report sought to be acted upon was read on 14th November 2003. The report appears to have a retrospective effect which the amendment does not say so.

It is the contention of the applicant that the power to surcharge is being exercised capriciously. The Commissioner of Co-operatives in purporting to surcharge the applicant is acting *ultra vires* hence this application.

I have carefully gone through the application and particularly the evidence in support thereof and find that the orders sought are merited as the application has been made within 6 months as by law enjoined.

Accordingly, I grant the application in terms of prayer 1, 2, 3 and 4 only. Costs shall be in the cause.

DATED and DELIVERED at BUNGOMA this 12th day of June 2006.

N.R.O. OMBIJA

JUDGE