



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Misc Civ Appli 72 of 2006**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF**

**CERTIORARI, MANDAMUS & PROHIBITION BY ISAAC WETOSI**

**AND**

**IN THE MATTER OF THE 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.....APP  
LICANT**

**VS**

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

**EX-PARTE**

**ISAAC**

**WETOSI.....APPLICANT**

**RULING**

By an application by way of chamber summons dated 15<sup>th</sup> March 2006, 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.244,014/45 as communicated vide the letter dated 30<sup>th</sup> December 2005 and fortified by the notice dated 23<sup>rd</sup> December, 2005 served on the ex-parte applicant on 17<sup>th</sup> February, 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 6<sup>th</sup> December 2005, surcharging the applicant a sum of Ksh.244,041/45.

3. That leave be granted to the ex-parte 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 30<sup>th</sup> December 2005, surcharging the applicant of a sum of Ksh.244,014/45.

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 this 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 in 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 Isaac Wetosi, the statement filed herein.

For the applicant, it was argued that on 17<sup>th</sup> February 2006, he was served with a letter dated 11<sup>th</sup> December, 2005, intituled a surcharge orders under section 58 and 73 of the Co-operative Societies Act Amendment 2004 and Co-operative Societies Rules Amended 2004. The said letter is exhibited as LW1”

That in terms of the said notice and/or letter, the applicant was surcharged the sum of Ksh.244,014/15 purportedly in pursuance of Bungoma Teachers’ Sacco Society Ltd members resolution purportedly reached in a special General Meeting held on 14<sup>th</sup> November 2003.

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

“IW2” the applicant is required to pay the said sum within 7 days failing which legal proceedings would ensue.

In terms of the said by laws of the Bungoma Teachers’ Sacco Ltd., the supreme authority is vested in the Annual delegates Meeting duly convened by the management Committee of the society.

That vide the notice issued by the District Co-operative Officer, 2 meetings – one Annual Delegates Meeting and a Special Delegates Meeting of Bungoma Teachers’ Sacco Ltd were scheduled to be held at Bungoma County Council Hall on 14<sup>th</sup> November 2003 and 15<sup>th</sup> November 2003 respectively. A copy of the notice is exhibited as “1W3”.

That the annual delegates meeting scheduled for 14<sup>th</sup> November 2003, aborted and in its place a purported inquiry report was read to the members. The said enquiry report was not in any case adopted by the members. A copy of the minutes are exhibited as “IW4”.

Notwithstanding the fact that the said enquiry report did not find the applicant liable in the sum of Ksh.244,014/45 the respondent holds that view all but wrongly. That there was neither a properly convened General Meeting on 14<sup>th</sup> November 2003 nor any resolution made as by law enjoined.

Furthermore, the notice of surcharge is defective in that it does not take into account amendments to the Co-operative Societies Act 2004 and the Co-operative Societies Rules as amended in 2004. The said amendments were to come into force on 5<sup>th</sup> November 2004 while the report sought to be acted upon was read on 14<sup>th</sup> November 2003. The report, therefore, appears to have a retrospective effect when the amendments does not say so.

It is the applicant’s contention that the power to surcharge is being exercised capriciously. That the Commissioner for Co-operatives in purporting to surcharge the applicant is acting ultra-vires hence this application.

I have scanned through the application 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 12<sup>th</sup> day of June 2006.**

**N. R. O. OMBIJA**

**JUDGE**