



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

Misc Civ Appli 71 of 2006

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

AND

IN THE MATTTTER 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.....
APPLICANT**

VS

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

EX-PARTE

**LIVINGSTONE
CHENGE.....APPLICANT**

RULING

By an application by way of Chamber Summons pursuant to the Provisions of Order LIII Rule 1(1) (2) (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.450,298/45 as communicated vide the letter dated 11th December 2005 and fortified by the Notice dated 6th December 2005 served on the ex-parte applicant on 27th 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.450,298/45.**
- 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 11th December 2005 and the Notice dated 6th December 2005, surcharging the applicant of a sum of Ksh.450,298/45.**
- 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 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 capriciously and/or maliciously.**
- VI. The respondent is acting in excess of jurisdiction.**
- VII. The powers to surcharge are being exercised in flagrant breach of the rules of natural justice.**
- 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 Livingstone Chenge sworn on 1st March 2006.

For the applicant, it was argued that on 27th December 2005, he was served with a letter dated 11th

December 2005 instituted “ surcharge orders under section 58 and 72 of the Co-operatives Societies Act Amendment 2004 and Co-operative Societies Rules amended 2004.” The said letter is exhibited as “LC1”

That in terms of the said notice and/or letter the applicant was surcharged the sum of Ksh.450,298/45 purportedly in pursuance of Bungoma Teachers Sacco Society Ltd., Members resolution purportedly reached in a Special General Meeting held on 14th November, 2005.

That on the basis of the said notice and accompanying Notice dated 6th December 2005, exhibited as “LC2” 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 the said 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 “LC3”. That vide the notice issued by the District Co-operative Officer, two meetings – one on Annual Delegates Meeting and a special delegates meeting of Bungoma Teachers Sacco Ltd-were scheduled to be held at Bungoma County Council Hall on 14th November 2003 and on 15th November 2003 respectively. A copy of the notice is exhibited as “LC4.”

That the Annual Delegates Meeting scheduled for 14th November 2003, aborted and in its place an inquiry report was read over to the members. The said inquiry report was in any case not adopted by the members. A copy of the minutes are exhibited as “LC5.”

That there was neither a properly convened general meeting on 14th 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 Rules as Amended in 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, therefore, appears to have a retrospective affect when the amendment does not say so.

It is the applicant’s contention that the power to surcharge is being exercised capriciously. That the Commissioner of Co-operative 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, particularly since 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