



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

**Misc Civil Appli 23 of 2005**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE REGISTRAR OF CO-OPERATIVE SOCIETIES).....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF CO-OPERATIVE SOCIETIES)....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

- |                              |                     |
|------------------------------|---------------------|
| WANGONDU)                    | 1. JOHN GITHINJI    |
| NJORA)                       | 2. PAUL MACHARIA    |
| KWIRIKIA)                    | 3. BENSON NDIRITU   |
| )                            | 4. MWANGI WA KIHUNI |
| MUGO)                        | 5. JOEL KARIUKI     |
| 6. FREDRICK MWANGI NDIRANGU) |                     |
| 7. PETER KARIUKI KIBOI)      |                     |
| WACHIHI)                     | 8. SIMON NDIRANGU   |
| 9. GICHINGA KANYUGI) .....   | APPLICANTS          |

**RULING**

The ex-parte applicants John Githinji Wangondu (1<sup>st</sup> Applicant), Paul Macharia Njora, (2<sup>nd</sup> Applicant) Benson Ndiritu Kwirikia, (3<sup>rd</sup> Applicant) Mwangi wa Kihuni, (4<sup>th</sup> Applicant) Joel Kariuki Mugo, (5<sup>th</sup> Applicant) Fredrick Mwangi Ndirangu, (6<sup>th</sup> Applicant) Peter Kariuki Kiboi, (7<sup>th</sup> Applicant) Simon Ndirangu Wachihi, (8<sup>th</sup> Applicant) and Gichinga Kanyugi (9<sup>th</sup> Applicant) have come to this court under

Order LIII rule 3(1) of Civil Procedure Rules seeking orders of certiorari to move to this court and quash the decision of the Registrar of Co-operative societies (1<sup>st</sup> Respondent) made pursuant to the findings of an inquiry of the Othaya Farmers Co-operative Society Ltd instituted under section 58 of the Co-Operatives Societies Act No. 12 of 1997 (hereinafter referred to as the Act), to surcharge each of the applicants of various amounts purportedly under section 73 of the Act. The applicants also seek a further order prohibiting 1<sup>st</sup> Respondent and or the Commissioner of Co-operative Societies (2<sup>nd</sup> Respondent) whether by themselves or through any other persons from effecting the order of surcharge.

It is the applicants contention that the Respondents have made an order surcharging the applicants without carrying out any inquiry under section 73 of the Act and without giving the applicants any hearing.

The Respondents though served did not enter any appearance or reply to the application nor did they attend the court.

I have considered the application and the annexures provided. Although the Respondents sent the applicant notice showing that the surcharge was being done under section 73 of the Act, the notice clearly indicates that the surcharge was being done pursuant to an inquiry report instituted under section 58 of the Act.

Section 58 of the Act states as follows:

**58 (1) The Commissioner may of his own accord, and shall on**

**the direction of the minister, as the case may be, or on**

**the application of not less than one third of the**

**members present and voting at a meeting of the Society**

**which has been duly advertised hold an inquiry or direct**

any person authorized by him in writing to hold an inquiry, into the by laws, working and financial conditions of any co-operative society.

**(2) All officers and members of the Co-operative Society**

**shall produce such cash, account books documents**

**and securities of the society and furnish such information**

**in regard to the affair of the society as the person holding**

**the inquiry may require.**

**(3) The Commissioner shall report the findings of his inquiry at**

**a general meeting of the society and shall give directions for**

**the implementation of the recommendations of the inquiry**

**report.**

**(4) Where the Commissioner is satisfied after due inquiry, that**

**the committee of a co-operative society is not performing its**

**duties properly he may:**

- (a) Dissolve the committee**
- (b) Cause to be appointed an interim committee consisting of not more than five members of the society for a period not exceeding 90 days.**

**(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.**

It is apparent from the above provisions that an inquiry instituted under section 58 of the Act has no reference to section 73 of the Act and cannot result in a surcharge of the officials but can only lead to a dissolution of the committee and appointment of an interim committee.

Section 73 of the Act states as follows:

**73(1) where it appears that any person who has taken part in the organization or management of a co-operative society or any past or present officer or member of the society,**

- (a) has misapplied or retained or become liable or accountable for any money or property of the society; or**
- (b) has been guilty of misfeasance or breach of trust in relation to the society,**

the Commissioner may on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.

**(2) upon inquiry under subsection (1) the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.**

**(3) This section shall apply notwithstanding that the act or default**

**by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.**

It is apparent from the above provisions that the commissioner can only order surcharge against any person who has misapplied, retained or misappropriated the society's money or property or has been guilty of misfeasance or breach of trust in relation to the society, after inquiring into the conduct of the specific person or persons.

A general inquiry into the by-laws, working and financial conditions of any co-operative society carried out under section 58 of the Act cannot therefore be the basis for an order of surcharge by the Commissioner but can only lead to further inquiry into the conduct of specific persons under section 73 of the Act.

The order for surcharge of the applicants made by the Commissioner based on an inquiry of the society's affairs carried out under section 58 of the Act was therefore made without jurisdiction and was an abuse of the powers of the Commissioner under the Act.

It is further evident that the cardinal principles of natural justice were contravened in that by the commissioner basing his decision on an inquiry into the society's affairs, the applicant's were not given a hearing as no inquiry was carried out on any specific allegations against each of them.

I am satisfied that this is an appropriate case in which the orders of certiorari and prohibition should issue to contain the excess of powers being exercised by the commissioner and to restrain him from acting contrary to the rules of natural justice.

According I do grant the application and do issue the orders of certiorari and prohibition as sought in prayer (1) & (2) of the Notice of Motion dated 10<sup>th</sup> March 2005.

The respondents shall pay costs of this suit to the applicants.

***Dated signed and delivered this 3<sup>rd</sup> day of August 2005***

**H. M. OKWENGU**

**JUDGE**