



**Olendo & 2 others v Commissioner for Cooperative Development,
Ministry of Industry, Trade & Co-operatives & another (Civil Appeal
E303 of 2022) [2025] KEHC 5169 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E303 OF 2022**

JN NJAGI, J

APRIL 25, 2025

BETWEEN

RICHARD OLENDU 1ST APPELLANT

DR CONSTANTINE WESONGA 2ND APPELLANT

LOI MUHUNJA KIRUI 3RD APPELLANT

AND

**COMMISSIONER FOR COOPERATIVE DEVELOPMENT, MINISTRY OF
INDUSTRY, TRADE & CO-OPERATIVES 1ST RESPONDENT**

MASENO UNIVERSITY SACCO SOCIETIES LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment of the Co-operative Tribunal
in Tribunal Appeal No.2 of 2019 delivered on 27/5/2021)*

JUDGMENT

1. The appellants herein were officials of the 2nd Respondent, Maseno University Sacco Society Limited. On the 5th February 2019, the Commissioner for Cooperative Development made a decision to surcharge them for embezzlement of the 2nd Respondent's funds related to the sale of the 2nd Respondent's shares in Co-operative Holdings. They were aggrieved by the decision of the Commissioner and filed an appeal before the Co-operative Tribunal seeking that the said decision be set aside and quashed and to tribunal to enter a plea of not guilty on the appellants.
2. The Tribunal in its judgment held that it had no jurisdiction to set aside and quash the decision of the Commissioner as the same was an administrative action which could only be set aside by the High Court in a judicial review application. The Tribunal consequently dismissed the appeal. The appellants were dissatisfied with the judgment of the Tribunal and lodged the instant appeal.



3. The appeal herein raises 21 grounds all of which fault the Tribunal for failing to set aside the decision of the Commissioner. The appellants sought that this court quashes the decision of the Tribunal dated 27th May 2021 and allow their Memorandum of appeal before the Tribunal dated 1st March 2019.
4. The appeal was disposed of by way of written submissions of the counsels appearing for the parties.

Appellants' Submissions

5. The appellants preferred 9 issues for determination before this court. They submitted that the Tribunal erred in law and fact in failing to find that the actions by the appellants towards the sale of the 2nd respondent's shares in Co-operative Holdings was procedurally and substantively within their jurisdiction as the management committee, having been procedurally approved by all the relevant organs of the SACCO through legitimate resolution and all steps, processes and documentations were procedurally and substantively complied with.
6. It was submitted that Section 28 of the Cooperatives societies Act provides for powers of the committee. The committee is the governing body of the society and shall subject to any direction from a general meeting or the by-laws of the cooperative society, direct the affairs of the SACCO with powers to enter into contracts, institute and defend suits and any other legal proceedings brought in the name of or against the SACCO and lastly to do all things necessary to achieve the objects of the co-operative society in accordance with the by-laws. By virtue of this provision, it was the submission of the appellants that they had the power to sell the class "A" shares. They submitted that the sale was done for the benefit of the SACCO.
7. It was submitted that the sale was approved by all the members of the Board of Directors. The sale agreement was found valid by the tribunal as well as by the High Court in HCCA No. 4 of 2018.
8. The appellants submitted that the Tribunal erred in finding that the appellants were negligent and fraudulent in engaging a 3rd party to scout for interested buyers yet section 28(3) of the Co-operative Societies Act donates such powers to the Appellants as the Management Committee. It was the submission of the appellants that engaging Rapid Equities Limited as their agent was well within their committee powers as all committee members endorsed the same. The tribunal's reliance on the Procurement Act was misadvised as the 2nd respondent is not subject to the Procurement Act as it is a private entity.
9. The appellants submitted that the decision of the tribunal was contrary to Article 47 of the Constitution, section 4(4) of the Fair Administrative Actions Act and the rules of natural justice. It was the appellants case that they were condemned unheard.
10. The appellants further submitted that the loss of Kshs. 44,094,800.00/= was just but a mere speculation. A loan of Kshs. 45,000,000.00/= was taken from Stima SACCO by the 2nd respondent. There is no audit report to show that the funds were lost. It was averred that the money purportedly lost was paid to the agent by the SACCO pursuant to a contract between the SACCO and the agent. Stima Sacco bought the said shares and therefore fees paid to a successfully concluded transaction cannot be termed as a loss to the SACCO.
11. It was submitted that the issues raised and dealt with by the tribunal were res judicata as they were substantially similar as those in Tribunal Case No. 32 of 2017 in which Hon. Justice Grace Nzioka directed Stima Sacco to finalize and conclude the share transfer agreement within 30 days of the judgment. The said SACCO having benefitted from the transaction is thus estopped from denying the legality of the said transaction.



12. The appellants submitted that the Tribunal erred in failing to find that the cost of inquiry had been borne by the SACCO and hence they cannot be found guilty. Lastly, the appellants submitted that the respondent had failed to provide any evidence to support the decision of the 1st respondent. The only document produced was the contract between the Agent and the SACCO, which provided for payment of the consideration upon getting the buyer. The actual transfer had nothing to do with the work done by the agent as that was a formality to be perfected between the two transacting parties.

2nd Respondent's submissions

13. The 2nd Respondent, the SACCO, pointed out from the outset that the Tribunal in its determination of the Appeal filed under section 74 of the *Co-operative Societies Act* addressed only the question of its jurisdiction to set aside the inquiry report conducted by the Commissioner for Cooperatives under Section 58 as read with Section 73 of the Co-operatives *Societies Act*. It was therefore its contention that the appellants were raising grounds and issues which the tribunal did not pronounce itself on and therefore cannot be raised at the appellate stage.
14. The 2nd Respondent submitted that the finding of the tribunal on the matter of surcharge was well founded in law. Reliance was placed on sections 3 & 74 of the Co-operatives *Societies Act*. Further that the appellants were subjected to a fair legal process wherein they appeared before the inquiry officers, gave their story and signed the acknowledgments to be interviewed.
15. The 2nd Respondent submitted that there were complaints from members of the 2nd respondent that their finances were not being properly managed. The Commissioner for Cooperatives then instituted an inquiry as required under Section 58 of the *Co-operative Societies Act*. After compiling the inquiry report, the same was presented before the Special General Meeting which was convened on 24/11/2018 and the report was adopted for implementation in line with section 58(3) of the Act.
16. It was submitted that upon the adoption of the findings, the Commissioner found the appellants liable for the sum contained in the inquiry report. The Commissioner proceeded to issue the surcharge order under Section 73(1) & (2) of the Act. Reliance was placed in the case *Republic vs. The Commissioner for Co-operatives Development- Kenya Insurers Sacco Society Ltd JR No. 280 of 2012*.
17. The 2nd Respondent submitted that the Tribunal dismissed the appeal for want of jurisdiction. They supported the holding of the Tribunal that the inquiry report can only be challenged in the High Court by way of Judicial Review. That the High Court can uphold the surcharge or quash the same if the process did not meet the constitutional threshold. They submitted that the Tribunal is not seized with the powers to quash the inquiry report.
18. The 2nd respondent further submitted that the appellants were the officials of the 2nd Respondent and hence had the responsibility of preserving assets and as such they were accountable for their actions. The 2nd Respondent submitted that the appeal has no merit and urged the court to dismiss it with costs.

Analysis and Determination

19. I have perused and considered the record of appeal together with submissions filed by the advocates acting for the parties.
20. It is to be noted from the outset that the Tribunal did not pronounce itself on the merits of the appeal but only confined itself on whether it was seized of jurisdiction to determine the appeal. The Appellants in their Memorandum of Appeal dated 1st March 2024 did not challenge the finding of the Tribunal that it had no jurisdiction to issue the orders sought by the Appellants.



21. The Appellants in their memorandum of appeal before the Tribunal were seeking for orders that:
...the decision of the Commissioner of Co-operative Development dated 5th February 2019 pursuant to gazette notice No. 9140 dated 7th September 2018 being the Inquiry Report of Maseno University Sacco Society Limited be set aside, quashed and substituted with a finding of not guilty on the part of the appellants.
22. The appellants were therefore asking the Tribunal to quash the decision of the Commissioner dated 5th February 2019 in which the Commissioner surcharged each of them a sum of Ksh.4,877,200/= for money reported to have been embezzled from the 2nd Respondent. The surcharge was under the provisions of sections 58 and 73 of the *Co-operative Societies Act*.
23. Section 58 of the *Co-operative Societies Act* mandates the Commissioner to carry out an inquiry into the by-laws, working and financial conditions of Co-operatives Societies either on his own accord, at the direction of the Minister or on application with no less than 1/3 of members present. The Commissioner has powers to inquire into the affairs of the Co-operative Society and thereafter to present an inquiry report at a General Meeting of the society and give directions for the implementation of the recommendation of the inquiry Report.
24. Section 73 of the Act gives power to the Commissioner to surcharge officials of a cooperative society upon receiving the inquiry report. The section provides as follows:
 73. Power to surcharge officers of co-operative society
 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.
25. Once the Surcharge Order is issued then the party is required under Section 74(1) *Co-operative Societies Act* to appeal against the said order within 30 days to the Tribunal. The Act confers the Tribunal with jurisdiction over the process followed in arriving at the surcharge Order.
26. In the present case, the Commissioner ordered an inquiry on the financial affairs of the 2nd Respondent. After the inquiry report was compiled, it was presented before the Special General Meeting convened on 24/11/2018 and the report was adopted for implementation in line with section 58(3) of the Act. The report recommended that the appellants be surcharged for money lost in selling the 2nd



Respondent's shares to Stima Sacco Limited. The Commissioner proceeded to issue summons to the Appellants for them to show cause why they should not be surcharged over the loss. The appellants submitted their responses to the Commissioner who apparently was not satisfied with their explanation and decided to surcharge them as per the letter dated 5th February 2019. It is that decision that the Appellants were seeking that it be quashed by the Tribunal.

27. In holding that it did not have the power to quash the decision of the Commissioner, the Tribunal stated as follows:

Under section 3 of the Cooperative *Societies Act* provides for –“functions, duties to be exercised by the Office of Commissioner of Cooperatives.” This is an administrative action attached to that office and any decisions made are administrative decisions of the said office. The said administrative decisions can only be challenged under Article 47 of *the Constitution* and under Section 3 of the Fair Administrative Actions Act.

The tribunal therefore is not required to investigate the administrative action of the Commissioner and this mandate lies with the High Court in a suit for judicial review as provided for under Section 7(2) of the Fair Administrative Actions Act and Article 165(3)(b) of *the Constitution* of Kenya.

The jurisdiction of the tribunal under Section 74(1) lies only in the procedure culminating to the issuance of the surcharge orders. The Tribunal does not open up the Inquiry Report to inquire on its merit, fairness and accuracy of the report.

Once the Tribunal is satisfied that the procedure was adhered to and that the appeal was filed within the time of the Jurisdiction of the Tribunal is exhausted.

In the Instant Appeal the Appellants have invited for the Tribunal to set aside, quash and substitute verdict of Inquiry Report hence challenging the powers, functions and duties of the Administrative office of the Commissioner of Cooperative Development.

The respondent rightly submitted that this is the purview and jurisdiction of the High Court and the Tribunal has No jurisdiction to delve into any denial, violation or infringement of, or threat to a right of a fundamental freedom in the Bill Of Rights. The tribunal is a subordinate Court and therefore has no jurisdiction under Article 25(a and b) of *the Constitution*.

In the conclusion we find that the appeal has no merits owing to the lack of jurisdiction.

The Appeal is dismissed.

The Appellants to pay the costs of the 2nd Respondent.

28. I am in total agreement with the holding of the Tribunal that the Tribunal does not have the power to quash the decision of the Commissioner. Section 3 *Co-operative Societies Act* provides for the functions and duties to be exercised by the office of Commissioner for Co-operatives. Surcharge is an administrative action by the Commissioner. Any such administrative action of the Commissioner can only be challenged under Article 47 of *the Constitution* and under Section 3 of Fair Administrative Actions Act. That is power reserved to the High Court in a suit for Judicial Review as provided for under Section 7 (2) *Fair Administrative Action Act* and Article 165 (3) (b) of *the Constitution* of Kenya. Section 7 of the Administrative Action Act provides as follows:

7. Institution of proceedings

- (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
- a. a court in accordance with section 8; or



b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law

29. There is no provision in the Co-operative Tribunal Act showing that it has power to review administrative actions. That is the jurisdiction of the High Court under the *Fair Administrative Action Act*. In so holding, I find support in the case of *Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others* [2012] eKLR, where Gikonyo J. held that the Co-operative Tribunal does not have jurisdiction to issue judicial review orders. What the appellants were seeking in the matter that was before the Tribunal were seeking were judicial review orders of which the Tribunal has no jurisdiction to entertain.
30. It is trite law that jurisdiction is everything as without it the court has no power to make one more step - see the holding in the *Owners of Motor Vessel Lillian ("S") vs Caltex Oil (K) Limited* (1989) 1 KLR. Where a court has no jurisdiction, any proceedings taken would be null and void. It is therefore my finding that the Tribunal did not have the jurisdiction to issue the orders sought by the Appellants. Consequently, the appeal has no merit and is dismissed with costs to the 2nd Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL, 2025

J. N. NJAGI

JUDGE

In the presence of:

.....for Appellants

.....for 2nd Respondent

Court Assistant – Mokeira

30 days R/A.

