



**Republic v Uasin Gishu Cooperative Commissioner; Kiplagat & 3 others  
(Exparte Applicants); Chepkonga & 4 others (Interested Parties) (Judicial  
Review E001 of 2024) [2024] KEHC 5885 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5885 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW E001 OF 2024  
RN NYAKUNDI, J  
MAY 24, 2024**

**BETWEEN**

**THE REPUBLIC ..... APPLICANT**

**AND**

**UASIN GISHU COOPERATIVE COMMISSIONER ..... RESPONDENT**

**AND**

**SAMUEL KURUI KIPLAGAT ..... EXPARTE APPLICANT**

**JOEL KABUR ..... EXPARTE APPLICANT**

**VINCENT CHERUIYOT ..... EXPARTE APPLICANT**

**KENNETH CHERUIYOT ..... EXPARTE APPLICANT**

**AND**

**HARON CHEPKONGA ..... INTERESTED PARTY**

**SAMUEL CHEBOI ..... INTERESTED PARTY**

**RUTTO SITIENEI ..... INTERESTED PARTY**

**LUCY THUO ..... INTERESTED PARTY**

**DAVID CHEMESIS ..... INTERESTED PARTY**

**RULING**

1. What is pending before this court is the Notice of motion Application dated 21<sup>st</sup> March 2024 seeking the following orders;



- a. Spent
  - b. Interested parties be enjoined in this suit.
  - c. The orders of this court issued on 20/03/2024 granting the order of leave to file the substantive motion do operate as stay of execution of the order of an interior tribunal be and is hereby set aside or varied to extend that the status quo obtaining as at 20/3/2024 be maintained until further orders of this court is granted.
  - d. Any other order this honourable court deems fit so to grant.
  - e. Costs of this application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the application sworn on the same date by the 1<sup>st</sup> Interested Party.
  3. The applicant contends that director of cooperatives commenced inspection of the documents of the society on her own accord on 14/08/2023 after receiving several complaints about the running of the affairs of the society. The inspection as finalized on 15/09/2023 and the presentation of the report was delayed by the conduct of the applicants. The inspection report was read on 02/02/2024 in the presence of the members of the society in a special general meeting. In said meeting the interim management committee was constituted by the members of the society in compliance with the recommendation of the director of cooperatives contained in the inspection report, By-Laws of the society and the Cooperatives Act. The formation of the interim management committee was arrived at after it transpired there were losses of funds attributed to the management committee. The interim management committee took over the running of the affairs of the society as from 02/02/2024.
  4. It is the applicants' case that the orders of the court staying the recommendations of the director has the effect of reversing the decision of the members of the committee and there is a danger of subjecting the running of the affairs of the society into a state of confusion. There is a real danger of interference with records if the management committee removed from office is allowed back to run the affairs of the committee. Further, that there have been attempts by the applicants to invade the office of the society and cart away crucial documents. The applicants have also gone ahead to wantonly collect parking fees, car wash proceedings and other contributions from the members of the society without proper records and there is real danger of wasting the society's income and resources.
  5. The applicants urged that the dispute should have been settled before the Cooperatives tribunal and further, that the applicants only approached this court upon receipt of letters demanding payment of the misappropriated amount by the interim management committee.

#### **4<sup>th</sup> Ex Parte Applicants' replying Affidavit**

6. The 4<sup>th</sup> Ex parte applicant filed a replying affidavit dated 19/04/2024 in opposition to the application. He urged that the application is overtaken by events and they are now dealing with the substantive motion. Further, that the issues raised by the interested parties do not touch n judicial review but are audit queries and therefore he should have sought for an audit review. Counsel urged that the issues raised were comprehensively addressed in the audit report prepared by the County Director of Cooperative audit.

#### **Replying Affidavits**

7. The 1<sup>st</sup> interested party respondent to the application vide a replying affidavit dated 23/04/2024 sworn by the 1<sup>st</sup> interested party , the chairman of Kipsinende Sacco Society Limited. He stated that he was



aware that the contents of the impugned report were at every stage of the inspection and well within the knowledge of the management committee and further, that they were given an opportunity to clarify all the aspects found untoward against them. Having been granted the opportunity to be heard, the applicants cannot be allowed to use the court's jurisdiction to hide from taking responsibility by their actions as stipulated by the relevant laws or by-laws.

8. He deponed that the ex parte applicants having been part of the management committee must have known the consequences of failure to comply with the law and cannot be seen to use the failure on their part to vilify the actions of the County Commissioner of Cooperatives whose actions were well within the confines of the law.
9. The deponent stated that the issues arising before this court would require a hearing in the nature of taking evidence and that therefore removes the dispute from the jurisdiction of this court and places it squarely on the jurisdiction of the Cooperatives tribunal as per section 76 of the Cooperatives [Societies Act](#). He urged that the application be dismissed as it is a clear abuse of the jurisdiction of the court.

### **Ex Parte Applicants' submissions**

10. The interested parties filed submissions dated 02/03/2024. Counsel urged that vide a letter dated 18/01/2024 received on 23/01/2023 the respondent notified the applicant that there shall be a special general meeting of Kipsinende Sacco Society Limited on 02/02/2024 and the agenda was to be the presentation of the inspection report that was instituted by the respondents' office through a letter dated 07/08/2023. The respondent required the 1<sup>st</sup> ex parte applicant to notify the members of the Sacco society to attend the meeting. Given the short notice, the society, through its members, wrote to the respondent vide a letter dated 30/01/2024 informing the respondent that the members require at least 15 days' notice prior to the Special General Meeting as provided for under section 27 of the Cooperative [Societies Act](#). The ex parte applicants were informally informed that the respondent read the inspection report on 02/02/2024 despite not responding to the letter. The society requested the respondent to supply it with the inspection report however the same was not supplied.
11. Counsel cited Section 60A of the Cooperatives Society Act and urged that in total disregard of the law, they have never been supplied with the law. Additionally, citing section 58 of the Cooperative Society Act, as read with Rule 46 of the Cooperative Society Rules, counsel submitted that there is no inquiry that has been done yet the respondent has purported to remove the ex parte applicants from office and put in place an interim committee without adhering to the law. He maintained that the decision of the respondent to implement the recommendation of the inspection report and to remove the management committee from office is tainted with illegality, irrationality and procedural impropriety. Counsel cited the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (2002) eKLR in support of this submission.
12. Counsel submitted that the replying affidavit of the respondent, Roselyne Nyango Rae is far from the truth and highlighted paragraphs 5 and 6 of the same. He urged that the audit reports/financial reports and financial statements for the year ending 31/12/2021 and 31/12/2022 having been prepared by an expert from the Respondents' office cannot be challenged by unqualified individuals who are not gazetted as inspectors but who are employees of the same office. He referred the court to page 7 of the audit report and stated that the deponent of the respondents' replying affidavit dated 15/04/2024 is double speaking and contradicting herself. He highlighted paragraphs 6,7,8,9,11,13,14,16,17 and 19 of the same.



13. Counsel maintained that the respondent has acted arbitrarily and with procedural impropriety without justification hence the orders sought should be granted. He urged the court to dismiss the application dated 21/03/2024 with costs as it has been overtaken by events.

### **Respondent's submissions**

14. Learned counsel for the respondents filed submissions dated 22/04/2024. Counsel urged that under the Fourth Schedule Part 2, is the County Governments devolved functions which relate to Trade Development and Regulations including Cooperative Societies. The instant dispute arose at the County Government of Uasin Gishu which enacted its domestic legislation being Uasin Gishu Cooperative [Societies Act](#), 2021. Therefore, they are under the provisions of this act and not those of Cap 490 laws of Kenya.
15. It is the respondent's case that section 70 of the Uasin Gishu County Cooperative [Societies Act](#), 2021, empowers the Commissioner to from time to time carry out impromptu inspection of affairs of a cooperative society and shall remove from office committee members found to have misappropriated members funds and shall require committee members to pay back such amounts. He urged that the mandate is denoted under Section 6 (3) and section 35 (8) & (10) in regards to the Special General Meetings of the Cooperative Societies including supervise and inspect Co-operative Societies to ensure compliance with the law and cautioning of Co-operative Societies' accounts to safeguard members' funds and in line with the Kipsinende Sacco Society Ltd.'s by laws clause 26 (c).
16. Counsel submitted that the General Meetings are to be convened with notice sent Fifteen (15) days prior to the said meeting under Section 35 (4) Uasin Gishu County Cooperative [Societies Act](#), 2021. The Respondent sent notice on 18<sup>th</sup> January, 2024 for Special General Meeting on 2<sup>nd</sup> February, 2024. This is Fifteen (15) Days sufficient notice. The notice was not short as alleged.
17. Counsel submitted that there are minutes of the said Special General Meeting which shows that the vote for removal of the said members as a result of the report showing accounts which members had lost faith in the current leadership was moved by a member of the Sacco and not the Respondent. Under section 70 of the Uasin Gishu County Cooperative [Societies Act](#), 2021, the Commissioner may make impromptu inspection and shall remove from office committee members who have misappropriated members funds. No procedure is required therein. On 29.06.2024, the Respondent received a complaint from a member of the Sacco and acted upon it by appointing impromptu inspection team on 4<sup>th</sup> January, 2024, which met with the committee members to air their views on the findings as well as have their input on it. Thereafter a special general meeting was called on 18th January, 2024 after report was handed over to the Respondent. The ex parte applicants were given an opportunity to explain the said discrepancies and despite the forum, their unsatisfactory answers led to the Respondent call for the SGM which is well within her mandate and powers in the act.
18. The ex parte applicants fault the Respondent for not supplying them with the inspection report which they interacted with on 4th January, 2024 but they had to wait until the SGM was announced to ask for the report days later. Equity aids the vigilant. The big question is therefore whether the ex parte applicants were aggrieved by the decision of the Respondent and what is their remedy. The genesis of the JR is not the decision in this case. The causative factor is the surcharging letters sent to the ex-officials, ex parte applicants on diverse dates. Counsel submitted that essentially, the ex parte applicants are aggrieved of the decision by the commissioner to surcharge them and in fact the Uasin Gishu Cooperative [Societies Act](#), 2021 provides under part XIII SURCHARGE section 82 and the subsequent appeal under section 83 is to the tribunal. The ideal situation is camouflaged herein as JR but the decision made by the Respondent should in law be appealed to the tribunal.



19. Counsel cited the case of Civil Appeal No. 234 of 1995, *The Commissioner of Lands Vs Kunste Hotel Limited* where the Court of Appeal defined the scope of judicial review. Further, that under the Uasin Gishu *Co-operative Societies Act*, 2021 has powers to;
- a. Carry out impromptu inspection into affairs of the Cooperative Society and Remove from office committee members who are found to have misappropriated members funds without any procedure under section 70 or under section 67 conduct an inquiry and inspection which results in case of aggrievances are to be presented as appeal to the Tribunal.
  - b. Convene a Special General Meeting, direct matters to be discussed and preside over all general meetings of all Cooperative Societies under Section 35 (8) & (10) 17. The Commissioner under the devolved governments have more power over affairs of the societies and some of these actions do not have laid down procedures for handling aggrievances but only appeal to the Tribunal.
20. Counsel urged that the Ex parte applicants have premised their application upon, among other things, alleged violation of the right to fair administrative action contrary to article 47 of *the Constitution* and the *Fair Administrative Action Act*. They are challenging the inquiry conducted under section 67 of the Uasin Gishu *Co-operative Societies Act*, 2021, for non-adherence with the requirements of fair administrative action. Section 9 of Fair Administrative Action embodies the doctrine of exhaustion of remedies and precludes the court from reviewing an administrative action unless all remedies available under any written law or internal mechanism in respect of the dispute before it has been exhausted. Further, that section 9(3) of the said Act requires the court to direct that the applicant first exhausts such remedy provided before instituting proceedings in the court. There are no exceptional circumstances in this case or anything to show that the remedy provided in section 83 of the Uasin Gishu *Co-operative Societies Act*, 2021, is ineffective or futile or any reason whatsoever in the interest of justice to exempt the Ex parte applicants from the obligation in section 83 of the Uasin Gishu *Co-operative Societies Act*, 2021. The circumstances of this case and in light of section 83 of the 83 of the Uasin Gishu *Co-operative Societies Act*, 2021 demand striking down of the proceedings.
21. As regards the costs, the respondent submitted that the motion is unmerited and the same ought to be dismissed with costs.
22. Counsel urged the court to find that the Respondent had powers to issue the letter dated 18<sup>th</sup> January, 2023, setting up the SGM, preside over the SGM and removal of the committee members from office and hence the Respondent cannot be prohibited by the court to do such functions as its creation of statute therefore the motion is unmerited and as such be dismissed with costs to the respondent.

### **Analysis & Determination**

23. Upon considering the application and responses thereto, the following issues emerge for determination;
- a. Whether the interested parties should be enjoined
  - b. Whether the orders granted on 20/03/2024 should be set aside

### **Whether the Interested Parties should be enjoined**

24. None of the parties to the suit submitted on the issue of interested parties therefore no orders on the same shall issue as the parties have abandoned the same.



## Whether the orders granted on 20/03/2024 should be set aside

25. The Applicants in the Judicial Review sought leave to institute Judicial Review Proceedings in order to quash a decision of the Uasin Gishu County Cooperative Commissioner that was read on 02/02/2024. The said decision had the effect of removing the chairman, treasurer, secretary and committee member of Kipsinende Sacco Society Limited. The removal was premised on the contents of the report emanating from the inspection that was instituted by the commissioner.
26. The respondents, sought a stay of the orders issued, as they sought leave to institute judicial review proceedings and the same were granted by this court. The applicants' contention that this court does not have jurisdiction to entertain this suit as the same should have been before the Cooperatives Tribunal before being brought before this court is stated as a ground of the application. It is my considered view that they do not dispute the jurisdiction of the court as the same would have been encapsulated as a prayer to have the suit struck out for want of jurisdiction.
27. It follows that the main issue for determination in the present application is whether the court should set aside its orders for stay that were issued on 20/03/2024. The judicial review application, I reiterate, was instituted in order to challenge the decision of the County Cooperative Commissioner that was communicated vide a decision read on 02/02/2024. However, the Uasin Gishu County Cooperative Societies Act provides the framework for the inspection and dissolution of a Committee of a Cooperative Society under section 67 of the Act.
67. The Commissioner may, of his own accord or on the application of a creditor and shall on the direction of the Executive Committee Member, or on the application of not less than one-third of the members present and voting at a properly convened General meeting of the society, hold an inquiry or direct some person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society or, on the conduct of 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.
- (1) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.
- (2) The Commissioner shall report the findings of the inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.
- (3) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may dissolve the committee, and cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.
- (4) Any person who contravenes subsection (4) 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.
- (5) Any person found to have misapplied or retained or become liable or accountable for any money or property of the society or has been guilty



of misfeasance or breach of trust in relation to the society, he may, if the Commissioner so directs, be required 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 fit.

- (7) 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.
- (8) Any person aggrieved by an order of the Commissioner under sub-section (6) may, within thirty days appeal to the Tribunal.
- (9) Any party aggrieved by the decision of the Tribunal may within thirty days appeal to the High court on matters of law.
- (10) Subject to sub-section (8) an order made pursuant to Sub-section (6) for any monies to be repaid or contributed to a co-operative society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.

28. Evidently, there is an appeals process to the tribunal before approaching the High Court for any reprieve. The applicant skipped an essential stage in this process by approaching the High Court for Judicial Review. Whereas the applicant challenges the process of the removal of the committee, the first port of call to challenge the commissioner was the Tribunal as per the provisions of section 67(8) of the act. In doing so, the applicant was able to obtain stay orders.

29. According to the Respondent, the court had no jurisdiction in issuing the orders in favour of the notice of motion dated 19<sup>th</sup> march, 2024 by the exparte applicants. In exercising judicial review jurisdiction, this court went further to grant leave to the applicants to apply for prerogative writs of Prohibition and certiorari as against the respondent. It is also apparent that the leave so granted was to act as stay of execution of the order by the inferior tribunal. Having been appraised of the Law as provided for under Uasin Gishu County Act, 2021 on the formation, organization and structure of co-operative societies, rights and obligations of co-operative societies, management of co-operative societies, inquiry, inspection and surcharge, property and funds of co-operative societies and settlement of disputes, this court had no jurisdiction to entertain the notice of motion. I am persuaded that the proposition canvassed by the respondent is correct in law. It is trite that jurisdiction is primordial in every suit a court of law has to exercise both personam and rem jurisdiction. The Court of Appeal in Owners of the Motor vessel Lillian S v Caltex oil Kenya Limited (1989) EA settled the law then and has remained to be good law even in 2024 season. In the pronouncements made by the learned judges of the court;

“Jurisdiction is everything. Without it, the court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ..... where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”



30. Similarly, in *Macfoy V United Africa Co. LTD* (1961) 3 ALL ER, 1169 as it was in *Owners of the Motor vessel Lillian S v Caltex oil Kenya Limited*, in this comparative jurisprudence, the court held that;

“If an act is void, then it is in law a nullity. It is not only bad, but incurable bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

31. In fact, the facts of this case are illustrative of a broader dilemma courts face when a party has not fulfilled a jurisdictional exhaustion requirement. The exhaustion doctrine’s judicial origin and purposes is faithfully to serve the interests of justice and disallow injustice being meted out to the adverse party. The rule on exhaustion is very simple although its application by parties confuses the entire procedural justice when it is not followed to the letter. Generally, where there is a statutory directive that one shall and must exhaust administrative, quasi-judicial, or tribunal jurisdictional grant of remedies before seeking leave in a court of law any such order, directions or dictates which may arise from that court remain voidable and a nullity. The dichotomy of the doctrine of exhaustion is that it does not have to precede merits, arguments and constitutional claims made by a party to invoke the jurisdiction of the court. The mandatory doctrine of exhaustion has several advantages; first, it finds support on how courts have already interpreted exceptions to statutory requirements like in the *Owners of the Motor vessel Lillian* case. Second, it is based on modern legal development in jurisdictional theory on dispute resolution and forum of conveniens. Third, the mandatory doctrine of exhaustion empowers the courts to avoid injustice that may arise from making the court the first point of call. It is instructive to note that the steps necessary to exhaust all remedies are specific to the statutory scheme like the ones referred to by the Uasin Gishu County *Co-operative Societies Act*, No. 4 of 2021. Fourth, the doctrine of exhaustion promotes judicial efficiency. That is, if a litigant or entity can correct his/its own errors at an administrative organ or tribunal, there will be no need for further litigation to the high court. Fifth, Parliament has insulated the doctrine of exhaustion requirement with a codification to clarify the precise steps a claimant, a party, an agency or a litigant must take to exhaust the remedies. To determine the specific facts of this case, one has to interpret the statutory exhaustion requirement in a jurisdictional context as provided for in the Uasin Gishu County *Co-operatives Societies Act*, 2021. How this impugned notice of motion dated 19<sup>th</sup> March, 2024 came to be decided in favour of the *exparte* applicant, was due to the pleadings indicative of the issues being purely under the judicial review jurisdiction as commonly known in our litigation trajectory. However, on appreciating the submission as canvassed by respective parties, there was an exception blur between judicial review jurisdiction and the non-judisdictional requirements provided in the applicable Act enacted by the county government to oversight the co-operative societies.

32. In sum, this court lacks jurisdiction to hear this matter and even the application dated 19<sup>th</sup> March, 2024 in view of the doctrine of exhaustion of internal dispute resolution mechanisms. Where does that leave the orders so granted to the effect that leave shall act as stay of execution of the orders by the inferior court. Truly so, the order was devoid of jurisdiction and could not therefore be sustained to pass any relief known in law to the *exparte* applicants. That notice of motion had not ripened for this court to exercise any jurisdiction over the subject matter.

33. For the foregoing reasons, and in light of the circumstances of the entire case docket, it is my considered view that the applicant contravened the doctrine of exhaustion by failing to adhere to the provisions of the Uasin Gishu County Cooperative *Societies Act* and consequently, the provisions of section 9 of the



Fair Administrative Act are applicable to rule this application as having been filed without jurisdiction. For purposes of clarity, Section 9 expressly states thus;

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

34. In the result, the motion dated 19<sup>th</sup> March, 2024 be and is hereby dismissed for being in contravention of the mandatory doctrine of exhaustion as provided for in Section 85 of the Uasin Gishu County *Co-operative Societies Act*, 2021.

35. That the objection by the respondent on jurisdiction is upheld.

36. That the exparte structural interdict issued by this court on 20<sup>th</sup> March, 2024 were made in error and upset the principle of exhaustion and as a consequence, the same remains voidable as a remedy in favour of the exparte applicants.

37. That the exparte applicants be condemned to pay costs for dragging the respondents to this court while fully aware they were in breach of the doctrine of exhaustion.

38. That the issue of interested parties joining the proceedings is now spent.

39. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24<sup>TH</sup> DAY OF MAY 2024.**

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**R. NYAKUNDI**

**JUDGE**

