



**Republic v Commissioner for Cooperatives Development & 2
others; Rianto & 9 others (Exparte Applicants) (Judicial Review
E002 of 2022) [2023] KEHC 18277 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
JUDICIAL REVIEW E002 OF 2022
F GIKONYO, J
APRIL 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COMMISSIONER FOR COOPERATIVES DEVELOPMENT 1ST
RESPONDENT**

GOODHOPE SACCO SOCIETY LIMITED 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

JONATHAN SAMARUAN RIAN TO EXPARTE APPLICANT

KATETI PERE EXPARTE APPLICANT

JACKSON SARUNI TIRKOLO EXPARTE APPLICANT

JONATHN MAISON MASIKONTE EXPARTE APPLICANT

DENNIS KOITAMET MELETO EXPARTE APPLICANT

DANIEL KAMAKEYI KUYIONI EXPARTE APPLICANT

EVERLYN KESUNA NASIEKU EXPARTE APPLICANT

ANN WACHEKE KARITIE EXPARTE APPLICANT

CAROLINE WANJIRU GATHERU EXPARTE APPLICANT

JULIUS KISAKA KIOK EXPARTE APPLICANT



JUDGMENT

1. Before me is the *Ex parte* applicants Notice of Motion dated 20th March 2022 seeking the following orders;
 - i. An order of *certiorari* to remove into the high court and to quash the entire surcharge order of the 1st respondent dated 13th day of January, 2022 and more importantly purporting to levy surcharge upon the applicants to pay a total sum of Kshs 236, 175, 965.00
 - ii. An order of prohibition directed at the 1st respondent prohibiting himself or any of the 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 surcharge order letters dated 13th January 2022 and notice dated 14th January 2022, surcharging the applicant a sum of Kshs 236, 175, 965.00
 - iii. An order of *mandamus* directing and / or compelling the 1st respondent to recall, cancel, invalidate and annul the surcharge orders communicated vide his letter dated 13th January 2022 surcharging the applicants a sum of Kshs 236, 175, 965.00
 - iv. Costs of this application be provided for.
 - v. Any other order the Honourable Court may deem fit and just to grant.
2. The application is expressed to be brought under Order LIII rules 3(1) *Civil Procedure Rules*, section 8 and 9 of the *Law Reform Act*.
3. The application is premised upon the grounds set out in the statutory statement and verifying affidavit of Jonathan Samparuan Rianto.

Brief *Ex parte* applicants' gravamen

4. The applicants are past officials of the 2nd respondent thus fall within the provisions of Section 73 of the *Cooperatives Act* CAP 490.
5. The *Ex parte* applicants are aggrieved by the surcharge order of the 1st respondent dated 13th January 2022 and notices dated 30th March 2021 and 14th January 2022 respectively.
6. The said surcharge order is premised on the inquiry report dated 26th April 2019 which they argued was irregularly arrived at and its development failed to meet the minimum standards allowed by the law.
7. The said inquiry report was undertaken allegedly pursuant to a petition by members of the 2nd respondent
8. That the content in the gazette notice is not factual since the members never passed such a resolution.
9. The inquiry report is arbitrary since developed without any invitation to those adversely mentioned and for recommendations made including punishment.
10. The 1st respondent has the obligation to ensure that the surcharge order was premised on due process.
11. Effectively therefore the applicants are aggrieved by the said inquiry, the manner and the process used to carry out the inquiry which they say was flawed, irregular and unfair.



2nd respondent's response

12. The 2nd respondent filed a replying affidavit sworn by Isaac Dopoi Kilesi on 31st March 2022. He averred that he is the chairman of the board of the 2nd respondent. He was elected to his current office by members of Good Hope Sacco on or about 20/01/2020 upon directions by the Commissioner of Cooperatives Development. The gist of the response is as follows.
13. The commissioner of cooperatives had carried out an inquiry into the affairs of Good Hope Sacco upon being petitioned by the members of the Sacco in accordance with the cooperatives law.
14. The commissioner for cooperatives development appointed Priscilla Maranga and Hilda Koech Chepkwony vide gazette notice vol. cxx1-No50 dated 26th April 2019 in accordance with provisions of the law at section 58 of the Cooperatives Act.
15. The officials appointed by the commissioner executed their mandate with diligence and in accordance with the law and issued summons to all members of the cooperative concerned who include the 10 *Ex parte* applicants herein. That the *Ex parte* applicants herein are 10 out of 34 persons surcharged by the commissioner for conduct that occasioned loss to the Sacco known as good hope Sacco society limited.
16. The *Ex parte* applicants have come before court as a group while in actual fact, each or them abused their position and office at the Sacco as an individual. Each of the persons surcharged was investigated as an individual and their culpability established during the inquiry.
17. Several of the persons surcharged have conceded and agreed that they were responsible and liable for inappropriate handling of good hope Sacco funds and paid surcharge amounts as follows; a) Patrick Mpatiany- Surcharge number 17 was culpable for Kshs 202,124/= and has paid Kshs 102,000/= b) Lemein Korei- surcharge number 19 paid in Kshs 1,200,000/= c) surcharges numbers 23-34 were the committee that administered good hope Sacco for a period of a period of 90 days (as provided by law) before election of the current committee elected by Sacco members in an annual general meeting (AGM).
18. The 12 committee members were found negligent of their duty and therefore surcharged an amount of Kshs 95,700/= each for their role in occasioning loss to Sacco members. The former committee members wrote a letter to the chairman of the Sacco seeking exemption from the surcharge.
19. The *Ex parte* applicants herein have pretended that the surcharge amounts subject to deductions of amounts of money paid as reflected at 8 above was being surcharged upon themselves. That is an outright lie and an attempt at manipulating this court for sympathy.
20. The *Ex parte* applicants have under urgency and relying on provisions of the laws seeking to mislead this Honourable Court that they were ambushed. That is not true because the *Ex parte* applicants had notice of the inquiry since 2019 vide summons issued to them. That further the law is a purposeful enterprise and individual rights cannot be asserted relying on some sections of the law and excluding others provisions of the law to enable a few rogue individuals muzzle out rights of a sizeable section of the public such as members of good hope Sacco Narok. The *Ex parte* applicants abused their positions of trust as staff members of good hope Sacco to the detriment of genuine Sacco members. That the *Ex parte* applicants did not object or attempt to give explanation for their conduct at the Sacco since 2019 and it is only when they realized that the law would be applied to their personal detriment that they now have rushed to court seeking equitable relief when their hands are soiled from picking out of the cookie jar. That equity does not aid and abet offences and whoever goes to equity must do so with clean hands. The *Ex parte* applicants herein have committed offences against public interest and equity should not aid them. That for the reasons given above, the application for stay ought to be



dismissed with costs to the 2nd respondent and the court do allow the appropriate and lawful authority to complete the process its administrative action as required and provided by the law.

1st Respondent's Response

21. 1st respondent filed a replying affidavit sworn by David K. Obonyo (the commissioner for cooperatives development) on 6th may 2022.the gist of the response was as herein below.
22. pursuant to the provisions of section 58(1) of the *Co-operative Societies Act*, the commissioner in his own accord directed the carrying out of an inquiry of good hope Sacco society limited upon receipt of complaints from the members of the society alleging financial, operational and governance challenges facing the society. in gazette notice no. 3836 dated 26th April 2019, the commissioner for cooperative development ordered an inquiry into; a) the by-laws; b) working and financial conditions; and c) the conduct of the present or past management committee of good hope Sacco society limited (CS/2749) and in accordance with section 58 as read together with section 73 of the *Co-operative Societies Act*.
23. The said inquiry order was made pursuant to section 58 as read with section 73 of the *Co-operative Societies Act*. The inquiry was conducted procedurally where all the respective persons including the applicants herein were accorded an opportunity to be heard.
24. Upon conclusion of the inquiry the findings of the inquiry were reported to the members of the society in a special general meeting held on 31st August 2019 pursuant to section 58(3) of the act. that as such the *Ex parte* applicants were fully aware of the findings of the inquiry together with the directions given for the implementation of the recommendations of the inquiry report.
25. The findings of the inquiry recommended inter alia that the board of directors and the employees of the society found liable and accountable for monies of the society be duly surcharged pursuant to section 73 of the act. in the findings of the report, 34 persons including the *Ex parte* applicants herein were found liable and accountable for s total of Kshs 239, 570,327 belonging to the society. Further by virtue of section 28(4)(k) of the act any member of a committee of the society adversely mentioned in the inquiry report is not eligible to serve in such capacity and the said persons had contravened section 28(6) of the act which provides that the committee is mandated to exercise the prudence and diligence of ordinary men in business and the members shall be held jointly and severally liable for any losses sustained through any of their acts which are contrary to the act, rules, by laws or the directions of any general meeting of the society.
26. Pursuant to section 73 of the act, an order was made requiring the said 34 persons to repay or restore the money as duly apportioned to each individual which order was served upon all 34 persons including the *Ex parte* applicants herein.
27. The inquiry was conducted lawfully and procedurally in accordance with the act and the provisions of section 48 and 49 of the *Sacco Societies Act* 2008 do not in any way conflict with the processes carried out pursuant to the act in this instance, as alleged by the *Ex parte* applicant as they are distinct processes. And as such the inquiry and findings therein were legally and rationally conducted and arrived at.
28. The office of the commissioner discharged its administrative duty pursuant to section 73 of the act which provides that upon inquiry the commissioner is mandated to make an order requiring the liable person(s) to repay or restore the money or property or any part thereof to the cooperative society together with interest at the rate as the commissioner deems just.
29. The cooperative tribunal is the court of first instance to hear and determine an appeal lodged against a surcharge order pursuant to section 74 of the act. The first opportunity for adjudication of the matter



ought to be given to the relevant Tribunal that is the cooperative tribunal as provided for in the act of which the applicant has failed to comply with in this instance.

30. The surcharge order was issued following the carrying out of an inquiry and the subsequent findings and recommendations of the inquiry report pursuant to section 58 and section 73 of the act.
31. The *Ex parte* applicants' application is misconceived and is without merit. The *Ex parte* applicants have not exhausted the appellate process as provided in the law. The application is an abuse of the court process and should be dismissed for lack of merit.

Background of this case

32. The applicants were granted leave to commence judicial review proceedings in the nature of *certiorari*, prohibition and *mandamus* seeking these prerogative judicial remedies to quash the decision of the 1st respondent to surcharge the *Ex parte* applicants as per section 73, cooperative society act cap 490 laws of Kenya
33. The impugned order dated 13/1/22 reads in part, 'You are required to pay the amount against your name within 30 days from the date hereof, failure to do so the commissioner for cooperative development shall institute legal proceedings against you'.
34. Section 75 of the cooperative act provides for recovery of surcharged amounts as civil debt. The money in the surcharged to be recovered are colossal.
35. The applicants sought to demonstrate that the process leading up to the surcharge by the 1st respondent was faulty, contravened the rules of natural justice hence illegal and lends to one outcome only being set aside by this honourable court.
36. The *Ex parte* applicants are aggrieved with the said inquiry, the manner and the process used to carry out the same which they say was flawed, irregular and unfair. That during the inquiry, the inquiry officers did not as a matter of fairness or right to be heard as espoused in article 47 of the [Constitution](#) give any hearing or seek any clarification from the *Ex parte* applicants before making the adverse findings about them and the resultant report was highly inaccurate, unfair and infringed on their right to fair administrative action and treatment under the law.
37. The applicants recognize that judicial review primarily interrogates the decision-making process leading to the impugned decision itself and not the merits of the decision rendered per se.

The *Ex parte* applicants' case

38. The applicants are past officials of the 2nd respondent thus fall within the provisions of section 73 of the Cooperatives Act.
39. The *Ex parte* applicants are aggrieved by the surcharge order of the 1st respondent dated 13th January 2022 and notices dated 30th March 2022 respectively.
40. The said surcharge order is premised on the inquiry report dated 26th April 2019 which was irregularly arrived at and it failed to meet the minimum standards required by the law.
41. That the said inquiry report was undertaken allegedly pursuant to a petition by members of the second respondent as per the gazette notice dated 26th April 2019.
42. The applicants allege that the said gazette notice is not factual since the members have never passed such a resolution.



43. The 1st respondent has the obligation to ensure that the surcharge order was premised on due process.
44. As such the applicants are aggrieved with the said inquiry, the manner and the process used to carry out the same which they claim was flawed, irregular and unfair.

1st & 3rd respondents' case

45. The 1st respondent ordered an inquiry into the operations of the society necessitated by the board of directors of the society of the 2nd respondent's society writing to the commissioner complaining of alleged financial, operational and governance challenges facing the society.
46. By gazette notice No. 3836 dated 26th April 2019, the commissioner for cooperatives development ordered an inquiry into; a) the by-laws; b) working and financial conditions of and; c) the conduct of the present or past management committee of Good Hope Sacco Society Limited (CS/2749) and in accordance with section 58 as read together with section 73 of the *Co-operative Societies Act*.
47. An inquiry order was made pursuant to section 58 as read together with section 73 of the *Co-operative Societies Act* (the Act). the inquiry was conducted procedurally where all the respective persons including the applicants herein were accorded an opportunity to be heard.
48. Upon conclusion of the inquiry, the findings of the inquiry were reported to the members of the society in a special general meeting held on 31st august 2019 pursuant to section 58 (3) of the act. Thus, the applicants were fully aware of the finding of the inquiry together with the directions given for the implementation of the recommendations of the inquiry report.
49. The findings of the inquiry recommended *inter alia* that:
 - “ all those who are adversely mentioned in the report are to relinquish their position with immediate effect. The board of directors should ensure that all dues to the Sacco have been settled before clearing persons adversely mentioned.
 - the board of directors should implement criminal proceedings with the directorate of public prosecution against the employees adversely mentioned in the report so that criminal charges can be filed against them for the recovery of the monies stolen from the society.
 - the board of directors failed in all ways to act as prudent and ordinary men of business. This has made the society to incur losses and not deliver services as it ought to. It is in this regard that they are ordered to step down from their positions with immediate effect and not seek fresh mandate. Further to this they are hereby surcharged.”
50. The inquiry was conducted lawfully and procedurally in accordance with the act and all requisite persons were afforded an opportunity to be heard. In addition, the inquiry and findings therein were legally and rationally arrived at.
51. Further, section 73 of the act provides that upon inquiry, the commissioner is mandated to make an order requiring the liable person(s) to repay or restore the money or property or any part thereof to the co-operative society together with interest at the rate as the commissioner deems just.

***Ex parte* applicant's submissions**

52. The *Ex parte* applicants are aggrieved with said inquiry, the manner and the process used to carry out the same. They argued that the same was flawed, irregular and unfair.



53. It is uncontested fact that during the inquiry, the inquiry officers did not as a matter of fairness or right to be heard as espoused in article 47 of the Constitution give any hearing or seek any clarification from the *Ex parte* applicants before making the adverse findings about them and their right to fair administrative action and treatment under the law.
54. The applicants sought to demonstrate that the decision complained of is tainted with illegality, irrationality and procedural impropriety. That there was failure to act fairly on the part of the decision-making authority being the 1st respondent in that the rules of natural justice are not complied with.
55. The applicants contend that under section 73 of the Co-operative Societies Act, the commissioner exercises a quasi-judicial function and is obliged to apply rules of natural justice when undertaking an inquiry, the notice of intention to surcharge the appellants dated 13th January 2022 were a nullity for violating clear procedures stipulated in the Constitution and the Fair Administrative Act 2013 and consequently no valid surcharge order emanates from the same.
56. The *Ex parte* applicants submitted that the averments in paragraph 6 and 7 of the 1st respondent's replying affidavit and the 2nd respondent's replying affidavit raises concerns. First in confirms the 1st respondent was aware of the need to serve the applicants with summons so as to attend and make remarks during the inquiry. Secondly there is no proof nor assertion that the summons annexed as annexure 1,2, and 9 were actually served upon the concerned applicants. Thirdly the inquiry report at para 3.6.1 and 3.6.2 does acknowledge that the 1st and 9th applicants were no longer in the employment of the 2nd respondent. It does not state whether or not there was effort to reach the two at all. Finally, it is apparent that there was no effort to serve and or issue summons for the other 3,4,5,6,7, 8 and 10th *Ex parte* applicants. That the conduct is incompatible with the 1st respondent's claim that it conducted the inquiry in accordance with the law, the Constitution and / or that rules natural justice observed as stipulated under the Fair Administrative Action Act(FAAA) and the Constitution.
57. In the end the *Ex parte* applicants invited this court to re affirm the rights of the *Ex parte* applicants under article 47 and 50(1) of the Constitution and section 4(3) &(4) and 5 of the FAA and allow the prayers sought in the notice of motion dated 20th march 2022.
58. The *Ex parte* applicants have relied on the following authorities;
 - i. Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR
 - ii. Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300
 - iii. Cortec Mining(K) Ltd v Cabinet Secretary, Attorney General & 8 others [2015] eKLR
 - iv. Section 9(4) of the FAAA
 - v. Article 3 of the Constitution

2nd respondent's submission

59. The 2nd respondent submitted that the 1st respondent acted within his scope in his decision to surcharge the *Ex parte* applicants and the applicants cannot condemn him to have acted ultra vires. That the members of the 2nd respondent good hope Sacco petitioned commissioner of cooperatives to inquire into the affairs of the society in accordance with cooperatives societies laws. The commissioner of cooperatives upon being petitioned by members of the 2nd respondent carried out an inquiry into



the affairs of the good hope Sacco. Subsequently the commissioner for cooperatives development appointed Priscilla Maranga and Hilda Koech Chepkwony vide gazette notice vol. cxx1-no50 dated 26th April 2019 in accordance with provisions of the law at section 58 of the cooperatives act cap 490 laws of Kenya. The officials appointed by the commissioner above executed their mandate with diligence and in accordance with the law and issued summons to all members of the cooperative concerned who included the 10 *Ex parte* applicants herein. The 1st respondent, the commissioner of cooperatives development upon getting the report from the appointed officials above took a decision to surcharge 34 persons, 10 *Ex parte* applicants herein included under section 58 and 73 of the [Co-operative Societies Act](#) and notified them of his decision.

60. The 2nd respondent submitted that an order of prohibition as sought by the *Ex parte* applicants cannot issue since already a decision was made and the order can only serve to stop an impending decision. The members of the 2nd respondent good hope Sacco in accordance with section 58 of the [Co-operative Societies Act](#) petitioned commissioner of cooperatives to inquire into the affairs of the society. The commissioner by virtue of section 58 appointed Pricilla Maranga and Hilda Koech Chepkwony vide gazette notice vol. cxx1-no50 dated 26th April 2019 to inquire into; a) the by-laws; b) working and financial conditions; and c) the conduct of the present or past management committee of good hope Sacco society limited (CS/2749) and in accordance with section 58 as read together with section 73 of the [Co-operative Societies Act](#). the findings of the inquiry were handed to the members of the Sacco in a special general meeting held on 31st August 2019 in compliance with section 58 of the [Co-operative Societies Act](#). The appointed officers conducted the inquiry in compliance with the law and the board of the Sacco together with employees the applicants included were accorded opportunity to be heard. The commissioner later based on the finding of the inquiry issued summons to all members of the Sacco who had been implicated for financial impropriety who included the 10 *Ex parte* applicants herein. Therefore, a decision was already made and appropriate steps taken legally as by the [Co-operative Societies Act](#) towards recovery of the members of the Sacco's fund.
61. The 2nd respondent submitted that an order of *mandamus* is meant to remedy the defects of justice. The actions of the 1st respondent were done within the scope of the [Co-operative Societies Act](#). the surcharges orders were issued in accordance with sections 58 and 73 of the act thus there was no injustice met on the 34 surcharged persons as all that were done by the 1st respondent was done as by the enabling statute.
62. In the end the 2nd respondent submitted that the instant application dated 20th march 2022 be dismissed with costs.
63. The 2nd respondent relied on the case of [Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others](#) [1997] eKLR

1st and 3rd respondent's submissions.

64. The 1st and 3rd respondents submitted that the applicants have no arguable claim for grant of the prerogative orders sought. The concern of the judicial review is the manner in which the decision is made and not the merits of the decision. the court interrogates the legality, rationality and procedural propriety of acts done by the decision making bodies. The applicants have failed to demonstrate whether there was any illegality, irrationality or procedural impropriety in issuing the surcharge orders.
65. The 1st and 3rd respondent submitted that the applicants should have exhausted the procedure set out in section 74 of the [Co-Operative Societies Act](#) before coming to this court. The 1st respondent urged that this court should be hesitant to interfere in internal processes of the 1st respondent as it will be an usurpation of the responsibility of management of the 1st respondent. The cooperative tribunal is the



court of first instance to hear and determine an appeal against a surcharge order pursuant to section 74 of the act. That where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament that procedure must be followed strictly before parties come to court. That the first opportunity for adjudication of the matter ought to be given to the relevant tribunal that is the cooperative tribunal as provided for in the act of which the applicant has failed to comply with in this instance. In view of the foregoing, the *Ex parte* applicant failed to show how the 1st respondent's decision was tainted with illegality or irrationality and is instead asking this court to go into a merit review of the decision which action is beyond the province of judicial review. Judicial review is different from an appeal that looks into the merits of a case and can arrive at a different decision from that of the initial decision maker.

66. In the end the 1st and 3rd respondent submitted that the 1st respondent lawfully discharged its administrative duty and as such they pray that the applicant's application dated 20th March 2022 be dismissed with costs.
67. The 1st and 3rd respondents relied on the following authorities;
- i. *Pastoli v Kabale District Local Government Council and others* [2018] 2 EA 300
 - ii. *Black's law dictionary* 10th edition
 - iii. Section 90 of the *Fair Administrative Action Act*.
 - iv. *Republic v National Environment Authority Ex parte Sound equipment Ltd* [2011] eKLR.
 - v. *Secretary County Public Service Board & Another v Hulbbai Gedi Abdille* [2017] eKLR
 - vi. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others ; Muslims For Human Rights & 2 other (Interested Parties)* [2020] eKLR
 - vii. *East Africa Pentecostal Churches Registered Trustees & 1754 others v Samuel Muguna Henry & 4 others* [2015] eKLR
 - viii. *Council of County Governors v Lake Basin Development & 6 others* [2017] eKLR
 - ix. *Speaker of the National Assembly v James Njenga Karume* [992] eKLR

Directions of the court

68. On 2.3.2022, this court granted leave to the *Ex parte* applicants to apply for orders of judicial review in the nature of *certiorari*, prohibition and *mandamus*.
69. On 8/3/2022, this court directed parties to file written submissions on stay. However on 19/9/2022, Mr. Okinyi stated that they were to file submissions on stay alone but due to other developments they were abandoning the quest for stay and canvass the substantive motion.
70. On 19/1/2023, this court allowed Kariuki for the 1st and 3rd respondents to file comprehensive submissions in 21 days. It ordered that earlier submissions by these parties are expunged from the record to avoid confusion.
71. The application was canvassed by way of written submission. The *Ex parte* applicants have filed. The 2nd respondent has filed. The 1st and 3rd respondents have also filed.



Analysis and Determination

Issues

72. Upon careful consideration of the Motion, the affidavits and submissions filed as well as the law, a number of issues emerge ranging from jurisdiction of this court to procedural fairness of the inquiry in question to the validity or lawfulness of the report and surcharge imposed upon the *Ex parte* applicants. But, the question of jurisdiction on the basis of the doctrine of exhaustion of remedies should be determined first.

Jurisdiction

73. The 1st and 3rd Respondents have challenged the jurisdiction of this court to hear and determine this matter on the basis that, the dispute ought to have been filed in the first instance in the Co-operatives Tribunal established under section 77 of the *Co-operative Societies Act*.
74. A challenge on jurisdiction of the court is of profound preliminary significance and should be raised at earliest opportune time, and be determined *in limine*; the reason, of course being, that jurisdiction is sine qua non adjudication of a dispute by a court of law.
75. The challenge on jurisdiction is fastened upon the doctrine of exhaustion of remedies- a preclusion doctrine.
76. This doctrine has had fair treatment in jurisprudence by courts in Kenya. See *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR .
77. I am particularly content to cite the Court of Appeal in *Speaker of National Assembly v Karume* {1992} KLR 21. that:-
- “Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
78. And post-2010 Constitution of Kenya, jurisprudence provided justification and rationale for the doctrine under the 2010 Constitution- see the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR. where it stated that: -
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”



79. I cite also a work *In the Matter of the Mui Coal Basin Local Community*, [2015] eKLR where the High Court stated the rationale thus:-

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of the *Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” the *Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the *Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

80. Therefore, if the objection succeeds, the court will decline to take jurisdiction over the matter. I will therefore determine the question first.

81. According to Section 74 of the *Co-operative Societies Act* –

- (i) “Any person aggrieved by an order of the Commissioner under Section 73 (1) may within thirty days appeal to the Tribunal.
- (ii) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on a matter of law”.

82. The *Ex parte* applicants herein are aggrieved by an order of the Commissioner which was made under Section 73 (1) of the *Co-operative Societies Act* in exercise of the powers of the Commissioner to surcharge the officers of a co-operative society. Thereby, bringing their grievance within the ambit of section 74 of the *Co-operative Societies Act*. And, according to the doctrine of exhaustion of remedies, they ought to appeal the order or decision of the Commissioner to the Tribunal in accordance with section 74(1) of the *Co-operative Societies Act*. They can only come to this court on appeal against the decision of the Tribunal as provided in section 74(2) of the *Co-operative Societies Act*.

83. The court is also aware 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 58 of the *Co-operative Societies Act* for non-adherence with the requirements of fair administrative action.

84. However, 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, thus: -

The High Court or a subordinate court under sub-section (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

85. And, 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. The section provides: -



- The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
86. The only time the court will depart from the general rule and relieve the applicant from the obligation for exhaustion of remedies is, inter alia, in exceptional circumstances depending on each case or where the remedy is ineffective or futile or illegal, or in the interest of justice (section 9(4) of the *Fair Administrative Action Act*) or where exhaustion requirement would not serve the values enshrined in the *Constitution* or law. See also section 6 of the *Arbitration Act*.
87. Article 47 of the *Constitution* and the *Fair Administrative Action Act* heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts in interpreting similar circumstances and provisions is useful guidance. The following points from the judgment of Thring J are relevant:-
- i. What is ordinarily contemplated by the words “exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different”
 - ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
 - iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
 - iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
 - v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.
88. Of whether a remedy is ineffective or futile see yet another South Africa decision *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J the court said the following about what constitutes exceptional circumstances:-
- “...where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”
89. There are no exceptional circumstances in this case or anything to show that the remedy provided in section 74 of the *Co-operative Societies Act* is ineffective or futile or any reason whatsoever in the interest of justice to exempt the *Ex parte* applicants from the obligation in section 74 of the *Co-operative Societies Act*.
90. Accordingly, I find and hold that the *Ex parte* applicants should have first exhausted the remedy provided in section 74 of the *Co-operative Societies Act* before instituting these proceedings in this court.



In consequence thereof, these proceedings offend the doctrine of exhaustion and more specifically section 74 of the [Cooperatives Act](#).

91. Ordinarily, where a party seeks Judicial Review of some action before pursuing all available remedies, the court decides on whether to review the agency's action or remit the case to the relevant agency for dispute resolution as provided in law or in the internal mechanism, or in apt instances, stay the proceeding leaving the matter undetermined ([Arbitration Act](#), section 6) or strikes down the proceeding altogether,
92. The circumstances of this case and in light of section 74(2) of the [Co-operative Societies Act](#) demand striking down of the proceeding. Accordingly, these proceedings are struck out.
93. Given the reason for striking out the proceedings, I do not think any party deserves costs. Accordingly, each party shall bear own costs.
94. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF APRIL, 2023.

F. GIKONYO M

JUDGE

In the presence of:

Okinyi for *Ex parte* Applicant

Kariuki for 1st and 3rd Respondent

Ms. Muigai for 2nd Respondent

Court Assistant – Mr. Kasaso

