



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 44 OF 2014

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN IN THE MATTER OF THE CO-OPERATIVE SOCIETIES act

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....1ST RESPONDENT

DISTRICT CO-OPERATIVE OFFICER.....2ND RESPONDENT

EX-PARTE:

MARY OYUGI ODHIAMBO

JUDGMENT

The Application

1. Mary Oyugi Odhiambo (hereinafter the Applicant”) is an adult female and former Chairperson of the United Nations Sacco Society Ltd. The Applicant states that she has been a member of United Nation Sacco for twenty years from 1992 to 31st October 2013. Further, that on 23rd May 2013 at an Annual General Meeting of the said Sacco, the Commissioner of Co-operative Societies, who is the 1st Respondent herein, stated that the Applicant had fraudulently taken money from the Sacco amounting to 32 million, and had acted with unnamed person to steal the Sacco’s official stamp.

2. The Applicant claims that she received an email letter dated 20th January 2014 informing her that the 1st Respondent had appointed Mr. Kiama and Mr. K.B Otachi to inquire into the affairs of the United Nations Sacco Limited, and that she had been summoned to appear before the said inquiry officers on a specified date. The Applicant subsequently filed the instant judicial review proceedings by way of a Notice of Motion application dated 4th February 2014 seeking the following orders:

a) An order of certiorari to quash the decision by the 1st Respondent to appoint and order Mr. Peter Kiama and Mr. KB Otachi to carry out an inquiry into the affair of the United Nations Sacco Society and the subsequent summons by the said persons directed to the applicant to appear before them.

b) That an order of prohibition be issued prohibiting the Respondents from summoning the applicant with the view of subjecting the applicant to unnecessary interrogations and interviews with regards to the affairs of the United Nations Sacco Ltd imposing penalties for disobeying such summons, issuing defamatory remarks or in any way interfering with the applicants rights to liberty and peace of mind.

c) Costs

3. The application is supported by a statement of facts dated 31st January 2014, and a verifying affidavit sworn by the Applicant on the same date. The Applicant explained the events leading to the Annual General Meeting where the allegations on the loss of Kshs 32 million are alleged to have been made, which sum of money was the refinancing fee of the Sacco's mortgage facility. She also annexed documentation on the said refinancing of the mortgage facility. The Applicant further averred that after criminal investigations were conducted, a person was identified as the one responsible for the loss of the money and that he admitted as much. She annexed copies of a letter and summons on the impugned inquiry.

4. The Respondents opposed the application in Grounds of Opposition dated 4th September 2019, wherein it was stated that the Respondents acted within the premises of the law, and that the instant application is premature as provisions of section 74 of the Co-operatives Societies Act grants the Applicant the right of appeal, which she has not exercised. Further, that section 58 of the Co-operative Societies Act applies to all members of a co-operative society inclusive of the Applicant, and judicial review cannot be used to curtail or stop statutory bodies of public officers from the lawful exercise of power within their statutory mandates.

The Determination

5. The Application was canvassed by way of written submissions. Khaminwa & Khaminwa Company Advocates filed submissions dated 27th March 2019 on behalf of the Applicant. The Respondent's submissions were dated 4th February 2019 and were filed by Munene E. Wanjohi, a State Counsel in the Attorney General's office.

6. I have considered the pleadings, submissions and arguments made by the parties and will need at the outset need to dispose of the argument made by the Respondents that section 74 of the Co-operative Societies Act which provides for an appeals process is applicable in this application. I find that the said section or appeals procedure only applies where a person is aggrieved with the decision of the 1st Respondent to impose a surcharge pursuant to section 73 of the Act. No such surcharge was pleaded by the Applicant, nor did the Applicant or Respondents produce any evidence of the same. Section 74 is therefore not applicable, and the instant application is properly before this Court.

7. The main issue arising for determination therefore is whether the Applicant is entitled to the relief sought. The question to be answered in this respect is whether the Applicant has demonstrated that the 1st Respondent acted illegally.

8. The Applicant's submissions on this question were that the impugned summons were not prepared and signed by the Plaintiff as required by Order 5 Rules 1(5) and 2 of the Civil Procedure Rules 2010. Furthermore, that she cannot get a fair hearing as the inquiry by the two appointed men Peter Kiama and Mr. KB Otachi was from the beginning biased, as the 1st Respondent publically announced that the Applicant misused public funds. Reliance was placed on the decision in **Kimani vs Kimani (1995-1998) 1 EALR 134** that one does not have to show that there is disposition of bias on the part of the Respondent, and all one has to show is that there is a reasonable cause to believe that there is bias.

9. The decisions in **Judicial Service Commission versus Gladys Boss Shollei & Another 2014 e KLR** , **Onyango Oloo vs Attorney General (1986-1989) EA 456**, **Angela Mwai & 3 Others vs Commissioner of Co-operative Development (2015) eKLR** and the provisions of Article 50(2) of the Constitution were also cited for the position that the Applicant was not informed of the case before her, and has never been given an opportunity to defend herself before an independent and impartial body of the accusations made against her by the 1st Respondent. Therefore, that the conduct of the 1st and 2nd Respondents have failed to meet the threshold of a fair hearing.

10. It is the Applicant's further submission that the Respondent action was beyond what is described under section 58 of the Co-operative Societies Act hence *ultra vires*, as they re-opened a case that was already investigated and determined by police. According to the Applicant, the investigation was properly conducted by the police and the inquiry by Mr. Peter Kiama and Mr. KB Otachi was inconsequential and not anchored in law.

11. Further, that the decision by the inquiry team to surcharge some Board members and not others was irrational given the circumstances, in line with the standard of irrationality as elucidated in **Civil Servants Union vs Minister for Civil Service (1985) AC 374 (HL)**, **Seventh Day Adventist Church Limited vs Permanent Secretary Ministry of Nairobi Metropolitan and Another (2014)** and **Pastoli vs Kabale District Local Government Council and Others. (2008) 2 EA 300**.

12. The Respondents on the other hand submitted that they acted with the powers accorded in section 58(1) of the Co-operative Act and within the law and thus their decision was informed by law and good governance. Further, that section 74 of the Co-operatives Act provides for an appeal mechanism to the Tribunal before the applicant moves the High Court, thus making the application premature. Reliance was placed on section 9(2) of the Fair Administrative Action Act which provides that an aggrieved party must first exhausted the internal mechanisms for appeal but moving to judicial review court.

13. The Respondents contended that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove the settled criteria for issuance of the orders which include illegality, impropriety of procedure and irrationality, as held in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, which is not the case in this matter. Further, that they acted fairly and in accordance with the provisions of the law, and relied on the decisions in **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** and **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR**.

14. In conclusion, the Respondents submitted that the office of the Commissioner for Co-operative Development has the responsibility to ensure that cooperative societies are managed correctly and in so doing it ensures that all this is done in accordance with the law which in this case is primarily the Co-operative Societies Act. Therefore, that if the said office has discharged its duties in accordance with the provisions of sections 58 and 73 of the Co-operative Societies Act, a court of law would have no reason to interfere with the merit of the decision reached within the four corners of the Act and the relevant regulations.

15. This Court has considered the parameters of its powers in judicial review in considering the arguments made by the parties herein. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876*).”

16. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

17. Lastly, the applicable law on the orders sought by the Applicant was restated by the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge, (1997) e KLR** *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

18. In the present application, the Applicant produced and relied on an email dated 20th January 2014 from one Ken Otachi informing the Applicant of the appointment of Peter Wanjohi Kiama and K. B. Otachi to inquire into the affairs of United Nations SACCO Society Limited, and summoning her to appear before them as indicated in an attached summons. The said summons dated 10th January 2014, and signed by Peter Wanjohi Kiama and Kennedy B. Otachi was also annexed by the Applicant.

19. The Respondents on their part reiterated that the 1st Respondent was acting within its powers under section 58 of the Co-operative Societies Act which provides as follows:

“(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, 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.

(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; and

(b) 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.

(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.”

20. This Court notes that while the Applicant seeks to quash a decision by the 1st Respondent appointing Mr. Peter Kiama and Mr. KB Otachi to carry out an inquiry into the affair of the United Nations Sacco Society, the evidence that she has produced and relied on are a letter and summons by the appointees. She did not produce any evidence of the impugned decision or of any decision made by the 1st Respondent. In any event, section 58 of the Co-operative Societies Act does give the 1st Respondent the power to make an inquiry into the affairs of any co-operative society, which was the subject of the letter and summons produced by the Applicant as evidence.

21. It is also notable that the letters and summons produced by the Applicant indicate that the inquiry was being conducted into the affairs of the United Nations Sacco Limited, and not on the Applicant personally. Furthermore, under section 58(2) the Applicant is obliged to provide such information as the persons holding an inquiry may require. The Applicant did not produce any evidence of any allegations made against her, which would require observance of the rules as regards a fair hearing. Lastly, no evidence was produced by the Applicant of the alleged police investigations into the subject matter of the inquiry, nor of any decision by the Respondents to surcharge her as alleged. The Applicant's claims were therefore not substantiated.

22. In the premises this Court finds that the 1st Respondent acted within its powers under section 58 in conducting the inquiry, and that the subject matter of the impugned inquiry did not involve any charges or allegations against, nor did it affect the Applicant, so to require compliance with the fair administrative action as she alleged. The Applicant's Notice of Motion dated 4th February 2014 is therefore not merited. The said Notice of Motion is dismissed with no order as to costs.

23. Orders accordingly.

DATED AND SIGNED THIS 19TH DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 20TH DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE