



Republic v Sacco Societies Regulatory Authority & another; United Nations Sacco Society Limited & 13 others (All Sued in Their Capacity as Members of the Board of Management of the First Interested Party)(Interested Parties); Njuhigu & 10 others (Exparte) (Miscellaneous Civil Application 248 of 2016) [2017] KEHC 7888 (KLR) (Civ) (17 February 2017) (Judgment)

*Republic v Sacco Societies Regulatory Authority & another
Ex Parte Martin Njuhigu & 24 others [2017] eKLR*

Neutral citation: [2017] KEHC 7888 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 248 OF 2016
GV ODUNGA, J
FEBRUARY 17, 2017

BETWEEN

REPUBLIC APPLICANT

AND

THE SACCO SOCIETIES REGULATORY AUTHORITY 1ST RESPONDENT

THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT 2ND RESPONDENT

AND

UNITED NATIONS SACCO SOCIETY LIMITED INTERESTED PARTY

SAMWEL OLAGO INTERESTED PARTY

GEOFFREY OMEDO INTERESTED PARTY

GABRIEL WANGA INTERESTED PARTY

MAURICE OWALO INTERESTED PARTY

PHILOMENA MAKENA INTERESTED PARTY

PENINAH WAIRIMU KIHUHA INTERESTED PARTY

SAMSON LEGESSE INTERESTED PARTY

KIMATHI MUNGANIA INTERESTED PARTY

PHILIP MIGIRE INTERESTED PARTY



MARKBEN OLUCHIRI INTERESTED PARTY
RAEL ODHIAMBO INTERESTED PARTY
STEPHEN NDETI INTERESTED PARTY
GORDON ONYATTA [ALL SUED IN THEIR CAPACITY AS MEMBERS
OF THE BOARD OF MANAGEMENT OF THE FIRST INTERESTED
PARTY] INTERESTED PARTY

AND

MARTIN NJUHIGU EXPARTE
GEORGE ROBERT BIRYA EXPARTE
SCHOLASTICA OGADA EXPARTE
DENNIS MUCHUCHA EXPARTE
MAUREEN MUNGAI EXPARTE
GERMAIN MIRINDI EXPARTE
MOSES KINGORI EXPARTE
MILLICENT WANGUI KARUE EXPARTE
PERPETUA WANGECHI MWANGI EXPARTE
CAROL GATHONI MACHARIA EXPARTE
GEORGE HERBERT OGERE EXPARTE

JUDGMENT

Introduction

1. By a Notice of Motion dated 28th July, 2016, the applicants herein who instituted these proceedings in their capacities as members of the Board of Management of the 1st interested party, sought the following orders:
 - 1) That an order of mandamus do issue to compel the Respondents to:
 - a. appoint a person to manage the affairs of the first Interested Party Sacco society and to exercise all the powers of the society to the exclusion of the board of directors, including the use of the corporate seal of the society;
 - b. hold an inquiry or direct any person authorized by them in writing to hold an inquiry, into the by-laws, working and financial conditions of the first Interested Party Sacco society.
 - c. require all officers the first Interested Party Sacco society to produce all 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.



- d. dissolve the Board of the first Interested Party Sacco society and cause to be appointed an interim Committee consisting of not more than five members from among the members of the society who are the Applicants herein.
3. That an order of certiorari do issue to quash the decision [expressed in a letter dated 19th May, 2016] of the Respondents and the first Interested Party to allow the first Interested Party's Special General Meeting scheduled for the 4th June, 2016.
4. That this Honourable Court be pleased to grant such other orders that are analogous and/or necessary adjuncts to the reliefs being sought that may deem fair and just to grant in the circumstances.
5. That the Costs of this application be in the cause.

Applicants' Case

2. According to the applicants, they had raised a number of issues of concern while exercising their rights as owners of the United Nations Sacco Society Limited (hereinafter referred to as "the SACCO"), but unfortunately none of them had been addressed by the Board. Instead the Board resorted to making threats against members, libellous comments and agitation.
3. It was averred by the applicant that they had identified the following irregularities which required intervention:
 - a. excessive and unnecessary Board meetings in violation of the Sacco Society Regulations, section 60 (50);
 - b. going over the legal limit of meetings and the same being compounded by failure to seek authority from members
 - c. holding the impugned meetings at a huge financial cost to the SACCO;
 - d. excessive allowances have been paid to the Directors without Approval of the Members through an Annual General Meeting [AGM] or Special General Meeting [SGM]
 - e. failure to recruit a Chief Executive Officer [CEO] upon the departure of the previous holder of the said office; thus creating a lacuna in management;
 - f. late and unwarranted presentation of the Budget to members;
 - g. the Year 2015 financial accounts presentation was not in conformity with the International Accounting Standards and there was therein deliberate and fraudulent misrepresentation of expenditure and income.
 - h. opening of a branch of the Sacco outside UN Gigiri Complex without Authorization from members;
 - i. a marked decline in the Primary Business Objective of the SACCO;
 - j. failure to adhere to fiduciary obligations with respect to investment;
 - k. failure to implement the Supervisory Committee's report and recommendations.
4. The applicants' complaint was that despite lodging their complaints to the Sacco Societies Regulatory Authority (hereinafter referred to as "SASRA") and the Commissioner of Co-operatives (hereinafter referred to as "the Commissioner") there was no avail.



5. The applicant then particularised instances which in their view supported their case and averred that despite their our attempts to seek clarifications on the floor during the AGM that was held on 19 March 2016 in UN Gigiri Complex, Conference Room 2, non was forthcoming. In addition they tried to seek clarifications from the auditors, Deloitte & Touch and ICPAK but no fruitful response was granted. Whereas the acting CEO was requested by the Auditor and ICPAK for an explanation, nothing has been reported.
6. The applicants also identified various irregularities in the accounts and disclosed that the Board of Directors together with the Management went ahead and opened the UNSACCO Branch at Gigiri Square without notice to, nor clear mandate, from the Sacco members.
7. The applicants therefore contended that they were seeking the intervention and protective orders to ensure the Sacco is healthy financially, to have proper governance mechanisms and to have all stakeholders in confidence to trade.
8. In support of their case, the applicants through their learned counsel, Mr Gatheru, relied on Kenya National Examination Council v Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 as cited in Republic vs. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR and asserted that an order of mandamus can issue to compel the Respondents to comply with the law. The applicants also relied on Article 47 of the Constitution and submitted that the Respondents need to be compelled to take action by an order of mandamus because among other reasons the First Respondent herein, The Sacco Societies Regulatory Authority (SASRA) is a statutory state corporation established under the Sacco Societies Act (Cap. 490B) of the Laws of Kenya (the Act) whose mandate is inter alia to regulate and supervise Sacco Societies. However it has failed to demonstrate that it supervised and regulated the UNSACCO sufficiently or indeed at all notwithstanding complaints made to it by the applicants. This inaction, it was submitted gives rise to credible suspicion that the 1st Respondent is either unwilling to do its work as provided for in statute or that it is working in cahoots with the Interested Parties herein to jeopardize the interests of the Ex parte Applicants and other members of the UNSACCO.
9. It was therefore the applicants' case that mandamus is the right remedy to compel the performance of a public duty which is imposed on the 1st Respondent by statute especially in a case such as this whereby it is demonstrated that the 1st Respondent has failed to perform the duty to the detriment of the Ex Parte Applicants who have demonstrated the existence of a legal right to expect the duty to be performed.
10. The applicants contended that they represented the interest of the majority of the members of the UNSACCO and the fact that this is not a representative suit, as already ruled, does not mean that the interests of the members who presented their signatures should not be taken into account.
11. It was the applicant's case that the level of mismanagement of the UNSACCO is so grave that there are other concerns over and above issues of misappropriation of funds and accounting irregularities. For instance the Interested Parties have failed to keep and maintain a proper register of members. It is impossible to tell how many members the UNSACCO has and how many are alive, active, dormant and deceased. This makes it very difficult to arrive at the figure of two thirds required to call for a special meeting.
12. As regards the 2nd Respondent, it was submitted that although the Co-operative Societies mandate is devolved, the County Government of Nairobi has not created laws yet to replace National Legislation in this regard. In this respect the applicants relied on section 7(1) of Part 2 of the Sixth Schedule to the Constitution and contended that the Co-operative Societies Act which is still in force has to be



construed as applying to the regulation of co-operative societies at the county governments, until a county government has enacted its own law regulating co-operative societies.

13. It was submitted that section 58 of the Co-operative Societies Act empowers the Commissioner for Co-operative Development to carry out inquiries in co-operative societies either on his own accord or on the direction of the Minister. In addition, section 60A of the same Act empowers the Commissioner to carry out impromptu inspection into the affairs of a co-operative society. Surcharges follow after inquiries are completed. All officials and/or employees adversely mentioned in inquiry reports are served with surcharge notices as per section 73 of the Act.
14. In this case, it was noted that the 2nd Respondent had not demonstrated that he had at any time carried out a proper inspection of the affairs of the UNSACCO. This was not done even after a written complaint was lodged. Instead, the 2nd Respondent just seemed to be rubber-stamping the illegal actions and unlawful activities of the Interested Parties, thereby exposing the Ex Parte Applicants and other members of the UNSACCO to loss and harm.
15. The Court was urged to note that the two Respondents had shown incredible lethargy and negligence in this matter. Whereas one would have expected that they would even try to investigate the complaints raised by the Ex parte Applicants and either dismiss them or issue other recommendations, no such thing was done at all. This shows that they are intractable and the only way to make them move is by way of an order of mandamus as they were being evasive of the law.
16. It was the applicants' position that mandamus should in the circumstances of this case be found to be the fastest and most efficacious way of addressing their grievances and they relied on Commissioner of Lands & Another vs. Kithinji Murugu M'agere [2014] eKLR where this Court held that:

“It has further been held that Mandamus is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “anybody of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, mandamus may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of mandamus against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in *Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others* [1999] 2 EA 245.

It is now trite that the order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet that mode of redress is less



convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform.

17. It was further submitted that the Ex Parte Applicants were entitled to impute bad faith against the Respondents because they had not tried to give the Applicants any explanation for their failure to act on the complaints. In a case where no reasons are given and the decision arrived at [in this case by the Respondents not to take any action] adversely affects the Applicants the Court is entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. To this end the applicants relied on section 6(4) of the Fair Administrative Action Act, 2015 which provides that:

Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

18. It was reiterated that the Applicants in this case had not only requested for mandamus; but have also demonstrated the specific orders that they would wish to be given in order to remedy the grave situation. In support of this submission the applicants relied on Republic vs. Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah [2015] eKLR.

19. The applicants asserted that the bye laws of the UNSACCO as currently constituted are against the Constitution, statutes and principles of co-operatives that promote the freedom of association. The two thirds rule in particular was introduced by the Interested Parties through the backdoor and irregularly and without the participation of the majority of the members. This rule restricts the members' right to associate and in the applicants' view, militates against democracy and participation and self-determination by the Sacco members. To the applicants, these bye laws have been used to violate their freedom of association which is protected under Article 36 of the Constitution.

20. With respect to section 76 of the Co-operative Societies Act the applicants took the view that states that the role of the Co-operatives Tribunal is limited and it lacks jurisdiction to handle the serious grievances raised by the Applicants in this case. In support of this submission they relied on Bernard Mugo & others vs. Kagaari South Farmers Co-operative Society & 4 Others [2015] eKLR where the Court ruled that:

“The plaintiff contends that they were not given a chance to be heard and that the rules of natural justice were not conformed with. They claim further that their rights as registered members of the society have been infringed. The prayers in the plaint named (a), (b), (c) and (d) challenge the decision of the society to suspend the plaintiff's from membership terming it as illegal, unjust, draconian and in blatant breach of the rules of natural justice. Prayer (e) seeks for reinstatement of the membership and an order against the defendant to take delivery of the coffee beans. The final prayer (f) seeks for punitive damages against the defendants jointly and severally for presiding over an illegality.

In the case of Alex Malikhe Wafubwa & 7 Others -vs- Elias Nambakha Wamita & 4 Others [2012] eKLR the court held that disputes relating to election, illegal holding of office and failure to convene a general meeting by the management committee did concern the business of the society and did not therefore fall within the ambit of section 76 of the Act.

The ALEX MALIKHE case was a judicial review application which is a matter of different nature from this case. However, it serves to illustrate that not all matters concerning Co-operative societies; the members and the society; past members or deceased members and the society fall under the jurisdiction of the tribunal.



I have carefully analyzed the nature of the claim and the prayers sought. I come to the conclusion that the claim does not fall within the description of the business of the society. It is a suit challenging the legality of the decision of the society alleged to have the effect of infringing the rights of the plaintiffs. The matter is outside the ambit of Section 76 (1) and (2) of the Act and therefore falls squarely under the jurisdiction of this court.”

21. For good measure the applicants reproduced the provisions of the said section which provides that:
- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the Tribunal.
 - (2) A dispute for the purpose of this section shall include-
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
 - (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

21. As for the interested parties, they were accused of preventing the members of the UNSACCO from holding a meeting in order to ventilate the matters raised and arrive at a proper way forward by inter alia injuncting all the members in Co-operative Societies Tribunal Case No. 433 of 2016. I support of this position the applicants relied on *Konza Ranching & Farming Society vs. Registrar of Co-operatives* [2004] eKLR where Wendoh, J noted inter alia that:

“It seems that the Respondent listened to the grievances of a handful of the members and decided to carry out an inquiry. The Applicant comprises about 1500 members. As earlier notes one of the principles incorporated in the ruling of the democratic member control. In considering the grievances of about 20 people the Registrar should have considered the interests of the majority who are the rest of the membership. I believe whatever decision the Registrar made should have taken into account the interests of the society at large. The Registrar’s decision was unfair in that the applicants were not given a hearing and there is no evidence that the applicants had been notified of the complaints and the Registrar was therefore in breach of rules of natural justice.”

22. Based on the foregoing, the applicants urged this Court to find in favour of the Applicants as prayed in this notice of motion.



1st Respondent's Case

23. In opposition to the application the 1st Respondent, SASRA, averred that it is a state corporation established under the Sacco Societies Act (Cap 490B) of the laws of Kenya, and it's principal mandate is to license Sacco Societies to undertake deposit-taking Sacco business in Kenya within the meaning of the Sacco Societies Act, as read with the Sacco Societies (Deposit-taking Sacco Business) Regulations 2010 (hereinafter the Regulations 2010). In addition, the 1st Respondent is also charged with the statutory duty of supervising and regulating all deposit-taking Sacco Societies in Kenya within the purview of the said Act and the Regulations 2010 made thereunder.
24. It was averred by SASRA that M/S United Nations Sacco Society Ltd, sued herein as the 1st Interested Party is one of the Sacco Societies which has since 2011 been licensed to undertake deposit-taking business in Kenya; and is as such supervised and regulated by SASRA within the purview of the aforesaid statutory instruments.
25. SASRA however insisted that as a financial regulatory of the said Sacco Society, it had consistently performed its statutory mandate of supervision and regulation of the said Sacco Society, and denied the accusation that it had failed to discharge it's mandate as purported by the Applicant. SASAR confirmed that on 17th May 2016, it received a letter dated 16th May 2016 from the from the Applicant's Advocates herein, detailing several allegations and/or improprieties against the manner in which the deposit-taking business of the Sacco Society was being conducted. Upon receipt thereof it duly interrogated the said allegations and determined that the said issues had either been addressed and/or were being addressed and/or could be addressed adequately without the necessity of appointing an interim committee or manager to run the operations of the Sacco Society or the necessity to dissolve the Board of the Sacco Society as demanded in the Applicant's letter dated 16th May 2016 and by way of its letter dated 30th May 2016, it advised the Applicants of the said position.
26. It was however contended by SASRA that notwithstanding the said advice it was on 3rd June 2016 served with the current proceedings commenced by the Applicants, in which the Applicants are seeking among others orders of the court compelling the two Respondents to appoint a person to manage the affairs of the Sacco Society exclusively, and to hold an inquiry into the financial condition of the Sacco Society and appoint interim Committee to run the Sacco Society.
27. SASRA was of the view that whereas section 52 of the Sacco Societies Act as read with the Regulations 2010 permits it to appoint a person to exclusively manage the affairs of a Sacco Society; such powers can only be exercised by the 1st Respondent when the conditions enumerated in sections 50 and 51 of the Act are determined to exist, namely that the business of the Sacco Society is being undertaken in a manner that is contrary to the provisions of Sacco Societies Act, and the Regulations made thereunder, and in an unsafe and unsound manner without paying due regard to diligence and prudence of an ordinary business man; or in a manner that is detrimental to, and not being in the best interests of Sacco members and members of the public at large, which puts to risk the continued sustainability and financial stability of the Sacco Society, or that the Sacco Society is undercapitalized.
28. According to SASRA there is no evidence in its possession to show that the business of the Sacco Society is being undertaken in any of the circumstances envisioned in section 50 and 51 aforesaid so as to warrant the exercise of the powers conferred by section 52 of the Act to appoint a person to exclusively manage the affairs of the said Sacco Society. In its view, appointing a person to exclusively manage the affairs of the Sacco Society under section 52 of the Act is a very expensive and costly exercise both on SASRA as a publicly funded government agency, and upon the said Sacco Society which may be called upon to bear most of the costs and expenses, to the detriment of the members. Consequently,



it was its position that prudent management of public resources demands that the provision be invoked as a last resort and only in clear and exceptional circumstances.

29. With regard to the demand by the applicant that the Sacco Society's Board of Directors be dissolved, it was SASRA's position that the said Sacco Society held its Annual General Meeting on 19th March 2016 whereupon an election took place and the current members of the Board of Directors were then elected. Consequently, the current members of the Board of Directors had hardly been in office for a period of 3 months when the current proceedings were commenced, and there is thus no good reason why the Applicants would seek that they be removed from office yet they had participated in electing them on 19th March 2016.
30. As regards the specific allegations of irregularities raised by the Applicants, the SASRA's position was that the same can be fully addressed within the normal exercise of its statutory mandate under the Act and Regulations 2010 made thereunder; and alongside the advice issued to the Applicants' Advocates vide the letter dated 30th May 2016. To it, the issues or complaints being raised by the Applicants in this case ought to be addressed amicably and the 1st Respondent has offered to mediate on the dispute because: -
- a) The 1st Interested Party Sacco Society is a deposit taking financial institution which operates on trust and confidence and thus any negative publicity that may be associated with its operations have the potential of occasioning it distress including unforeseen liquidity demands; and
 - b) In case of financial distress occasioned by loss of trust and public confidence, the majority of the members of the Sacco Society who are the depositors therein are likely to suffer; and
 - c) The Applicants herein are members and remain members of the 1st Interested Party Sacco Society, and there is therefore need to cultivate cordial relationship through a non-adversarial dispute resolution mechanisms; and
31. It was therefore the applicant's case that it is in the interest of justice and fairness that the present application be dismissed with costs in its favour.

2nd Respondent's Case

32. On the part of the 2nd Respondent, the Commissioner, the following grounds of opposition were filed:
- 1. The application as filed is premature and not suitable for determination by this Honourable Court; a reading of the provisions of section 9(2) of the Fair Administrative Action Act as read together with section 76 of the Co-operatives Societies Act Cap 490 Laws of Kenya contemplates that court action must be preceded by recourse to statutory redress through administrative review by the Co-operative Tribunal, which the applicant herein has not invoked.
 - 2. That Section 67(3) of the Sacco Societies Act provides that all disputes under the Act shall be referred to the Tribunal thus this matter is prematurely before the High Court.
 - 3. That this Honourable Court in the circumstances ought to decline to exercise jurisdiction/ discretion since the applicant has not exhausted the internal mechanisms before moving to this Honourable Court.
 - 4. That the order of mandamus cannot issue as prayed as Section 58 of the Co-operatives Societies Act cap 490 Laws of Kenya provides the situations when the Commissioner of Co-operatives can hold an Inquiry.



5. That the application as drawn and taken out is incompetent and accordingly, ought to be dismissed forthwith with costs to the Respondents.

1st Interested Parties' Case

33. According to the interested parties, the Ex-Parte Applicants have made a wholesale condemnation of the Interested Parties without assigning any specific or particulars of each Interested Party's alleged transgressions especially when it is to be borne in mind that the Interested Parties have been officials of the Sacco at different times/periods. Based on advice from their advocate, the interested parties averred that certain averments by the applicants are not only scandalous and oppressive but also injurious to the good standing of respected persons diligently fulfilling their duties and obligations as duly elected official of the Sacco in addition to them not conforming to the requirements of an affidavit as known in law, i.e. the same are drawn in plural and inter-alia do not disclose sources of information.
34. It was their case that since the Court in its ruling delivered on 8th July, 2016 struck out the Applicants' prayer seeking leave to institute these proceedings in a representative capacity on behalf of the members of the Sacco, the Applicants in these proceedings can only speak for themselves, and cannot purport to speak for other members of the Sacco not before the Court.
35. It was contended that whereas the Applicants have moved this Court for Orders of Mandamus and Certiorari on the premise that the Respondents have failed, neglected and/or refused to perform a statutory function/duty when allegedly requested to do so by the Applicants, the interested party averred that this was untrue. The interested parties similarly denied the applicant's allegations of mismanagement of the Sacco by them. The interested parties averred that there was neither evidence that the purported letters of complain were served on SASRA nor that the provisions of section 58 of the Co-operative Societies Act were adhered to. It was averred that there is no demonstration or at all that the Applicants advertised for any meeting of the Sacco where one third of the Sacco Membership voted to move the Commissioner to conduct an inquiry. As that resolution was not exhibited the Court was urged to hold that the Motion against the Commissioner must fail ab initio.
36. According to the interested parties, the letter dated 16th May, 2016 addressed to the Chief Executive Officer, SASRA was, unlike in the letter dated 3rd May, 2016 by an unknown author, though received by the addressee and the Commissioner on 17th May, 2016, was merely copied to the Commissioner without any request to undertake any statutory duties e.g. conduct an inquiry into the affairs of the Sacco and therefore to pray for a Mandamus to issue against the 1st Respondent and the Commissioner would be premature.
37. It was averred that the Applicants' lack of good faith was demonstrated by the fact that in their Advocates' letter dated 16th May, 2016 they purport to request SASRA to conduct an inquiry, but on the same date the same Advocates in a letter wrongly addressed to the UN Sacco but marked for the attention of Mr. Martin Njuhigu reveals that the Applicants were already set to go to Court and the letter to SASRA was merely a formality. This shows that the Applicants had no intention of giving SASRA any opportunity to actually carry out their statutory duties. It was therefore averred that the Applicants did not want to give any other form of dispute resolution a chance but were determined to bring this matter to Court.
38. The interested however averred that SASRA responded to the Applicants' Advocates letter dated 16th May, 2016 vide their letter dated 30th May, 2016 in which SASRA undertook to look into concerns raised by the Applicants. Despite this, the Applicants proceeded to file the Ex-parte application dated 31/5/2016 on the same date. It was therefore averred that this conduct disentitles the Applicants to



the discretionary orders of Judicial Review. In the interested party's view, it can hardly be gainsaid that to have effected the Applicants' unreasonable demands on SASRA would have thrown the Sacco into total disarray and it is clear that it was a move not intended for the well being of the Sacco but calculated to cause fear, uncertainty, capital flight and might have led to the collapse of the Sacco which has been in existence for the last four decades. Further the Sacco Board is at the very least entitled to be heard in a due process before any adverse action is taken which could hardly have been attained in 3 days as demanded by the Applicants.

39. It was the interested parties' position that SASRA being a creature of statute can only operate within the provisions of Chapter 490B of the Laws of Kenya and the Regulations thereunder. Accordingly an inquiry as known in law and particularly Chapter 490 of the Laws of Kenya can only be undertaken by the Commissioner as provided under section 58 of the said Act and not by SASRA.
40. It was further contended that SASRA cannot be directed to dissolve the Sacco Board and appoint an Interim Committee consisting of none other than 5 members of the Sacco from amongst the Applicants. In effect therefore the Applicants are purporting to have the Respondents directed to appoint 5 of the Applicants as Members of a so called Interim Committee which would be self serving and therefore untenable as the law vests in SASRA the exclusive discretion to determine who to appoint to manage the affairs of a Sacco Society in an instance where SASRA has to take such action. This clearly shows that the Applicants would like to be in the management of the Sacco without going through the vetting process stipulated in the Sacco's By-laws. It was averred that in any event for SASRA to appoint a person to manage the affairs of a Sacco as a condition precedent it must first of all make a determination that a Sacco Society has conducted its business in a manner contrary to the provisions of the Sacco Societies Act or of any regulations made thereunder or of any other Act which condition precedent has not been met in the circumstances of this case.
41. It was contended that in any event section 49 of Chapter 490B does not spell out the time frame within which SASRA may carry out inspection of a Sacco's inter-alia books of accounts and that the law permits SASRA to inspect a Sacco's books account and records at any time and from time to time. To require such an inspection within 3 days would be unreasonable in the circumstances.
42. The applicants were accused of exhibiting bad faith and approaching the Court with unclean hands. To prove this the interested parties cited a case in which the Applicants having obtained leave of the Court on 21st July, 2016 to commence these Judicial Review Proceedings, some of the Applicants instead of waiting for the Court to determine their Motion proceeded to issue the Sacco the following day with a Notice dated 22/7/2016 fixing a Special General Meeting on 5/8/2016 in spite of communication from the Chairman of the Sacco that they had not met the requirements of the Sacco's Bylaws regarding the calling of Special General Meeting. The Applicants had in their letter dated 27th June, 2016 purported to allocate themselves a 'mandate' to call for a Special General Meeting which they set for 5th August, 2016 which Special General Meeting was to deliberate on issues similar to the ones the Applicants have brought before this Honourable Court, i.e. audit of Sacco's administrative and financial affairs.
43. These flagrant disregard for the law by the Applicants and contempt for the Interested Parties constrained the Sacco to seek the Co-operative Tribunal's intervention in stopping the illegal Special General Meeting, that being a dispute strictly between the Sacco and some of the Applicants.
44. With respect to the prayer for Certiorari, the interested parties were of the view that the particular letter referred to by the Applicants was neither authored by SASRA nor the Commissioner and could not therefore be a subject of an order for Certiorari. The said letter was written by the Sacco's then Secretary, Peninah Wairimu-Kihuha, and was addressed to "All United Nations Co-operative Society



Members”. It was therefore a private letter between the Sacco and its Members and as such did not qualify for a quashing order of this Honourable Court. In any case, it was contended the said letter was proper and lawful having been written by the authorized Sacco Secretary in the ordinary course of the running of Sacco business hence there is/was nothing un-procedural or illegal about it. The interested parties in any event were of the view that the calling of the Special General Meeting had been sanctioned by the Sacco’s supreme authority, that is, the Sacco members at the Annual General Meeting held on 19th March, 2016 which directed that a Special General Meeting of the Sacco be held within 2½ months of the Annual General Meeting.

45. It was urged that this Court having declined to grant the stay sought by the applicants, the applicants cannot purport to attempt to have a second bite at the cherry through the order of a Certiorari so as to undo the actions or resolutions made during the Special General Meeting duly convened and held on 4th June 2016. This Court was therefore urged not to make orders in vain since the Special General Meeting held on 4th June 2016 lawfully transacted the business of the Sacco and the Applicants had the opportunity to attend and participate as members. For the Applicants to now urge this Court to reverse the holding of the said Special General Meeting that was held after this Honourable Court had declined to grant a prayer that had sought to stop the holding of the said General Meeting is to ask this Honourable Court to grant what this Honourable Court declined to grant and amounts to gross abuse of the Court process. Accordingly the Applicants are attempting to reverse and undo through an order of Certiorari that which has already been done, which is untenable. It was posed that it left a lot to be desired how the Applicants could have sought to stop the convening of a Special General Meeting of the Sacco scheduled to be held on 4th June 2016 and yet they themselves purport to convene a Special General Meeting of the same Sacco scheduled to be held on 5th August, 2016.
46. The interested parties asserted that the mandate to reform the Sacco in terms of good governance and management lies with the Board of Directors elected by Sacco Members at the Annual General Meeting and that almost the entire verifying affidavit is an attempt to prove alleged wrong doings on the part of the Sacco’s Board, Management and/or Interested Parties which alleged wrong doings were denied in total. In the interested parties’ view, this Court is in the circumstances being invited to consider the merits of the Applicants’ allegations which task is not within the realm of Judicial Review but that of civil litigation. While denying the allegations made by the applicant, the interested parties confirmed that the Sacco’s Board is well intentioned towards all the members of the Sacco and should be supported to carry out its mandate without undue interference and intimidation.
47. It was submitted on behalf of the interested parties, by their learned counsel, Mrs Wachira, that are 2 Respondents in this application i.e. SASRA, and, the Commissioner against whom orders of mandamus and Certiorari are being sought. In the interested parties’ view, SASRA is a body Corporate established under section 4 of the Sacco Societies Act 2008 whose functions are to:-
 - “(a) license Sacco societies to carry out deposit-taking business in accordance with this Act;
 - (b) regulate and supervise Sacco societies;
 - (c) hold, manage and apply the General Fund of the Authority in accordance with the provisions of this Act;
 - (d) levy contribution in accordance with this Act;
 - (e) do all such other things as may be lawfully directed by the Minister, and



- (f) perform such other functions as are conferred on this by this Act or by any other written law.”

48. It was further submitted that Part V of the said Act deals with Regulation and Supervision of Sacco Societies while section 48 provides that SASRA shall be responsible for the regulation and supervision of Sacco societies to which the Act applies. Sub-Section (2) thereof provides inter-alia that SASRA shall prescribe Prudential Standards to be adhered to by Sacco Societies, and, undertake inspections or require a Sacco Society to submit information and reports on its financial affairs of the deposit taking business to enable the Authority to evaluate the Society’s financial condition. The requirement imposed on SASRA to Inspect is also provided in section 49(1) of the said Act which provides that:-
- “The Authority may, at any time and from time to time and shall if so directed by the Minister cause an inspection to be made by any person authorized by the Authority in writing of any Sacco Society and of its books Accounts and records.”
49. Upon inspection, it was submitted that it is expected that a Report of such findings shall be submitted by the Authority to the Commissioner, and, to the Board of Directors of the Sacco Society, and such action taken as provided under the Co-operative Societies Act, 1997 undertaken. Impliedly therefore the Commissioner is mandated to implement the inspection findings of SASRA as provided under the Co-operative Societies Act. Additionally, SASRA has powers to advise and direct as provided under Section 50 of the Act meaning that SASRA can give advise and make recommendations to the Society Sacco with regard to the conduct of its business generally. Lastly, SASRA can take supervisory enforcement actions as provided under section 51 of the said Act and this is after the Authority determines that a Sacco Society is conducting its business in a manner contrary to the Provisions of this act or of any regulations made thereunder or any other act or in any manner detrimental or not in the best interests of its members or members of the public, or a Sacco Society is under capitalized.
50. It was submitted that it is only after such a determination is made by SASRA which then takes an enforcement action under section 51 that the provisions provided under section 52(1)(b) can then take effect i.e. “appoint a person to manage the affairs of the Sacco Society and to exercise all the powers of the Society to the exclusion of the Board of directors including the use of the Corporate Seal of the Society.” It was therefore submitted that prayer 1 of the Application cannot be granted as against SASRA for the simple reason that there was and there is no enforcement action taken by SASRA against the Sacco as provided under section 51 of the Act. That prayer is dependent on the requirements of section 51 of the Act being met. Accordingly, prayer 1(a) of the application is premature, and incapable of being granted against SASRA for now.
51. It was submitted that SASRA being a creature of Statute cannot act outside the Provisions of the Act that establishes it. Since SASRA has no powers to hold an inquiry of any nature whatsoever or howsoever and therefore prayer no. 1(b) and (c) of the application also cannot issue against it.
52. Lastly, SASRA has no powers to dissolve the Board of any Sacco and to appoint an Interim Committee thereof. Accordingly prayer no. 1(d) of the application too cannot issue against SASRA.
53. It was nevertheless submitted that the letter dated 3/5/2016 addressed to the Chief Executive Officer, The Sacco Societies Regulatory Authority and copied to the County Commissioner, Nairobi County, ought to be disregarded because the name of the writer is not disclosed; it is not signed. In fact the Applicants lawyers, Gatheru Gathemia & Co. Advocates, indicate that the said letter was written by one of his clients whose name he too does not know. In the circumstances the letter could as well have been written by non-member of the Sacco as no one is answerable for the said letter.



54. With respect to the letter dated 16th May, 2016 by the Applicants lawyers, Gatheru Gathemia & Co. Advocates, to the Chief Executive Officer, The Sacco Societies Regulatory Authority (SASRA) copied to the Commissioner of Co-operatives, received by both SASRA and the Commissioner on 17th May, 2016, and by the Sacco on 18th May, 2016, which lays the basis of the Applicants' claim before the Court in form of Judicial review, I was submitted that since the letter is addressed to SASRA alone, and the Commissioner is merely copied in, it is SASRA only that is purportedly being moved by the Applicants to perform purported statutory duties. Consequently there is no request to perform or undertake any Statutory Obligation on the part of the Commissioner. He is merely being informed of the request made to SASRA. This is important to demonstrate that the part of the Commissioner cannot be accused of failing to perform a statutory duty for the simple reason that no such request/demand was made to him by the Applicants. It was however contended that the Advocates were requesting SASRA to undertake some activities which they are not in law empowered to do i.e. hold an inquiry into by laws, working and financial conditions of the Sacco, and, to appoint an Interim Committee to run the affairs of the Sacco yet SASRA's statutory functions do not include conducting an Inquiry.
55. It was reiterated that SASRA can only intervene in management where a supervisory enforcement action has been taken under section 51 of the Sacco Societies Act 2008, and, only then can it appoint a person to manage the affairs of the Sacco for a limited period of 6 months only unless the High Court on the application of the Authority extends such period as it deems necessary. The Applicants lawyers in our view were asking SASRA to put the cart before the horse as there has to be first a determination by SASRA that the Sacco was conducting its businesses in a manner contrary to the Provisions of the relevant Act or any of its regulations.
56. With respect to the lawyers' demand to SASRA that they require the Board to produce for inspection all the cash, accounts, books, documents and securities of the Society, the interested parties relied on section 49(1) of the Sacco Society Act, 2008 cited hereinabove.
57. It is clear therefore that there is no basis upon which the Applicants could directly move SASRA to Inspect the Sacco's books of accounts etc. The proper procedure would have been for the Applicants to move or request the Minister in this case the Minister for the time being responsible for matters relating to Sacco Societies to direct SASRA to cause an Inspection to be made by any person authorized by them in writing of the Sacco's books, accounts and records. Short of the Minister's directive, SASRA moves on its own motion to inspect Sacco's books of accounts from time to time.
58. It was therefore contended that the upshot of the foregoing submissions is that none of the demands made by the Applicants were/are capable of being complied with for being either defective in form or substance. As regards SASRA it was submitted that prayer no. 1(a), (b) (relates to inquiry) (c) (also relates to inquiry) and (d) cannot be granted and the same ought to be dismissed.
59. With respect to the Commissioner of Co-operative Development and whether an order of mandamus can issue against him, it was submitted that there was no evidence or at all that the Commissioner was requested by the Applicants to conduct any investigation, inspection or inquiry into the affairs of the Sacco. Consequently he cannot be accused of failure to discharge his statutory duties for an order of mandamus to issue.
60. The interested parties however relied on section 58 of Cap. 490 of the Laws of Kenya which provides that:-
- (1) The commissioner may, of his own accord, and shall on the directions 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 and



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 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.
61. It was therefore submitted that it is only the Commissioner who has powers to hold an inquiry, require all books of accounts as may be required in carrying out an inquiry, and finally if satisfied after due inquiry that the Committee of a Co-operative Society is not performing its duties properly, dissolve the Committee, and cause to be appointed an Interim Committee consisting of not more than 5 Members from among the members of the Society for period not exceeding ninety days.
62. However as the Commissioner was not requested by the Applicants to intervene, there is no evidence that an application for inspection and inquiry was made to the Commissioner by not less than one third of the Members present and voting at a meeting of the Society which has been duly advertised. What was exhibited, from the title itself, it was submitted were not for moving the Commissioner to carry out an inquiry but for an SGM which the applicants and others not before the Court intended to hold on 5/8/2016, and, against which an order of inter-alia injunction issued against the same from the Co-operative Tribunal for being illegal for want of compliance with the Saccos own by-laws/requirements for holding an SGM. Secondly, it is evident from the said signatures that they were gathered at different locations and not in a meeting advertised for the purpose of voting to have an inquiry done.
63. It was therefore submitted that an order of mandamus cannot issue against the Commissioner as the Commissioner was not moved or at all to conduct an inquiry into the affairs of the Sacco. It was however submitted that if the Commissioner were to even appoint a Committee to run the affairs of the Sacco he cannot be directed to appoint 5 such members from the Applicants which is what prayer 1(d) of the seeks.
64. With respect to the prayer for an order of Certiorari to quash the decision expressed in a letter dated 19th May, 2016 of the Respondents and the first Interested Party to allow the first Interested Party's Special General Meeting scheduled for the 4th June 2016, it was submitted that the said letter is a Private letter and does not fall within a letter written by a public officer whose contents can be quashed. It is a Notice issued in the ordinary course of running the affairs of the Sacco. In any event, the SGM of 4th June 2016 was held and quashing the decision to hold the SGM on 4th June 2016 (now past) would be purely an academic exercise as the same has been overtaken by events.
65. The interested parties averred that whereas it would rightfully be expected that the Sacco ought to be enjoined in this kind of an action, there was absolutely no need to enjoin Interested Parties no. 2, 3,



4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14. This is because the Sacco is a body Corporate capable of suing and being sued in its own name and unless and until there is established individual culpability which exercise is provided under the provisions of section 73 of Chapter 490 of the Laws of Kenya, which deals with Surcharge, then enjoining the individuals herein was merely intended to embarrass, harass, and/or intimidate the named persons.

66. The interested parties relied on the decision in *Alphonse Kondi Riaga vs. Commissioner for Co-operative Development* [2016] e KLR at paragraph 33 (on page 7) where this Court:-

“Judicial review, it is trite, is concerned not with private rights or the merits of the decisions being challenged but with the decision making process. Its purpose is to ensure that the individual is given a fair treatment by the authority to which he has been subjected, and not to ensure that the authority, after according fair treatment reaches a decision on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the Court.”

67. It was averred that had the Respondents effected the demands of the Applicants to so act within 3 days the Interested Parties would have been denied a right to be heard which right is now a Constitutional right apart from being a Common law requirement and reliance was placed on *Onyango Oloo vs. Attorney General* [1986–1989] E.A 456; *General Medical Council vs. Spackman* [1943] All ER 337 cited with approval in *R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007* and submitted that the net effect of the foregoing is that to grant the orders prayed in the application the same would be tantamount to condemning the Interested Parties unheard as they will be deemed to have engaged in malpractices while serving on the Board and/or Management of the UNSACCO hence their removal from office to make room for an Interim Committee.

68. It was further submitted that the conduct of the Applicants is also considered in an application for Judicial Review ad they relied on *Republic –vs- Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Getaria* [2010] e KLR where it was held by Wendoh, J that:-

“I do agree that the conduct of a party seeking Judicial Review Orders is an important fact to consider. One who approaches this Court for Judicial Review Orders must do so with clean hands and in utmost good faith.”

69. In this case it was submitted that the Applicants conduct amounted to an abuse of the Court process. The applicants make unreasonable demands upon the Respondents giving them unreasonable time lines, they then jump into Court process, and, even before their application which they kept urging was extremely urgent could be determined they decide to take matters into their own hands. That we submit is conduct undeserving of the Court’s exercise of its discretionary powers herein in their favour. In their support he interested parties cited *Republic –vs- National Transport & Safety Authority & 10 Others ex-parte James Maina Mugo* [2015] e KLR where the Court at page 10 of the judgement cited with approval the law in *Halsbury’s Laws of England 4th Edition Vol. 1(1) paragraph 12 page 270* .

70. Based on the foregoing the interested parties urged the Court to dismiss this suit with costs.

Determination

71. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions filed and authorities relied upon.

72. An issue was taken with respect of the use of the word “we” in the verifying affidavit. It was contended that this did not conform to requirements of an affidavit as known in law. This issue was dealt with



by Mbaluto, J in *Naftali Ruthi Kinyua & Another vs. Kenya Commercial Bank & Another Nairobi (Milimani)* HCCC No. 653 of 2001 where he held that the use of the word “we” in an affidavit in respect to matters which the deponent and his colleague took in does not relate to the affidavit and does not therefore in any way affect or offend in any manner the provisions of Order 18 Rule 5 of the Civil Procedure Rules. Wambilyangah, J similarly expressed himself in *George Arunga Sino vs. Kenya Alliance Insurance & Another Kisumu* HCCC No. 129 of 1992 that:

“There is nothing faulty or wrong with the entire replying affidavit. The deponent certainly swore about matters within his knowledge even although he was swearing on behalf of his firm. The mere fact that he used the first person plural “we” can in no way connote any deficiency or handicap on his part i.e. that he was not connected or conversant with the matters in issue.”

73. It is therefore my view and I hold that nothing turns on that point.

74. The scope of the judicial review remedy of Mandamus was the subject of the Court of Appeal decision in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No. 266 of 1996 [1997] eKLR in which the said Court held inter alia as follows:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done... 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.”

75. Similar position was adopted in *Shah vs. Attorney General (No. 3)* Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:

“Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of



compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”

76. Similarly, in *Mureithi & 2 Others vs. Attorney General & 4 Others* [2006] 1 KLR (E&L) 707 it was held:

“A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”

77. In *Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002* [2002] 1 KLR 486; [2008] 2 KLR (EP) 393, it was held that mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

78. It is however clear from *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others* (supra) that mandamus is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be done in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It is therefore my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, mandamus may go forth.



79. It is therefore clear that a person seeking an order of mandamus must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty whether at common law or by statute to so perform. Where there is no such a duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant such an order.
80. That SASRA is under a statutory obligation pursuant to section 5 of the Sacco Societies Act to inter alia regulate and supervise Sacco societies and that the subject Sacco falls within those Saccos that SASRA has the mandate to regulate and supervise is not in doubt. The question is how does it perform this task. The powers of SASRA are prescribed in sections 49 to 53 of the Sacco Societies Act. The exercise of such powers is however based on SASRA's assessment of the manner in which the Sacco concerned is being managed or mismanaged as it were. It is therefore a discretionary power in which cases the general rule is that where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.
81. In this application, the manner in which prayer 1 in the motion is couched is meant to compel the Respondents as to the mode of performance of their discretion. What the Court can do in cases where a body has declined to exercise discretion is to compel it to do so either way and not in a particular way. It is only where it is contended and satisfactorily proved that the said body has in fact exercised the said discretion unreasonably that the Court may be justified in interfering with the same.
82. In this case, the applicants' contention is that despite lodging their complaints with the Respondents, the Respondents have not acted thereon hence there has been a dereliction of duty on the part of the Respondents. It is my view that since SASRA is under a statutory obligation pursuant to section 5 of the Sacco Societies Act to inter alia regulate and supervise Sacco societies, where a complaint is made that a particular Sacco is being mismanaged, SASRA is obliged to investigate such complaints.
83. I however agree with position adopted in Republic vs. Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah [2015] eKLR that:
- “As already pointed out, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. However, there is an exception to this rule as was pointed out by Panganiban, J in the Philippines case of First Phillippine Holdings Corporation versus Sandiganbayan, 253 Scra 30, February 1, 1996 that:
- “Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is ‘gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.”
84. In this case the applicants relied on the letter dated 3rd May, 2016 as the one by which their complaints were transmitted to SASRA. The said letter was on the face of it addressed to the Chief Executive, SASRA and copied to the County Commissioner, Nairobi County. The person who authored the said letter is however not indicated. The same is similarly not signed. In my view not much weight can be attached to this letter particularly as its receipt is not admitted by any of the parties hereto.
85. There was however another letter dated 16th May, 2016 addressed to SASRA and copied to inter alia, the Commissioner of Co-operatives and the Sacco. The receipt of this letter was however acknowledged. SASRA and the Commissioner received the same on 17th May, 2016 while the Sacco received it on 18th May, 2016. In the letter the complaints of the applicants were clearly enumerated.



- By a letter dated 30th May, 2016, SASRA acknowledged receipt of the said letter and notified the applicants that the concerns raised by the applicants would be and/or were being addressed within its the supervisory and regulatory mandate. However on 3rd June, 2016 these proceedings were instituted.
86. In my view, in the circumstances of this case, this Court cannot agree with the applicants that SASRA had declined to address their concerns in order for this Court to issue an order compelling it to do so. That however does not mean that SASRA is not under a statutory obligation to do so.
87. With respect to the Commissioner, section 3(3) of the Cooperative Societies Act, Cap 490, Laws of Kenya provides as follows:
- The Commissioner shall be responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.
88. Section 5(1) and 73 of the same Act, on the other hand provides as follows:
- 53(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.
73. (1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—(a) has misapplied or retained or become liable or accountable for any money or property of the society; or (b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.
- (2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.
- (3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.
89. It is therefore clear that section 53(1) is restricted to inquiries into the by-laws, working and financial conditions of any co-operative society. It is in such circumstances that where the inquiry is sought by the members the threshold of at least one-third of the members present and voting at a meeting of the society which has been duly advertised is required to be met. Where however the complaint relates to misapplication or retention or liability or accountability for any money or property of the society culpability of misfeasance or breach of trust in relation to the society, the Commissioner is at liberty upon application by any member to undertake an inquiry into the complaints. In this case, it is my view that the nature of the complaints made by the applicants fell within the latter and therefore the threshold in section 53 was not required.
90. It is however important that an application be made by a member to the Commissioner before the Commissioner can undertake such inquiry unless the Commissioner decides to act on own accord.



91. The question here is whether there was indeed such an application made by the applicants in order to trigger action on the part of the Commissioner. The letters mentioned herein were expressly addressed to SASRA though they were copied to the Commissioner. None of them however required the Commissioner to act. Whereas the Commissioner could as well have taken notice of the existence of the dispute and acted, such action in the absence of an express application directed at the Commissioner, could only be on the Commissioner's own accord. This Court however cannot direct the Commissioner to act on own accord where there is an express provision for the applicants to invoke his powers.
92. It is my view that where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. In this case the condition precedent had not been put into motion in order to trigger the action on the part of the Commissioner.
93. With respect to the order of certiorari to quash the decision [expressed in a letter dated 19th May, 2016] of the Respondents and the first Interested Party to allow the first Interested Party's Special General Meeting scheduled for the 4th June, 2016, it is clear that as the direction in the nature of stay was not granted, the said prayer has been overtaken by events and cannot issue.
94. It is therefore my view and I find that this Court cannot issue the orders in the manner sought in the instant Motion. However section 11(2) of the Fair Administrative Action Act empowers this Court in proceedings for judicial review relating to failure to take an administrative action, to grant any order that is just and equitable, including an order directing the taking of the decision.

Order

95. Pursuant to the said provisions I hereby direct the 1st Respondent herein, the Sacco Societies Regulatory Authority (SASRA) to proceed to consider the complaints raised by the applicant herein in the letter dated 16th May, 2016 and notify the applicant of its decision thereon within 30 days of service of this order.
96. As the dispute herein pits the members of the UNSACCO Society Ltd amongst themselves, in order to promote reconciliation there will be no order as to costs.
97. It I so ordered

DATED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macronald for Mr Gatheru for the applicants

Mrs Wachira for the interested parties and holding brief for Mr Isinta for the 1st Respondent

CA Mwangi

