



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 5 OF 2010

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF CO-OPERATIVE

SOCIETIES.....1ST RESPONDENT

COMMISSIONER OF CO-OPERATIVES.....2ND RESPONDENT

ex parte:

John Githinji Wangondu & 8 Others

JUDGMENT

By a motion dated 10th March, 2005, the ex parte applicants sought from this honourable Court for two orders of judicial review which they couched in the following terms:

1. That an order of certiorari do issue to remove to this court and quash the decision of the 1st Respondent, pursuant to the findings of an inquiry of the Othaya Farmers Co-operative Society Ltd instituted by him under Section 58 of the Co-operative Societies Act 1997, to surcharge the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Applicants purportedly under Section 73 of the Co-operative Societies Act 1997 of the following respective amounts of money

<i>John Githinji Wangondu</i>	<i>1,447,613.75</i>
<i>Paul Macharia Njora</i>	<i>1,147,610.75</i>
<i>Benson Ndiritu Kwirika</i>	<i>1,060,110.75</i>
<i>Mwangi Wa Kihuni</i>	<i>970,709.00</i>
<i>Joel Kariuki Mugo</i>	<i>537,709.00</i>
<i>Fredrick Mwangi Ndirangu</i>	<i>256,789.20</i>
<i>Patrick Kariuki Kiboi</i>	<i>226,210.75</i>
<i>Simon Ndirangu Wachuhi</i>	<i>224,296.00</i>

2. That an order of prohibition do issue to restrain the 1st Respondent and/or the 2nd respondent whether by himself or through any other person from effecting in any way and/or proceeding further with the process he has commenced of surcharging the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Applicants under section 73 of the Co-operative Societies Act, 1997 of the respective amounts stated in (1) above or any amounts of money at all pursuant to the findings of the inquiry of Othaya Farmers Co-operative Society Ltd instituted by him under section 58 of the Co-operative Societies Act, 1997.”

They also sought for the costs of the application.

According to the statement of facts and the affidavit sworn by John Githinji Wangondu verifying those facts, except for Mwangi Wa Kihuni, the rest of the applicants were former committee members of **Othaya Farmers Co-operative Society Ltd (herein “the society”)**; Mwangi Wa Kihuni was the former Secretary Manager of the Co-operative society. On the 29th day of January, 2003, the District Cooperatives Officer called and chaired an annual general meeting of the society in which various allegations were made against the applicants. The meeting then resolved to have an inquiry conducted into the affairs of the society, apparently to establish the veracity or otherwise of these allegations.

On 5th day of March, 2003, the first respondent invoked **section 58** of the Co-operative Societies Act, 1997 and ordered an inquiry into the affairs of the society vide **Kenya Gazette Notice No. 1751 of 2003**.

Upon conclusion of the inquiry, an inquiry report was compiled in which allegations against each of the applicants were documented. The report was presented to a special general meeting of the society held on 7th August, 2003 and amongst its recommendations, was the restriction against the applicants from holding any public office for a term of 10 years and an order for a surcharge against each of them for the respective amounts stated in prayer (1) of the motion. The report was apparently adopted by the members at the special general meeting.

Following the recommendations of the inquiry report and its subsequent adoption by the members of the society, the first respondent wrote to the applicants on 24th of October 2003, notifying them that he would surcharge them under section 73 of the act upon expiry of 14 days of the date of that notice. The applicants wrote back and challenged the legality of the notice arguing that they could not be surcharged under **section 73** of the Act on the basis of an inquiry instituted under **section 58** of that Act. Despite their reservations, the first respondent proceeded to make a surcharge order on 6th October, 2004 according to which he surcharged each of the applicants for the aforesaid respective amounts.

In a nutshell, the applicant’s case is that **sections 58** and **73** of the Act contemplate two distinct inquiries none of which is alternative to the other; to this extent, the first respondent was grossly mistaken to act on the recommendations of the report of an inquiry initiated under section 58 as if it was the inquiry made pursuant to **section 73** of the Act. Accordingly, so they have urged, the impinged order is ultra vires the Act, it is illegal and it is based on a process informed by bad faith. For this reason, it should be quashed and the respondents be prohibited from enforcing it.

In the replying affidavit he swore in opposition to the applicant’s motion, Mr Frederick Odhiambo, who described himself in that affidavit as the Commissioner for Co-operative Development and Marketing, largely agreed with the narrative of events as articulated by the applicants except for their view on the legality of his order.

The Commissioner admitted that he appointed a team of officers to inquire into the affairs of Othaya Farmers Co-operative Society in accordance with the provisions of the Co-operative Societies Act. In the course of the inquiry, these officers established that the applicants abetted irregularities in the management of the society to the extent that it incurred what he described as “huge losses.” They accordingly compiled an inquiry report in which they made their findings. The report, according to Mr

Odhiambo, was presented before a special general meeting in which the applicants participated; it was deliberated upon and subsequently put to vote.

Mr Odhiambo's depositions leave no doubt that the inquiry he initiated was that envisaged under **section 58** of the Act whose scope was limited or ought to have been limited to only those issues that concerned "the by-laws, working and financial conditions of any co-operative society." As a matter of fact, he invoked that section for the proposition that under subsection (3) thereof, it is within the prerogative of the members of the society to take such steps as they deem necessary apparently in implementation of the report. It is in this spirit that they resolved that the applicants ought to be surcharged. Following the members' resolution, so he deposed, the Commissioner surcharged the applicants under **section 73** of **Act**. In short, it is Mr. Odhiambo's case that the decision to surcharge the applicants was made, not by himself, but by the members of the Society.

The next logical question would have been to interrogate the legality of the surcharge order and in particular to examine whether it is subject to judicial review; however, a fundamental question was raised by the parties' respective counsel in their submissions on whether the applicants ought to have presented their grievances to the co-operative tribunal rather than to the High Court by way of a judicial review application. Since this question goes to the jurisdiction of the court and its determination may very well determine this matter, it is only fair that I deal with it *in limine*.

Section 74 of the Act sheds light on the course of action open to a person who is aggrieved by an order made by the commissioner under **section 73 (1)** thereof; it states thus:

74. Appeal against order

(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.

This provision of the law is self-explanatory; it is plain that any person who has any grievances against the order of the commissioner made under **section 73 (1)** of the **Act** can only appeal to the Tribunal if he chooses to exercise his right to challenge that order. The context in which the word "may" is used in this provision should not be mistaken to mean that an aggrieved person has at his disposal a variety of alternatives to challenge the impugned order; rather, it simply means that the applicant has the discretion to challenge the order and whenever he opts to do so, he has to appeal to the Tribunal. The Tribunal referred to here is established under **section 77** of the Act.

There is no doubt, and it is common ground between the parties, that the order in issue was made by the Commissioner under **section 73**. In order to appreciate its nature, form or import it is apt to reproduce it here below:

MINISTRY OF CO-OPERATIVE DEVELOPMENT & MARKETING

OFFICE OF THE REGISTRAR OF CO-OPERATIVE SOCIETIES

THE CO-OPERATIVE SOCIETIES ACT,

No. 12 of 1997 (SECTION 73)

SURCHARGE ORDER

WHEREAS a notice of intention to surcharge dated 24th October, 2003 was issued upon you **Mr John Githinji Wangondu** requiring that you show cause why a surcharge order amounting to **Kshs 1,447,613.75** should not be issued and enforced against you jointly and severally.

AND WHEREAS you the said **Mr John Githinji Wangonde** being former chairman of Othaya Farmers Co-operative Society Ltd has failed to show sufficient cause why a Surcharge Order should not be issued against you pursuant to the resolution of the Special General Meeting of the said Society held on 7th August, 2003 at Othaya Approved School Sports Ground.

NOW WHEREFORE, under **section 73** of the Co-operative Societies Act, it is hereby ordered that you the said **Mr John Githinji Wangonde** of P O Box 21 Othaya be surcharged a sum of **Kshs 1,447,613.75/=** together with interest at 12% per annum from the date of this order until payment is effected in full accordingly.

YOUR attention is further drawn to **section 75** of the said Act which makes this liability of **Kshs 1,447,613.75/=** a **civil debt recoverable summarily**.

GIVEN under my hand at NAIROBI this 6th day of October, the year 2004.

Signed

F.F. ODHIAMBO, DSM

SENIOR DEPUTY REGISTRAR OF CO-OPERATIVE SOCIETIES

Incidentally, this is the only order I can see attached, not to the verifying affidavit but apparently on the statement of facts. It would appear that the orders in respect of the rest of the applicants were not exhibited anywhere. I should think that if the applicants intended to rely on these documents as their evidence they ought to have exhibited them on the affidavit verifying the facts. That is, however, not the issue and I do not wish to pursue it any further.

As far as the question at hand is concerned, all I can say is that if the Act provides in specific terms how an order made under **section 73** should be challenged, it is not open to a party to take any other course in questioning the order; the prescribed procedure must be followed.

In **The speaker of the National Assembly versus The Hon. James Njenga Karume (Nairobi Civil Application No. NAI.2 of 1992) (NAI.NO.40/92UR)** the respondent filed a miscellaneous application for judicial review for an order of certiorari to quash the order of the speaker of national assembly declaring the parliamentary seat held by the respondent vacant. The High Court granted him leave to proceed and file the substantive motion for this order and further ordered that the leave granted do operate as a stay of the speaker's declaration. On appeal to the Court of Appeal, the court adopted the appellant's argument that parliament, in its own wisdom having prescribed the procedure to be followed by anyone seeking to challenge a declaration made by the speaker under **section 18** of the **Elections Act**, it was not open to the respondent to bypass this procedure by invoking the prerogative orders under **order 53** of the **Civil Procedure Rules**. According to the learned counsel's argument, where there is an effective remedy available it is not open to a party to invoke **order 53** of the **Civil Procedure Rules**. In allowing the application under **rule 5(2)(b)** of the Court of Appeal rules, the court held that:

In our view, there is considerable merit in the submissions 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.

I would echo the Court of Appeal's words and hold that **order 53** of the Civil Procedure Rules cannot supplant the clear provisions of section 74 of the Co-operative Societies Act on the procedure to be adopted in challenging an order made under **section 73** of that Act.

Counsel for the applicants argued that this issue ought to have been determined at the leave stage and the appropriate course the respondent should have taken was to apply to aside the grant of leave for the application of the judicial review orders. I would agree that it would have been appropriate to bring this

issue to the fore at the earliest opportunity possible; however, I have not found any provision of the law that would bar a respondent from raising such an issue in subsequent proceedings. I also doubt that the court can sweep such issue under the rug merely because it was not determined in the context of an application to set aside the order granting leave. Despite the grant of leave, the court can still determine the issue as a preliminary point particularly where, as in this case, it goes to the question of whether the court has jurisdiction to entertain the substantive motion on its merits. **(See Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd (1989) KLR 1 at page 14)**

My conclusion is that to the extent that the applicants bypassed a statutory provision in the Act through which their grievances ought to have been determined and purported to invoke **order 53** of the **Civil Procedure Rules** instead, their application is misconceived and fatally so; I hereby strike it out with costs to the respondents. It is so ordered.

Dated, signed and **delivered in open court this 16th June, 2017**

Ngaah Jairus

JUDGE