REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION (JR) NO. 2 OF 2015

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT (CAP 490)

AND

IN THE MATTER OF THE COUNTY CO-OPERATIVE OFFICER – KISUMU AND THE SUB-COUNTY CO-OPERATIVE OFFICER – KISUMU

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR ORDERS

JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC …..... APPLICANT

VERSUS

1. THE COUNTY CO-OP OFFICER – KISUMU …..... 1ST RESPONDENT

2. THE SUB-COUNTY CO-OP OFFICER – KISUMU …..... 2ND RESPONDENT

3. THE ATTORNEY GENERAL …..... 3RD RESPONDENT

JUDGMENT

On 14th May 2015 this Court granted leave to the ex-parte applicant to bring judicial review proceedings in the nature of certiorari and also an inhibition order and by the Notice of Motion dated 15th May 2015 the exparte applicant seeks the following orders:-

''1. Spent.

2. That this Honourable Court be pleased to issue an order in the nature of certiorari quashing (sic) the decision/order of the 1st and 2nd respondents made on the 16th March 2015 ordering;

a) The immediate and indefinite stopping of transactions of the Exparte applicant's Bank accounts held at Co-operative Bank – Kisumu Branch A/cs Nos. 01120012350701 (main account), 01120012350702 (loan settlement account); Family Bank – Kisumu Branch A/c No.025000021049 (loan deductions account.

b) Immediate and indefinite inspection of the business/transactions unlawfully, unprocedurally in contravention with Sections 26, 59 of the Co-operative Societies Act (Cap 490), Co-operative Society by laws, Co-operative Society rules 2004 (rules 27, 51 (1) -(6) and without any notice to the applicant.

3. That the Honourable Court be pleased to issue an order in the nature of prohibition against the 1st and 2nd respondents or anybody acting on their behalf or with their authority from infecting (sic)/making an order/decision for the inspection of the applicants books of accounts and from ordering that transactions in the bank accounts of the applicants be stopped unless and until the due procedure established by the law is followed.

4. That the exparte applicant be at liberty to apply to this Honourable Court for necessary and/or consequential orders that this Honourable Court may deem fit and proper/just to grant.

5. That the cost of this application be provided for.''

The gist of the application as stated in the grounds on its face and the supporting affidavit is that the 1st and 2nd respondents acted without jurisdiction as they are not authorized by any law to make that decision; that the decision was without any legal basis and that it was made without giving the applicant an opportunity to be heard. Further that it was made unprocedurally and was ultravires of the Co-operative Societies Act. It is also urged that the conduct of the respondents is oppressive and may cause them to make an unlawful, illegal and unprocedural report/finding on the inspection.

The 1st and 2nd Respondents opposed the application vide a replying affidavit sworn by Zephaniah Osok on 8th June 2015 and a further affidavit sworn by Josephat Kola on 9th June 2015. It is their contention that the decision was lawful, procedural and within the powers of the 1st and 2nd Respondent under the Co-operative Societies Act.

The Advocates in this case agreed that they would canvass the application by way of written submissions and these were duly received.

The impugned decision is contained in a letter dated 16th March 2015 written to the Banks by Irene Maraga (Mrs) the Sub-County Co-operative Officer Kisumu East/Central which states:-

''<u>RE: STOPPAGE OF ALL TRANSACTIONS OF MEK SACCO LTD.</u>

Following persistent complaints by members of MEK Sacco, it has been deemed fit that all transactions pertaining to the above be stopped until the inspection report will have been read to the members.

…….''

It is the exparte applicant's submissions that the 1st and 2nd Respondent or even the Commissioner of Co-operatives has no power whether under the Co-operative Societies Act or the rules thereunder to make such a decision; that under Section 58(4) of the Act the powers of the Commissioner are limited to dissolving the committee and causing to be appointed in its place an interim committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days and that as such the respondents' action is not only illegal but unconstitutional and violates Articles 40(1), (2), (3) and 31(b) of the constitution. The applicant further submits that the act of carrying out an inspection was done without following the law as it can

only be ordered on the application of a creditor which was not the case here; that therefore the respondents acted without jurisdiction. It is also argued that the respondents did not comply with the cardinal principle of natural justice in that the respondents were not given/afforded their right to a hearing, before the decision was made. In any event the decision in so far as it was made pursuant to a resolution of the Special General Meeting was unprocedural as the supervisory committee that purported

to call the meeting had no power to do so. It is further argued that the exparte applicant is a body corporate capable of suing and being sued in its own name but is not a society registered under the Societies Act which can only sue through its officials. The applicant has relied on several authorities in support of its case.

On behalf of the 1st and 2nd Respondents it is submitted that the exparte applicant ought to have appealed to the Tribunal as provided under Section 74 but not come to this Court. On this they rely on the decisions of the High Court in:

1. Republic V. Ministry of Interior and Co-ordination of National Government & Another exparte 2TE JR NO. 441 of 2013.

2. Republic V. National Environment Management Authority [2011]eKLR.

3. Republic V. The Commissioner of Lands Exparte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998 *and the English case of:*

4. RE Preston [1985] AC 835 at 825D.

It is also submitted that the exparte applicant did not make full disclosure of all material facts in that it did not disclose that the freezing of the account was as a result of issues raised by members and the supervisory committee of the alleged embezzlement of the Sacco funds and secondly a resolution by members in a

Special General Meeting held on 14th March 2015; That in the circumstance the exparte applicant is disentitled to the orders sought. To fortify that submission Counsel relies on the decision of the Court of Appeal in **Bahadurali Ebrahim Shamji V. Al Noor Jamal & 2 Others [1998]eKLR.**

The respondents further submit that the effect of the order will be opening the bank accounts and allowing the same to be operated by the exparte applicant notwithstanding the hue and cry by a section of the membership and that the Court shall descend into the arena of managing the affairs and operations of the Sacco effectively shutting out the members.

As regards the powers of the Commissioner to make the decision Counsel submitted that the power is donated by Section 58 of the Act and all the exparte applicant can do now is to request the 1st and 2nd Respondents to convene a general meeting at which the report on the inquiry shall be tabled and discussed by the members.

Finally it is argued that the order sought by the exparte applicant is against public policy in that it will result in allowing persons who are alleged to be embezzling Sacco funds to operate the accounts. On this Counsel relies on **LG Electronics Africa Logistrics FZE V. Charles Kimani [2012]eKLR.** The Court is then urged to dismiss the application with costs to the 1st and 2nd Respondent.

The respondents have raised a preliminary issue which requires to be determined before going into the other issues and this is that the exparte applicant ought to have exhausted the appeal process afforded to him by Section 74 of the Act before coming to this Court for judicial review. I concur fully and find merit in their Counsel's submission that where there is an alternative remedy it is only in

exceptional circumstances that an order for judicial review would be granted. This

was indeed the principle enunciated in **Republic V. Ministry of Interior and Co-ordination of National Government and Another exparte ZTE JR NO.441 of 2013** and **Republic V. National Environment Management Authority [2011]eKLR** cited by the respondents and which I am in agreement with.

In our case Section 74 of the Act provides as follows:-

''(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.''

Section 73(1) on the other hand states:-

''73. Power to surcharge officers of co-operative Society.

(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 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 or the liquidator or of any creditor or member inquire into the conduct of such person.''

Subsection (2) is relevant as it then gives the Commissioner power if he considers it appropriate to surcharge the officer (s). Section 73 relates to the Commissioner's power to inquire into the conduct of an officer and to surcharge officers of the Co-operative Society but not to make a decision such as was made in this case. The argument that the exparte applicant ought to have gone to the

Tribunal on appeal instead of coming here for judicial review does not therefore hold, as their complaint is not one of a surcharge.

Another issue which I find appropriate to deal with at this stage is that of material non disclosure. The respondents submit that the exparte applicant did not disclose that the impugned decision was made pursuant to a resolution of the members at a special general meeting and that this disentitles him to the remedy sought. Again I do agree that that is the legal position. However the issue of the Special General Meeting arose very early in these proceedings and is in fact the basis upon which the decision of the respondents is challenged. That line of argument must with respect, also fail.

It is a cardinal principle that in judicial review the Court is not concerned with the merits of the decision but with the process. In **Pastoli V. Kabale District Local Government Council and Others [2008] 2 EA 300**

it was held:-

''procedural impropriety is when there is a 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 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.''

In the same case it was held:

''when parliament prescribes the manner or form in which a duty is to be exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The Courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be ''substantial compliance'' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of

the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act. In assessing the importance of the provision. Particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of

disobedience, breach of procedural rules or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell the above principles indicate that to determine whether the legislature intended a particular provision of statute to be mandatory the Court must consider the whole scope and purpose of the statute. The to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of decision that the provision is mandatory.''

It is contended that in making the impugned decision the 1st and 2nd Respondent acted without jurisdiction and did not observe the rules of natural justice. As I stated in an earlier ruling the Co-operative Societies Act and Rules give the Commissioner wide powers over Co-operative Societies and the exparte applicant is bound by those rules. The Act and the Rules do however prescribe the purposes and the manner in which those powers ought to be exercised. For instance under Section 73 the Commissioner has power to inquire int the conduct of a person suspected to be embezzling the money of a society – Section 73(1). Such inquiry is made with a view to surcharging that person. The section is also clear that such power can be exercised on the Commissioner's own accord, or on

the application of the liquidator or or any creditor or member. Although the 1st and 2nd Respondents' position is that they were conducting an inquiry into the conduct of any person they purport to have made the decision to stop the transactions pursuant to a resolution made by members at a Special General Meeting convened by the Supervisory Committee. I did state in my earlier ruling that this meeting was illegal having been called by the Supervisory Committee which had no mandate to do so and which was clearly usurping the role of the Management Committee upon who that power is vested.

The role and powers of the Supervisory Committee is set out in Rule 28(3) of the Co-operative Societies Rules and does or do not include convening meetings. The legislature recognizing that it is not always that the Management Committee will agree to call a special general meeting also gave power to the Commissioner to do so – Section 27(8). The members may also convene a meeting where the management refuses to do so – Section 27(6)(b). That this meeting was not called by either the members or by the Commissioner renders it not only irregular but illegal. That being the case it could not give rise to a legitimate decision.

The 1st and 2nd Respondents purport to have exercised their power under Sections 58 and 59 of the Act. Having admitted that they made this decision pursuant to the will of the members as expressed in the special general meeting that cannot be correct. The decision/resolution was arrived at in an illegal meeting and as I have stated it could not give rise to a legitimate process. Both Section 58 and 59(1) clearly provide the manner in which the inquiry by the Commissioner and the inspection of the books of an indebted society respectively is to be carried out and that was not done in this case. Moreover there is nothing to demonstrate that the exparte applicant was an indebted society so as to attract the intervention of the Commissioner under Section 59. Perhaps the 1st and 2nd Respondent could have exercised that power under rule 51 of Co-operative

Societies Rules which provides for suspension of operations and which states:-

''51. Suspension of operations

(1) where upon inspection or inquiry, the Commissioner considers that a co-operative Society accepting deposits from its members is bankrupt or insolvent or that it has willfully violated the Act, or is operating in an unsafe or unsound manner, the commissioner may issue an order temporarily suspending such operations for a period not exceeding thirty days.

(2) The committee shall be given written notice of the suspension which shall include a list of the reasons for the suspension and upon receipt of the notice, the society shall cease all operations, except those allowed by the commissioner.....''

Subsection (3), (4), (5) and (6) of Section 51 provide for the right to be heard of the Management Committee. Even were we to assume that the decision here was made pursuant to this rule there are many things wrong with it as firstly it was an "open ended" decision so to speak as it did not limit itself to thirty days as provided and even before this there is no evidence that the Commissioner had prior to writing to the banks done an inspection or inquiry. If there was, no such proof was availed to this Court.

Sub-rules (3), (4), (5) and (6) require that the Management Committee be informed and be given a hearing which was not done at all in this case. The respondents do not however pretend to have acted under this rule. The deponent of the replying affidavit makes it clear at paragraph 8 that it was pursuant to the resolutions made at that Special Meeting which as I have stated was irregularly convened and could not give rise to legitimate resolutions. The 1st and 2nd respondent acted without jurisdiction and did not observe the rules of natural justice. Accordingly I find merit in the Notice of Motion and allow the same by calling the decision of the 1st and 2nd respondents made on 16th March 2015 to this Court and quashing it.

As for the prayer for prohibition I shall be reluctant to grant it the reason being that as far as the right procedure is followed and the exparte applicant afforded the right to a hearing the commissioner may exercise those powers.

As for the costs they shall in this case follow the event and are awarded to the exparte applicant as against the 1st and 2nd Respondents.

It is so ordered.

E. N. MAINA

JUDGE

Signed, dated and pronounced this ...3rd... day of ….February..... 2016

In presence of:-

Mr. Odeny for Nyawiri for Exparte Applicant

N/A for Respondents

CC: Felix Magutu