REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO 400 OF 2014

ANGELA MWAI…….....…1ST APPLICANT

JAMES ALELA NDALE……..…….…….…….....2ND APPLICANT

KIMANI MACHARIA……..…….....3RD APPLICANT

KITHINJI CHOKERA.…….....4TH APPLICANT

VERSUS

COMMISSIONER OF CO-OPERATIVE DEVELOPMENT……..RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 6th November, 2014, the ex parte applicants herein, **Angela Mwai**, **James AlelaNdale**, **Kimani Macharia**, **KithinjiChokera** and **RichadOpiyo** who are past Board members of the Board of Directors of United Nations Sacco Society Limited (hereinafter referred to as "the Society") seek the following orders:

1. **An Order of Certiorari to remove into this court and quash the decision of the Commissioner for Co-operative Development (hereinafter referred to as "The Respondent") herein to surcharge each of the ex parte Applicants a sum of Kshs. 3,916,576.14 as communicated vide the letter dated 4th August 2014 and fortified by the Notice dated 21st May 2014.**
2. **An Order of Prohibition directed at the Respondent prohibiting him or any of his agents or persons acting through or under him or under his directives from enforcing the surcharge orders purportedly issued under the provisions of sections 58 and 73 of the Co-operative Societies Act and communicated vide a letter dated the 4th August 2014 and Notice dated 21st May 2014 surcharging each of the Applicants a sum of Kshs. 3,916,576.14 and further to prohibit the Respondent whether by himself or any of his agents or through other persons from further relying on the Inquiry Report dated 28th March 2014 against the Applicants.**
3. **An order of Mandamus directing and/or compelling the Respondent to recall, cancel, invalidate and annul the surcharge orders communicated vide his letter of 4th August 2014**

and the notice dated 21st May 2014 surcharging each of the Applicants of a sum of Kshs. 3, 916, 576.14

4. **That the costs of this application be provided for.**

Applicants' Case

2. According to the applicants, as the Board Members they bore responsibility of the governing authority of the society and subject to any direction of the Annual General Meeting, direct affairs of the society. The Applicants were therefore mandated together with other board members to take appropriate steps to protect and enhance the value of the assets of the society in the best interests of the members.
3. It was their case that on or about 2007 before they became members of the board, the society had entered into a Memorandum of Understanding (MOU) with Housing Finance Company of Kenya (HF) whereby it was agreed that the members of the society would be able to get mortgage facilities from HF at lower interest rates compared to prevailing interest rates in the market. The Applicants' allege that it was agreed that members would be offered mortgage facilities at the rate of 12.5% per annum and such mortgagees would be protected from changes in interest rates for a period of three (3) years after taking the mortgage.
4. It is the Applicants' case that in 2011 there was acute market volatility within the financial industries which caused banks to adjust their interest rates upwards by significant margins. The Applicants' contend that the interest rates kept oscillating but always maintaining an upward trend and that since the three year protection that had been granted to members under the MOU had lapsed, members were seriously affected by these fluctuations in the interest rates.
5. The Applicants' affirmed that as a result of this circumstance, members of the society asked the Board which included the Applicants to explore alternatives to the credit facility offered by HF or renegotiate with HF for more favourable terms and after an intensive research into the mortgage industry and negotiations with HF the Board resolved to source for an alternative mortgage provider who would guarantee members that the interest rates would remain constant and that the rates would also be lower than the prevailing interest rates. Accordingly, several mortgage providers were considered and it was agreed that the society settles upon a real estate company known as Fintax Consultants ("Fintax") which sources funds from its European partners for investment in Africa.
6. It was further contended that Fintax sourced an offshore mortgage provider by the name Integrate Real Estate Services ("IRES") who would take over the loan portfolio with HF under more favourable terms. The agreement between the society and Fintax provided that Fintax would source for a mortgage provider to take over the loan portfolio of Kshs. 818,504,843 from HF and that a loan processing fee of 1% would be paid by the Society and that the interest rate would be fixed at 8% per annum over the term loan and that there would be a tenant purchase mortgage scheme with a buy back option. The said loan was to be secured by a first legal charge on the subject property and a corporate guarantee from the society and the borrowers were required to place the funds at risk in processing their files hence the requirement of a refundable upfront deposit equivalent to 4% of the loan amount being Kshs. 32,416,033.
7. Accordingly, it was contended negotiations between Fintax and the Society were undertaken and this culminated in the payment by the Society to IRES of a refundable upfront deposit equivalent to 4% of the loan amount being Kshs. 32,416,033. The Applicants assert that the entire of the above stated transaction was carried out within the confines of the law and for the best interests of the members of the society.
8. However, during the annual general meeting of 4th of March 2013 it was resolved that the transaction be cancelled and the money paid to IRES Ltd be recalled and pursuant thereto the cancellation was done and the money was recalled and IRES Ltd commenced the refund process and indeed refunded Kshs. 5,000,000.00.
9. It was asserted by the Applicants' case that they ceased to be members of the Board on the 24th of May 2013 and that since then the new board has not taken any step to collect the balance of the

funds from IRES Limited. The Applicants allege that IRES admitted in writing that they are indebted to the Society and they even commenced remitting the refund of the money, and this in the Applicant's view negates any finding that the Kshs. 32 Million is lost. The Applicants held the view that the Society had not exhausted the remedies available to it before the Respondent began surcharging them and that the society had neglected its obligations especially the mandate of protecting its members' interests including those of the Applicants.

10. To the Applicants, there was no fraud that had been proved and that although the matter had been reported to the police and the relevant documentation forwarded to the CID no one had been arrested or charged for the offence because the transaction was done above board. The Applicants therefore complained that the decision to surcharge them was totally irrational and unreasonable because it ensured that the society retained the cause of action against IRES and at the same time exposed the Applicants to surcharge orders yet the Applicants can't pursue IRES for want of privity of contract. The Applicants argued that in reaching a conclusion to surcharge them the Respondents relied on unsubstantiated and unfounded perceptions and prejudices.
11. The Applicants alleged that the Inquiry Report expressly stated that the Inquiry team did not access crucial documents yet the team did not make effort to obtain these documents from the CID despite being fully aware that the CID had taken custody of the material documents for purposes of investigations. The Applicants were appalled that in conducting the purported inquiry the Respondents claimed to have interviewed directors of Fintax/IRES and the society's lawyers yet their representations were not considered in the report despite them being key players in the transaction and as such the Applicants held the view that the Respondents arrived at conclusions that are not properly informed by facts. They further contended that the Respondents were biased by exonerating a **Clement Tongi** yet he was part of the Board that negotiated and oversaw the execution of the transaction with Fintax and allegedly signed the cheque that transferred the money to Fintax. The Applicants allege that on the one hand it is said that the 3rd Applicant did not have authority to sign documents on behalf of the society while on the other hand the said **Clement Tongi** is exonerated on grounds that the payment of the Kshs. 32 Million to IRES was effected through duly signed instruments by the authorised signatories. To the Applicants, this amounts to irrationality and the entire report was compiled with the objective of created an unfounded burden on the Applicants
12. It was their case that according to Section 28(6) of the ***Co-operative Societies Act*** Cap 490 (hereinafter referred to as "the Act") and the Society By Laws 2012 No. 51 (hereinafter referred to as "the By Laws"), in the conduct of the affairs of the Society, the Members of the Board of Directors/Committee are enjoined to exercise the prudence and diligence of ordinary men of business and are jointly and severally liable for any losses sustained through any of their acts which are contrary to the Act, Rules, by-laws of the society and any other applicable law or directions of any general meeting. In light of this provision the Applicants were of the view that the Respondent was selective in surcharging only the Applicants and instead should have surcharged all the Board members under the collective responsibility principle.
13. It was the Applicants' case that the inquiry and the report were vitiated by illegality since the inquiry was conducted and the report prepared by persons whose appointment had lapsed and as such any purported surcharge founded on such a report is *ultra vires*. They asserted that the surcharge process was tainted by irrationality since the Respondent failed to consider the fact that the Board that replaced the Applicants and failed to collect the balance of approximately Kshs. 27,416,033 from IRES in contravention of a lawful resolution passed by the members of the society during the special general meeting.
14. To them, the surcharge process undermined their legitimate expectation that their liability is limited within the law wherein any *bonafide* thing done by them in executing functions powers or duties of the society should render them personally liable to any action, claim or demand whatsoever. Further, the surcharge process was unreasonable and irrational as the society was not asked by the Respondent to confirm if IRES was refunding the monies pursuant to the cancellation of the transaction andfurther as the Inspection Report conducted by the Respondent had noted that there was a limitation in determining the issue of the IRES due to the fact that some documents were in the custody of CID. The Applicants also aver that the Respondents did not interrogate the officials of the society in order to have the whole picture and instead purported to isolate the Applicants in order to actualise its preconceived objective of surcharging them.

15. They contended that there was no allegation that the IRES transaction was not a viable one and to the contrary, the Supervisory Committee and the Supervisory Department of the Respondent acknowledged that it was a brilliant idea and the issue of refund only became necessary following the premature cancellation of the transaction which they aver was not their decision.
16. To the Applicants, the power of surcharge is a power that should be exercised justly as a shield and not as a sword in order to prevent co-operative societies from losing their money through misapplication, embezzlement, theft and other vices. Therefore the use of the power of surcharge should be applied judiciously and the rules of natural justice must be observed while taking the circumstances into account.
17. It was submitted on behalf of the Applicants that the Respondent was very irrational in undertaking the surcharge process given the circumstances of the matter. The Applicants submit that in line with the standard of irrationality as elucidated in **Civil Servants Union vs. Minister for Civil Service (1985) AC 374 (HL), Seventh Day Adventist Church Limited vs. Permanent Secretary Ministry of Nairobi Metropolitan & Another (2014)**and**Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300**the Respondent's actions were so outrageous in defiance of logic that no sensible applying his mind to the situation that was before him would have arrived it.
18. It was submitted that arbitrariness is an affront to the rule of law and that this court has the immense responsibility of checking the arbitrary exercise of power by various public authorities and relied on **Professor William Wade's, *Administrative Law* 6th Edition.**
19. It was submitted that the Applicants were being targeted for being antagonistic towards **Clement Tongi** who was allegedly pointed out for irregularly handling a member's account. Based on ***Constitutional and Administrative Law***by **David Pollard Neil Parpworth**and **David Hughes 4th Edition**, it was submitted that it is irrational to take irrelevant matters into consideration or fail to take "relevant matter" into consideration and that "fairness and reasonableness" and their contraries are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. The Applicants submit that if the Respondents considered that the consultant confirmed in writing that they would refund all monies and had commenced the process then the parties would not be here before this court. The Applicants also submitted that this court should note that the surcharge notice and orders as issued against the Applicants did not disclose the general Meeting during which the Inquiry Report was adopted as is required under Section 27 (5) (b) and (6) (a) of the Act and that there was no evidence on the record of any such meeting ever taking place and no minutes to account for the same.
20. By choosing to surcharge only 5 out of the 9 Board members, it was submitted that the Respondent's action was in breach of Section 28(6) o the Act and the Society By Laws 2012 No. 51 which provide that in the conduct of the affairs of the Society, the Members of the Board of Directors/Committee shall exercise the prudence and diligence of ordinary men of business and shall be held jointly and severally liable for any losses sustained through any of their acts which are contrary to the Act, Rules, by-laws of the society and any other applicable law or directions of any general meeting. By exonerating **Clement Tongi**, it ws submitted that the surcharge orders were biased.
21. It was contended that the entire surcharge process was founded on illegality because the inquiry was conducted and the report prepared by persons whose appointment had lapsed because the inquiry was required to be carried out within 10 days; an extension was given vide gazette notice number 796 dated 3rd February 2014 up to 14th February 2014 and yet the report from the inquiry was prepared on 28th March 2014 and as such the same was done out of time and therefore is ultra vires.

Respondent's Case

22. The Respondent's case was on the 24th of May 2013 the Society had a special general meeting where the Applicants attended and the main agenda of the meeting was presentation of Fintax Mortgage Finance. To it, the Society had lost around Kshs. 32 Million to Fintax Group/IRES an outfit that held itself out as a licensed mortgage company which it was not. It was the respondent's contention that the board members authorized the transaction and subsequent commitment of member's money to Fintax without consulting the members thus not practising full disclosure.

23. The Respondents averred that the meeting agreed that the Board members who had considered, authorized and approved the transaction would do the honourable thing and take responsibility and resign to allow for investigations to take place and indeed they resigned. Subsequently the there was a resolution that an inquiry as provided for by the law be carried out to unearth the truth. Pursuant thereto, on the 14th of January, 2014 **Peter Wanjohi Kiama** and **Kennedy B Otachi** both Chief Co-operative Officers were appointed to carry out the inquiry and the inquiry order was published in the Kenya Gazette on the 17th of January 2014 vide Gazette Notice Number 282 and an extension was sought vide Gazette Notice No. 796 which was dated 3rdFebruary 2014.
24. It was disclosed that all the Applicants and officials of the Society were interviewed and they signed acknowledgement notes proving that they were given a fair hearing before the inquiry committee. The Respondent added that the inquiry report was forwarded to the Commissioner and the Society in March, 2014. Thereafter on the 28th of March 2014 the Society held its 38th Annual General Meeting where the report was read and recommended that the applicants be surcharged in accordance with the law. The Respondent reiterated that each Applicant was given a fair hearing and a chance to defend him/herself as required by the rules of natural justice.
25. The Respondent explained the 1st Applicant was liable personally because she was central in the search for an alternative mortgagor and was against further negotiations with HF. As for the 2nd Applicant, he was liable personally because he was a signatory to the letter of acceptance, letter of intent and minutes authorizing that KCB transfer Kshs. 32,416,033.00 to IRES Limited yet he was not an authorized signatory to the society's documents. The 3rd Applicant, according to him, was liable for irregular payments and subsequent loss of society's funds because he appended his signature to the irregular dealings while the 4th Applicant was liable because he was a signatory to the fictitious minutes which authorized KCB to transfer the funds to IRES Limited and signed the cheque to withdraw the funds transferred to IRES Limited. With respect to the 5th Applicant, his liability was due tothe signing the letter of acceptance, letter of intent and fictitious extract minutes authorizing the irregular payment to IRES Limited yet he was not a signatory to society's documents.
26. It was therefore the Respondent's case that from the Inquiry Report, the Applicants herein carried themselves in an unprofessional manner and against the well-being of the society and therefore the administrative action taken was fair and within the provisions of the law. The Respondent averred that the surcharge order issued to the Applicants is well within the provisions of the law and was applied judiciously and the rules of natural justice were taken into consideration.
27. It was his position that the allegation by the 3rd Applicant that he was served after a lapse of 30 days remained merely an allegation because the 30 day period to appeal starts running from the date of receipt. The Respondents also refuted the claim that the 3rd Applicant lodged an appeal.
28. To the Respondent, the fact that the IRES Limited refunded Kshs. 5 Million does not negate the liability of the Applicants acting without informing the members of the society.
29. On behalf of the Respondent, it was argued that there is very well settled criteria for the issuance of judicial review orders and these are on the grounds of illegality, impropriety of procedure and irrationality. The cases of**Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**and**Council of Civil Unions vs. Minister for the Civil Service [1985] AC**were similarly cited for this proposition.
30. To succeed in a claim, it was submitted that a party seeking orders in a judicial review application must prove breach of any of the above criteria in order to succeed in their claim.
31. The Respondent submitted that it acted within the law cited Section 58(1), 73 and 74 of the ***Cooperative Societies Act***.
32. The Respondents also cited inter alia**Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR**and **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary Ministry of Nairobi Metropolitan Development & Another (2014) eKLR**in support of its case and submitted that unless that restriction on the power of the court is observed the court will, under the guise of preventing abuse of power, be itself guilty of usurpation of power.
33. To the Respondent, as far as orders of prohibition is concerned the surcharge orders have already been issued in accordance with the law the orders sought herein should not be allowed as it will amount to an order barring the Respondents from carrying out their statutory duties in accordance

with the law and relied on **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996**and**Republic vs. University of Nairobi Civil Application No. Nai 73 of 2001 (2002) 2 EA 572**to the effect that judicial review order of prohibition must be pre-emptive in nature and must be directed at preventing what has not been done.

34. The Respondent's position was that it has the responsibility to ensure that cooperative societies are managed correctly and in so doing it ensures that all this is done in accordance with the law which in this case is primarily the Co-operative Societies Act.

Determination

35. I have considered the pleadings, the issues raised by the respective parties and this is the view I form of the matter.

36. In **Municipal Council of Mombasa vs. Republic &Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

> **"Judicial review is concerned with the decision making process, *not with the merits of the decision itself*: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and *whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters*…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**[Emphasis mine].

37. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

38. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given 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 authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285andChief Constable of the North Wales Police vs. Evans (1982) I WLR 1155

39. The Applicants contend that they were not heard before the impugned decision was made. Article 47 of the Constitution provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

40. The right to be heard is therefore not just a common law requirement but is under our current Constitution, a constitutional requirement as well. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect**

those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

41. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

42. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

43. However, as was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

44. In response to the application, the Respondent exhibited copies of documents entitled "acknowledgement of being interviewed" which were variously signed by the Applicants. In **Re**

Pergamon Press Ltd [1971] Ch. 388, the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

45. As is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

46. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

47. In **R vs. Aga Khan Education Services *ex parte* Ali Sele& 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be

unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

48. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

49. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audialterampartem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

50. From the record it is therefore clear that the Applicants were afforded a hearing. It cannot therefore be successfully contended that their rights to be heard were violated.
51. It was further contended that the decision arrived by the Respondent was unreasonable. The Applicants' case was that they exercised due diligence acted in the best interest of the Society hence ought not to be penalised for doing so. Other issues were also raised with respect to whether the decision arrived at by the Respondent was sound in light of the circumstances. I must however say that these were issues touching on the merit of the decision made by the Respondent rather than the process. Whereas, they could properly form the subject of an appeal, before a judicial review court, they are certainly misplaced.
52. The Applicants further contended that the term of the inquiry team expired hence they acted outside their mandate. However, it is clear that the Gazette Notice to institute the inquiry was dated 14th of January 2014 and it stated that they were "…to hold an inquiry within ten (10) days from the date thereof…" This meant that the inquiry was to terminate on the 24th of January, 2014. However another Gazette Notice dated 3rdFebruary, 2014 was issued which extended the inquiry period till 14th February, 2014. This means that the working period for the Inquiry team was from January 14th to February 14th 2014. The team then presented their report before the AGM which adopted the same at the 38th Annual General Meeting of the Sacco which was held on the 28th of March, 2014. It is not contended that there was no jurisdiction to extend the said term. Section 59 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

Where in a written law a time is prescribed for doing an actor taking a proceeding, and power is given to a court or other authorityto extend that time, then, unless a contrary intention appears, the powermay be exercised by the court or other authority although the applicationfor extension is not made until after the expiration of the time prescribed.

53. Therefore if there was power to extend the inquiry team's term that power could validly be exercised even after the expiry of the period stipulated. Accordingly nothing turns on that issue.

54. It was contended that the Respondent failed to consider the fact that the amount in question was being repaid. Reliance was however placed on sections 58(1), 73 and 74 of the Act which provide:

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.***
>
> ***74.(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.***

55. It is therefore clear that the Commissioner's powers under section 73(2) aforesaid are meant to attain the repayment or restoration of the the money or property or any part thereof to the co-operative society together with interest or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just. However, this power is not a bar to institution of criminal proceedings against the persons concerned. It is however my view that the said power does not warrant the Commissioner to take an action whose effect would amount to an unjust enrichment to the Society. It is therefore my view that one of the considerations in the exercise of such power is whether the property or money in question is being or is capable of recovery by othermeanswhich do not expose the Society to unnecessary expenditures. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See**Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

56. It is clearly my view that the issue whether or not the money in question is being recovered by another mode rather than by way of surcharge is clearly a relevant matter. However, once that matter is taken into consideration the Court would not be entitled to interfere unless it is contended that considering the facts of the case, the decision arrived at after such consideration was

irrational.

57. **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

"**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

58. The circumstances under which the Court is entitled to interfere were enumerated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** where he expressed himself inter alia as follows*:*

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis…The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

59. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade in his Book *Administrative Law*:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith,

only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

60. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC**:

"A power which is abused should be treated as a power which has not been lawfully exercised….. Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

61. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

62. As was held in **Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at**

39-40 and 55:

"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute"

63. Section 58 (2) of the ***Co-operative Societies Act*** which deals with Inquiry provides that:

(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.

64. It is correct in the conduct of the affairs of the Society, the Members of the Board of Directors/Committee are enjoined to exercise the prudence and diligence of ordinary men of business and are jointly and severally liable for any losses sustained through any of their acts which are contrary to the Act, Rules, by-laws of the society and any other applicable law or directions of any general meeting. However a decision to surcharge some only of those who otherwise would have been surcharged without any rational basis may amount to wrong exercise of discretion and even abuse of power if not an outright bias. In this case, it is clear that the Inquiry team was not seized of all the documents necessary for arriving at its decision. Whereas the same may well have been sufficient to enable it reach a decision that the officeholders were liable, in light of the provisions of section 58(2) above, it is not clear on what basis the decision to surcharge only some and not all the office bearers was arrived at. If the inquiry team did not have all their documentation then what informed their decisions to surcharge some Board members and not others?

65. As was held by **Nyamu, J** as he then was in **Stephen Mutuku Muteti vs. The Director of Land Adjudication & Settlement & Others Nairobi HCMA 246 of 1998:**

"The court deals with limits of power because the government is limited by law and when public officers act outside the law aggrieved parties are as of right entitled to ask for relief from the Courts so that those limits of power are defined by the Court and the necessary sanctions are given…Where the decision making process is clearly flawed in that the public officers clearly acted outside their jurisdiction and their acts were both biased, unreasonable and not supported by any provision under the relevant Act, a constitutional and judicial review court cannot deny the applicant a judicial remedy because the illegality brings the matter within the judicial review ambit."

66. In the premises it is my view and I hold that the Respondent failed to consider a relevant issue i.e. that the money could have been recovered by some other avenue other than by surcharge and secondly its decision did not pass the test of impartiality.

Order

67. In the premises I grant the following orders:

1. **An Order of Certiorari removing into this court and quashing the decision of the Commissioner for Co-operative Development, the Respondent herein, to surcharge each of the ex parte Applicants a sum of Kshs. 3,916,576.14 as communicated vide the letter dated 4th August 2014 and fortified by the Notice dated 21st May 2014.**
2. **As this decision is not on the merits of the case and as the real issues in controversy still**

remain unresolved there will be no order as to costs.

Dated at Nairobi this day 8th June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wathuita for the Applicants

N/A for the Respondents

Cc Patricia