REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 394 OF 2014

AND

IN THE MATTER OF AN APPLICATION FOR ORDER OF

CERTIORARI

AND

IN THE MATTER OF AN APPLICATION FOR ORDER OF

PROHIBITION

AND

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT NO. 12OF 997 LAWS OF KENYA AND THE CO-OPERATIVE SOCIETIESAMENDMENT ACT OF 2004 LAWS OF KENYA, ORDER 53 OF THECIVIL PROCEDURE RULES, 2010 AND ARTICLE 50 OF THECONSTITUTION OF KENYA

BETWEEN

REPUBLIC……………………………………………………………APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT……………………………………………..RESPONDENT

AND

UIGUANO NYONJORO FARMERS

CO-OPERATIVE SOCIETY LIMITED……........…INTERESTED PARTY

EX PARTE: **LAWRENCE MWANGANGI MWANIA**

JUDGMENT

Introduction

1. By a Notice of Motion dated 26th November, 2014, the ex parte applicant herein, **Lawrence Mwangangi Mwania,** seeks the following orders:

> **a) That an order of Certiorari to remove into this honourable court and quash the finding of the Inquiry Report on Uiguano Nyonjoro Farmers Co-operative Society Limited of December, 2009.**
>
> **b) That order of Certiorari to remove into this honourable court and quash the surcharge order dated 16th June, 2014 made by the Respondent herein against the Applicant herein.**
>
> **c) That an order of Prohibition prohibiting the Respondent by himself or by whomsoever acting on his behalf from effecting the surcharge order dated 16th June 2014 against the Applicant herein.**

Applicants' Case

2. According to the applicant, all material times relevant to this suit he was the District Officer of Ndaragwa and by virtue of his said position he was also an ex officio member of Uiguano Nyonjoro Farmers Co-operative Society Limited (hereinafter referred to as "the Society") in year 2009.

3. In December 2009 by a report instigated by the commissioner of co-operative Development and Marketing he was alleged to have misappropriated the aforesaid society's members funds and ordered to reimburse Kshs. 56,640.00.

4. According to him, he was not accorded a hearing before the committee of inquiry to defend himself. However, on 17th July, 2014 he received a surcharge order from the commissioner for co-operative Development requiring him to pay Kshs. 595,218.00 which decision he averred was also arrived at without affording him a hearing at all.

5. Based on legal counsel, he contended that the aforesaid surcharge order was highly irregular and went against the requirement of natural justice as he was not afforded a chance to exercise and enjoy his rights viz;

   i. to be heard by the commissioner;

   ii. to have prior notice of the allegations of misappropriation of funds levelled against me;

   iii. to be heard in answer to the allegations of misappropriate of funds levelled against me.

6. According to him, had he been afforded a fair hearing before the offending decision was arrived at he would have been able to clear his name. The said decision, he asserted has tainted his image as he has been a loyal civil servant and the general consequence thereof is that he stands stand to suffer unwarranted and unnecessary loss for an offence he did not commit.

7. It was therefore his position that the aforesaid decision by the Respondent is unlawful and fundamentally defective and should in essence be reviewed for being in breach of natural justice

Respondent's Case

8. In opposition to the Motion the respondents raised the following rounds:

1. That the Applicant is totally defective and without merit.

2. The Ex parte Applicant have not demonstrated any justifiable reasons against not issuing and effecting proper service, upon the interested parties on record.

3. That the Ex parte Applicant does not dispute he was once in active management of the Interested Party.

4. The court is being held in ramsom by the Ex parte Applicant in being asked to make orders in vain.

5. That the mandatory provisions as stipulated by the statutes were not met, within the duration before service neither the duration after service.

6. That the aggrieved party being the Ex parte Applicant ought to have appealed against the decision of the commissioner of co-operatives to the Tribunal.

7. That the Ex parte Applicant irrespective of blaming a subordinate member of staff on the issue of service they have not been demonstrated through an invoice or a cash voucher that money for the respective service had been cashed out.

8. That thus the Ex parte Applicant have not demonstrated a primafacie case neither have they satisfied the elements not conditions for granting Judicial Review Prerogatives as set out in Section 53 of the Civil Procedure Rules 2010.

<u>Interested Party's Case</u>

9. On its part the interested party raised the following preliminary objections:

1. Order 53 Rule 3(1,2) & 4 of the Civil Procedure Rules 2010. That it's a mandatory requirement that cannot be bent by the Ex parte Applicant that the substantive application being the notice of motion shall be made within 21 days and at least eight clear days before the service of the same. Unless the judge granting leave otherwise directs.

2. That part XIII on surcharge, Section 73 as per the Co-operative Societies Act Cap 490, Revised Edition 2005, is that the commissioner on his own accord or member inquire into the conduct of any party having taken part in the organization or management of a Co-operative Society and after the inquiry the commissioner may make an order requiring the person to repay or restore the money, the property and any object of the society with interest by way of compensation.

3. That on Section 74 of the Co-operative Societies Act Cap 490 "any party aggrieved by the decision Commissioner of Co-operative can appeal against the decision to the Tribunal".

4. The Co-operative Societies Act No. 12 of 1997 Laws of Kenya and the Co-operative Societies Amendment Act of 2004 Laws of Kenya are not applicable as we have the Co-operative Societies Act Cap 490 Revised Edition 2005 the commenced on the 5th November 2004.

<u>Determination</u>

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

11. The Applicant contends that he was 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.***

12.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].

13.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."**

14.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."**

15. In this case the applicant has averred that he was never afforded an opportunity of being heard before the impugned decisions were made. This averment, though on affidavit has not been controverted either by the respondent or the interested party by way of an affidavit.

16.The only substantial ground of opposition raised by the respondent and the interested party is that the applicant did not lodge an appeal against the decision in question as required under section 74 of the ***Co-operative Societies Act***. Subsection (1) thereof provides:

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

17. That a party ought to exhaust alternative options before invoking the judicial review jurisdiction is now trite. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

18.It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

19.There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute.

20. As was stated 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*:***

> **"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..."**

21.It is now a ‘cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D** **Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in the English case of **R (Regina) vs. Dudsheath**, *ex parte*, **Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

> *"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "*

22. In *Ex parte* **Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

23. However, confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant’s grievance. The right to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.

24. The requirement that alternative remedies be exhausted is now statutorily underpinned in section 9(3) and (4) of the ***Fair Administrative Action Act, 2015*** which provides:

> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection***
>
> ***(2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under***
>
> ***sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers***
>
> ***such exemption to be in the interest of justice.***

25. Therefore the Court has the power to exempt a party from resorting to alternative remedies in exceptional circumstances. In my view one such exceptional circumstance is where the available alternative remedy is not efficacious. In **Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

> **“In Kenya, the functions and remedies of orders of *certiorari, mandamus* and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not**

of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

26. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

27. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

28. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

> **"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."**

29. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny a deserving litigant a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

30. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

31.The applicant contends, which contention is not disputed that by the time he became aware of the surcharge order the period for appealing had lapsed and there is no provision for enlarging the same. To expect a party to appeal against a decision which he was unware of till the expiry of the appellate period would, with due respect, be the height of irrationality. To decline to entertain these proceedings on the ground of the existence of an alternative remedy would amount to a denial of justice to a deserving litigant due to no fault of his own. That would engender injustice and this Court has no jurisdiction to do that.

32. Apart from that one of the cardinal tenets of the rule of law is the need to comply with the rules of natural justice where a person's interests are likely to be affected by administrative action. Failure to adhere to the rules of natural justice cannot, in my view, be sacrificed at the altar of existence of an alternative remedy. This fact is recognised by the ***Fair Administrative Action Act, 2015*** itself when it provides in section 12 thereof as follows:

> ***This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.***

33. In the premises I find that the respondent's decision flew in the face of the rules of natural justice and cannot be allowed to stand.

Order

34. In the premises I grant the following orders:

1. An order of Certiorari removing into this court for the purposes of being quashed the finding of the Inquiry Report on Uiguano Nyonjoro Farmers Co-operative Society Limited of December, 2009 which finding is hereby quashed.

2. An order of Certiorari removing into this court for the purposes of being quashed the surcharge order dated 16th June, 2014 made by the Respondent herein against the Applicant herein which surcharge is hereby quashed.

3. That an order of Prohibition prohibiting the Respondent by itself or by whomsoever acting on its behalf from effecting the surcharge order dated 16th June 2014 against the Applicant herein.

4. The costs of this application are awarded to the applicant to be borne by the respondent.

Dated at Nairobi this day 14th October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Orina for Mr Maluki for the applicant

Miss Ndirangu for the Respondent

Mr Nderitu on behalf of the interested party, the Co-operative Society

Cc Patricia