REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 336 OF 2012

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER FOR.....1ST RESPONDENT

CO-OPERATIVE DEVELOPMENT

JOSEPHINE NGANDU .....2ND RESPONDENT

ESHMAIL MENGICH .....3RD RESPONDENT

VIWANDA SACCO SOCIETY LIMITED .....INTERESTED PARTY

EX-PARTE

PATRICIA ALEMBI

DEBAR SITATI

CHARLES MATIVO

LAURIAN KWOBA

JUDGEMENT

The ex-parte applicants Patricia Alembi, Debra Sitati, Charles Mativo and Laurian Kwoba have through the notice of motion dated 24th September, 2012 prayed that the **"judicial review ORDER OF CERTIORARI do issue to remove into the High Court for purposes of quashing and to quash, in so far as it relates to the Ex-parte Applicants, the Inquiry Report dated May 2012 made by the 2nd and 3rd Respondents recommending surcharging of the Ex-parte Applicants by the 1st Respondent."** They also pray for the costs of the application.

The Commissioner for Co-operative Development, Josephine Ngandu and Eshmail Mengich are the 1st, 2nd and 3rd respondents respectively. Viwanda Sacco Society Limited (the Society) is the Interested

Party.

The facts that emerge from the papers filed in Court show that between 31st May, 2008 and December, 2008 the 4th applicant was the chairman of the Society. The 1st to 3rd applicants were members of its management committee. Through an Inquiry Order dated 21st March, 2012 the 1st respondent as is mandated by the Co-operative Societies Act, Cap 490 appointed the 2nd and 3rd respondents to conduct an inquiry into the by-laws, working and financial conditions of the Society and the conduct of the management committee, and past or present members or officers. At the conclusion of the inquiry, the 2nd and 3rd respondents prepared a report which was tabled and adopted in the Society's Special General Meeting of 28th July, 2012 with directions that the recommendations in the Inquiry Report should be forwarded to the 1st respondent for implementation. One of the recommendations in the Report was that the applicants among other persons be surcharged for the loss of certain monies.

Before the Report could be implemented the applicants filed this matter. On 20th September, 2012 they were granted leave to commence these proceedings and the said leave was directed to operate as stay of the implementation of the recommendations of the Inquiry Report.

The applicants' case is that the Inquiry Report prepared by the 2nd and 3rd respondents made adverse findings on them but they were not given an opportunity to rebut those findings. They assert that the Inquiry Report is therefore bad in law as it was arrived at in clear breach of the rules of natural justice.

The respondents opposed the application through a replying affidavit sworn on 11th December, 2012 by Fredrick F. Odhiambo the Commissioner for Co-operative Development and Marketing. In answer to the claim that the applicants were condemned unheard, Mr. Odhiambo averred that the applicants will be given an opportunity to show cause before the decision to surcharge them is made.

It is agreed by the parties herein that the applicants were not given an opportunity to defend themselves before the recommendation to surcharge them was reached. The question therefore is whether this amounted to a breach of the applicants' right to a hearing.

The right to a hearing is one of the cornerstones of the principles of natural justice. The Court of Appeal reiterated this fact when it observed in **KIAI MBAKI & 2 OTHERS v GICHUHI MACHARIA & ANOTHER, CA Nairobi Civil Appeal No. 178 of 2002** that:

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. "**

According to the Inquiry Order found in the **Kenya Gazette Special Issue Notice Vo. CXIV – No. 38 of 9th May, 2012** the inquiry was being conducted in accordance with **Section 58** as read together with **Section 73** of the **Co-operative Societies Act, Cap 490.**

Section 73 gives the 1st respondent power to surcharge persons of a registered society. However, this cannot be done before the person to be surcharged is given an opportunity to explain why he should not be surcharged.

The 1st respondent was yet to issue notices to the applicants. That was the stage at which the applicants would have been given an opportunity to be heard.

Dismissing a similar application, Warsame, J (as he then was) observed in **MENELIK MAKONNEN & ANOTHER v COMMISSIONER OF CO-OPERATIVE SOCIETIES & ANOTHER AND BALOZI HOUSING CO-OPERATIVE SOCIETY LTD, Nairobi H.C. Misc. Application No. 158 of 2011** that:

> **"The evidence available is that the applicants were given an opportunity to rebut the**

contents of the report and show cause why they should not be surcharged for the amount misappropriated."

I agree with the reasoning of the learned Judge that the opportunity to rebut any allegation is given at the point when a person is called upon to show cause why he should not be surcharged. In my view, it would have indeed been more appropriate had the applicants been given an opportunity to have their say before the Inquiry Report was compiled but the fact that they were not asked for their comments before the Report was prepared did not prejudice them in any way as they were going to be given an opportunity to explain why they should not be surcharged.

The application before this Court is therefore premature. The same has no merit and it is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 6th day of June, 2014

W. KORIR,

JUDGE OF THE HIGH COURT