



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

MISC CIVIL APPLI 1129 OF 2007

**IN THE MATTER OF AN APPLICATION BY KANYENYA-INI FARMERS CO-OPERATIVE
SOCIETY**

LIMITED

AND

IN THE MATTER OF THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT

AND

**IN THE MATTER OF NOTICE OF INTENTION TO SURCHARGE UNDER SECTION 73 OF
THE CO-OPERATIVE SOCIETIES ACT NO.12 OF 1997 AND**

**THE CO-OPERATIVE SOCIETIES RULES 2004 AND OTHER ENABLING PROVISIONS OF
THE LAW**

BETWEEN

REPUBLIC APPLICANT

VERUS

THE COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT & OTHERS.....RESPONDENT

JUDGMENT

By the Notice of Motion dated 1/11/2002, the ex-parte applicant Kanyenyaini Farmers Co-operative Society Ltd seeks the following orders against the Commissioner of Co-Operative Development;

1. *An Order of certiorari to issue to remove into this Court the Notice of intention to surcharge No. CS/4942 of 16/4/2007 of the Commissioner for Co-operative Development and quash the said Notice;*

2. That an order of mandamus do issue to direct the Commissioner of Co-operative Development to issue a fresh notice of intention to Surcharge the Interested parties Nos. 2 to 10 inclusive which shall be in compliance with the inquiry report No. CS/4942 as adopted in the Applicant; General Meeting on 19/10/2006.
3. Costs of this application to borne by the interested parties

The application is supported by the statement of facts and verifying affidavit sworn by **Erastus Mwangi Nyingi**, the Chairman of the applicant on 11/10/2007. The applicant also filed submission on 23/9/2008.

The Respondent filed an affidavit dated 5/11/2008 in opposition, skeleton submissions dated 23/1/2009 and a list of authorities and a Notice of Preliminary Objection dated 21/10/2008. Livingstone Irungu Kibui, John Kamau Kiberu, James Kamau Kariithi, David Waithaka Mwangi, Peterson Karemeri Munene, Alfred Muiruri Mwangi, Solomon Mwangi Irungu, John Munga Mwangi and Douglas Mwangi Murugu were all named as Interested Parties.

Douglas Mwangi Murugu the 10th Interested Party swore a replying affidavit dated 11/6/2008.

The case of the Applicant is that the Commissioner of Co-operative Development ordered a repeat inquiry into the financial and management of the applicant Society and its by-laws by officer appointed by the Respondent. They prepared and signed an inquiry report CS/4942 on 31/8/2006 (EMNI). That the Applicant in a special general meeting held on 19/10/2006 adopted the said report by resolution (EMN2). That the Respondent proceeded to act on the report and issued a notice of intention to surcharge that was at variance with the said Inquiry Report in that it excluded from the surcharge the 10th Interested Party who had been surcharged Ksh. 33, 204/50 and reduced the overall surcharge sum from Kshs.1,135,664/= to Kshs.891,486/= a reduction by Kshs.234,168/= without giving reasons or hearing the Applicant. That the said 10th Interested Party has further filed PMC 200/07 claiming his terminal benefits for reasons that he was absolved from blame by the Respondent. That the Applicant suffered monetary loss as a result of the Respondent not complying with rules of natural justice. That the applicant was not given a hearing and the decision made by the Respondent is unfair. Counsel for the applicant Mr. Mbutia relied on the case of **R.V. ATTORNEY GENERAL EX-PARTE WASWA (2008) IKR** where the Court said that there is an implied duty of fairness in all administrative acts, and **WELAMONDI V CHAIRMAN ELECTORAL COMMISSION OF KENYA(2002) I KLR** where the court held that mandamus would issue to direct performance of a particular duty.

Ms Nyamichaba appeared for the Respondent. The Preliminary Objection filed by the Respondent is to the effect that this court has no jurisdiction to entertain this matter because the applicant did not exhaust the dispute settlement procedure found under sections 73 and 74 of the Co-operative Societies Act and the application is therefore premature, vexatious and frivolous and should be dismissed. In his affidavit, Mr. Odhiambo, deponed that after a repeat inquiry, he did exercise his power under Section 73 (2) of the Act and issued notices of surcharge dated 21/2/2008 requiring the 2nd to 9th interested parties, by way of written submission if any, to show cause why within 14 days they should not be surcharged. That under S. 73 (2) of the Act, the Commissioner was not bound by the recommendation of the Inquiry Report. The Respondent made recommendations of Surcharge as per paragraph 6, of his affidavit against the Secretary Manager. He found that some items included in the surcharge were not discussed at the Annual General Meeting and found that to be an error in the Report. The same was rectified excluding the items not discussed and hence a reduction in the amounts of surcharge. That he exercised his discretion in the matter having had due regard to the circumstances of the case. Ms. Nyamichaba also urged that the Co-operative Tribunal set up under Section 74 of the Act is specialized in disputes arising under the Co-operative societies Act and should have been referred to that Tribunal. Counsel made reliance on the case of **WAKENYA PAMOJA SACCO SOCIETY LTD VS. STEPHEN OGAMBA NO.8 OF 2008** where the court quoted **THE SPEAKER OF THE NATIONAL ASSEMBLY vs. THE HON. JAMES NJGENGA KARUME C.A. 192/1992** in which the Court of Appeal said that where a statute or the Constitution provides a particular procedure for redress, that procedure has to be adhered to and the court struck out the claim which arose under the Co-operative Societies Act, but which had been filed in the Civil Court instead of the Co-operative tribunal. Counsel urged that under Section 81 (5) of the Act, an appeal from

the decision of the Tribunal lies to the High Court whose decision is final and that that procedure should have been followed.

Mr. Muriuki counsel for the 2nd to 9th Interested Parties relied on the submissions filed on 20/6/2008 and added that it has not been demonstrated that the Respondent acted outside his powers under the Act or contrary to public policy. Counsel urged that the Respondent has a wide discretion under SS 58, 60 and 73 of the Act and the words used are may or may not. He urged the court to dismiss the notice of motion.

Miss King'oo, counsel for the 10th Interested Party relied on the affidavit of the 10th Interested Party and submissions filed. She urged that the Notice of Motion is fatally defective because there is no Respondent named against whom these orders can issue. That only Interested Parties are named. She also agreed with the submissions of the Respondent and other Interested Parties that the Respondent acted within his discretion under the Act and it has not been shown that he acted in excess of that discretion and she too, urged the court dismiss this application.

Judicial Review orders lie against a public body or Public officer performing public functions. In the Notice of Motion dated 1/11/2007, there is no Respondent named but Interested Parties. In the statement, all the Interested Parties had been named as Respondents, which is also incorrect because the 2nd to 10th Interested Parties are persons who may be affected by the orders of this court but are not public officers. The order of Judicial Review cannot lie against them. The applicant's counsel has explained that it is a genuine mistake. I find that since there is a mistake in both the Notice of Motion and statement that may be a genuine, that does not really render the application fatally defective. The mistake is excusable.

Judicial Review proceedings are not a bar to any other alternative remedy. This is because Judicial Review is concerned not with the merits of the decision but with the fairness of the decision making process. However, in some cases there is a very thin line between the process and the decision. When a party moves to court for Judicial Review orders, where there is an alternative remedy, the Applicant must disclose the existence of the alternative remedy and why it is not preferred. A preliminary objection was raised to this application that there is procedure for settlement of disputes arising from the Co-operative Societies Act, by the tribunal.

S 74 of the Co-operative Societies Act provides as follows:-

“74 (1) Any person aggrieved by an order of the Commissioner under S 73 (1) may, within 30 days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within 30 days appeal to the High Court or matters of law.”

In the instant case, the dispute is between the Co-operative Society and the Commissioner of Co-operatives. That dispute should have been referred to the Co-operative Tribunal under S74 of the Act. The applicant has not explained to this court why he preferred to bring the dispute to this court instead of the Tribunal. Section 76 of the Act lists the various disputes that should be referred to the Tribunal for adjudication and it is couched in mandatory terms and the applicant has to demonstrate why the mandatory requirement should not be complied with. In the case of ***R V BIRMINGHAM CITY COUNCIL ex parte FERRER LTD. 1993, ALL ER S30*** the court held:-

“S 76 of the Act lists the various disputes that should be referred to the Tribunal for adjudication and it is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure it was only exceptionally that Judicial Review would be granted. In determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory provisions was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

In another case, ***R v HURDSHAM DISTRICT COMMISSIONER ex parte WENMAH (1995)1***

WER 680 (QBD) page 706. The court had this to say:-

“it is of course trite that when parliament has provided an alternative remedy it is only in exceptional cases that Judicial Review should be granted --- (P 7101 thirdly, it is common place that in proceedings like these, all material matters must be placed before the Judge who is being invited to grant leave exparte. How could it be right not to draw the court’s attention to the alternative statutory remedy or to explain why this was thought to be inadequate?”

The above authorities support the view that where there is an alternative remedy, the court must be informed of its existence at the earliest possible time at the leave stage and why it is inadequate in the circumstances, before leave to bring Judicial Review proceedings can be granted. In this case, it is clear that there is procedure for determining such disputes by the Tribunal created by the Co-operative societies Act. That is a specialized tribunal in Co-operative matters. An appeal would then lie to this court. Since the applicant has come directly to this court, it means that the parties are denied their rights of appeal to the High Court. This court can not have both original and appellate jurisdiction in the matter. See ***KIRINYAGA DISTRICT FARMERS SOCIETY VS KIRINYANGA DISTRICT CO-OPERATIVE UNION LTD. CC 226/00.***

Back home in the ***KARUME***’s case (supra) the Court of Appeal reiterated what the above cited cases said. The court said:-

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Order 53 can not oust clear Constitutional and statutory provisions”.

In this case the applicant did not bother or attempt to justify why it came directly to this court instead of the tribunal. Besides, by coming directly to this court, the Applicant prejudices the right of Appeal to the High Court. I will uphold the Respondent’s objection that this notice of motion is incompetent and premature and should be placed before the tribunal for determination.

On the merits of the application, the applicants are aggrieved by the Respondents decision not to surcharge the 10th interested party under S73 of the Act. The Commissioner has powers to surcharge under S 73; under S 60(1) of the Act, the Commissioner has power to apportion expenses after an inquiry or inspection has been carried out. S 60 (1) reads,

“where an inquiry is held under S 58, or an inspection is made under S 59 of this Act, the Commissioner may, by a certificate under his hand, make an order apportioning the expenses, or such part of the expenses as he considers proper, between the society, the members or creditor demanding the inquiry or inspection, and the officers or former officers of the society and the decision of the Commissioner thereon shall be final.”

Under S 73 (2) the Applicant can then order an inquiry and after the inquiry, he may make orders requiring payment by any person for restoration of the co-operative’s property. The section reads,

“73 (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.”

As can be deduced from the above provisions the Commissioner is given a wide discretion under the Act.

In this case, the Commissioner has explained that some items had not been taken into account by the inquiry Report and after adjustment, the sums reduced. Secondly, the Commissioner said that he asked parties to show cause why they could not be surcharged and upon the 10th interested party making his

representations, he exercised his discretion and exonerated him from the surcharge. For the Applicant to allege that it was unfair, they had to demonstrate that the Respondent's exercise of discretion was unjudicious. But having given his explanation, the Respondent was well within his powers to exercise his discretion and the challenge to the discretion is untenable. The Applicants have no basis to challenge the said decision in light of the provisions of S 73 of the Co-operative Societies Act. The Applicant's allegations lack any substance and the Notice of Motion is not merited.

An order of certiorari lies to quash a decision made in excess or without jurisdiction or where rules of natural justice have been breached. The Applicant has been unable to establish any of the above. The Applicant also seeks an order of mandamus to compel the Respondent to issue a further notice of intention to surcharge to the Interested Parties. An order of mandamus issues to compel a public body to perform its statutory duty which it has neglected or refused to perform. However, the order can not direct a public body to act in a particular manner. In ***KENYA NATIONAL EXAMINATION COUNCIL V R, CA 266/1996*** the Court of Appeal held as such. The order of mandamus would not be available as it would be usurping the Respondent's jurisdiction by asking the Respondent to act in a particular manner. The Respondents can only be compelled to act in accordance with the law. In conclusion, apart from this application being incompetent, it lacks merit and the orders of certiorari and mandamus can not be available in any event. It is dismissed with the Applicant bearing the costs of both the Respondents and Interested parties. It is so ordered.

Dated and delivered at Nairobi this 1st day of October 2009.

R.P.V. WENDO

JUDGE

Delivered in the presence of:-

Ms Otieno holding brief for Mr Mbutia for Applicant

Mr Wetangula holding brief for Kigoo for 10th Interested Party

Court Clerk - Muturi