



**Kiragu v Commissioner for Co-operative Development and Marketing;
Orient Sacco Limited (Interested Party) (Civil Appeal E610 of 2023)
[2025] KEHC 14184 (KLR) (Civ) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E610 OF 2023

AN ONGERI, J

OCTOBER 8, 2025

BETWEEN

JIMMY KUNGU KIRAGU APPELLANT

AND

**THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT AND
MARKETING RESPONDENT**

AND

ORIENT SACCO LIMITED INTERESTED PARTY

(Being an Appeal from the Co-operative Tribunal at Nairobi (Hon. Beatrice Kimemia – Chairperson, Hon. J. Mwatsama, Deputy Chairperson, Hon. Beatrice, Same member, Hon. Frida Lotuiya – Member, Hon. Philip Gichuki – Member, Hon. Michael Chesikow – Member and Hon. Paul Aol – Member) delivered on 8th June 2023 at Nairobi in Tribunal Appeal No. 22 of 2019)

JUDGMENT

1. The Commissioner for Co-operatives surcharged the Appellant and ordered him to pay Ksh. 1,861,67.00 to Orient Savings and Credit Co-operative Society Ltd (hereinafter referred to as the Interested Party) following an inquiry exercise which was conducted into the affairs of the Interested party.
2. According to the inquiry, the Appellant had misappropriated the said sum of Ksh. 1,861,67/=.
3. The Appellant appealed against the surcharge to the Co-operative Tribunal and he alleged that during the inquiry, the inquiry officers did not accord him an opportunity to give his side of the story.



4. The Tribunal found that it did not have the power to quash the surcharge order or to reinstate the inquiry challenging the powers and duties of an administrative officer.
5. Further, that the Tribunal being a subordinate court, had no jurisdiction to delve into denial, violation or infringement of, or threats to the rights of a fundamental freedom in the bill of rights.
6. The Appellant has appealed to this Court against the said judgment of the Tribunal on the following grounds:-
 - i. The Co-operative Tribunal erred in law by converting the Appellant’s appeal into a Judicial Review Application and thereafter proceeding to dismiss the appeal for lack of jurisdiction.
 - ii. The Co-operative Tribunal erred in law by relying on an Inquiry which had been done beyond 60 days as is mandated by law.
 - iii. The Co-operative Tribunal erred in law by relying on an Inquiry Report where the Inquiry Officers usurped the powers of the Commissioner of Co-operatives and surcharged the Appellant.
 - iv. The Co-operative Tribunal erred in law by proceeding to confirm a surcharge order issued by a person who was not the Commissioner.
 - v. The Co-operative Tribunal erred in law in relying on an Inquiry that had not been proposed and approved in a General Meeting of the Interested party.
 - vi. The Co-operative Tribunal erred in law in approving surcharge orders that had not been approved by the Interested Party.
7. The parties filed written submissions as follows:- The appellant submitted that the appellants filed appeals to the tribunal but the tribunal converted those appeals into Judicial Review Applications then dismissed them thereby occasioning a gross injustice to the appellants.
8. The appellant submitted that under section 73 (2) of the Co-operatives *Societies Act* the commissioner can make a surcharge order requiring a person to repay and/or restore property.
9. However, a perusal of the record of appeal at pages 63-64 and 66-67 the Notice of Intention to surcharge and the surcharge order were both issued by Geoffrey N. Njang’ombe who signed for the commissioner. A clear indication that he was not the commissioner.
10. The appellant submitted that they were convicted through a Surcharge Order which was not issued by the Commissioner as required by the Law, thus causing them gross injustice. Section 27(1) of the Co-operatives *Societies Act* provides; -

“The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters”.
11. While section 27(6)(a) of the *Co-operative Societies Act* provides; -

“A special general meeting of a co-operative society may be convened by the Committee for the purpose of discussing any urgent matter which in the Committee’s opinion is in the interest of the co-operative society”.
12. The appellant argued that the inquiry report should have been presented to members of the Interested Party at a Special General Meeting where it should have been presented, discussed and adopted.



- Then members would have resolved to forward it to the commissioner to proceed and surcharge the appellants.
13. The respondents noted further that there is no record whatsoever that the inquiry Officers called the appellants for interviews before proceeding to find them liable of misappropriating the interested party's monies. The appellants were therefore condemned unheard which is against their constitutional rights.
 14. the 2nd respondent submitted that the Tribunal in its ruling observed that the appeal was filed outside 30 days as required under the Section 74 of the *Co-operative Societies Act*.
 15. To begin with the appeal was filed out of time and Section 74 (1) of the Act does not envisage an enlargement of time. Any appeal ought to be within 30 days of the date of the surcharge order.
 16. In this case the surcharge order was issued on 3/7/2019. The appeal was filed on 10/8/2019. This was way past the 30 days a party can challenge the surcharge order. the
 17. The 2nd respondent argued that the appellant had raised an issue of his rights being violated amongst other claims. The Tribunal correctly found and held that this was within the purview of the High Court under Article 23 of *the Constitution*.
 18. This would address the right to be fair hearing. The appeal as framed makes challenges on the manner the 1st respondent executed his powers.
 19. Article 47 of *the Constitution* as read with the *Fair Administrative Action Act*, 2015 addresses the manner and or exercise of administrative action.
 20. Section 9 (1) of the Fair Administrative Act provides that any person who is aggrieved by an administrative action may apply for judicial review. A further read of Section 9 (2) of the Act details that a court including subordinate court shall not review an administrative action or decision unless the mechanisms including internal ones for appeal or review have been exhausted.
 21. The 2nd respondent submitted that the entire appeal is incurably defective, incompetent and legally untenable having been filed outside the prescribed time lines consequently the Tribunal lacks jurisdiction to hear and determine the same.
 22. Further the appeal itself is not based on merit but rather on unsubstantiated' allegations by the appellant and we shall be urging the Tribunal to dismiss the same.
 23. The Commissioner of Co-operatives Development properly invoked his powers as provided under Section 58 read together with Section 73 of Act and instituted an inquiry into the affairs of the appellant and other members of the interested party.
 24. An inquiry was diligently conducted by the officers appointed by the Commissioner and the recommendations were subsequently adopted in a Special General Meeting as provided in the law.
 25. In effect, the appellant with other members of the interested party were found to have stolen, embezzled and/or misappropriated its funds and were surcharged under Section 73 of the Act.
 26. The 2nd respondent submitted that the appellant alleges that the appeal constitutes issues of procedure, conduct and decision of inquiry officers and therefore an appeal against the process of the Inquiry Report.
 27. This ought to have been carried out after the issuance of the intention to surcharge was issued and before the actual surcharge was given.



28. The Appellant ought to have moved to the High Court and filed for the orders being sought herein.
29. The 2nd respondent submitted further that the inquiry process was conducted within the provisions of the law and the appellant was found culpable for the loss and subsequently issuance of the notice of intention to surcharge dated 9/5/2019.
30. At this particular point the appellant ought to have challenged the illegality, irrationality and procedural impropriety against the finding of the Commissioner by the extension the inquiry officers in the appropriate court.
31. The Appellant cannot at this point claim that he was not accorded an opportunity before the inquiry officers yet there were invitations to attend the inquiry, and if the same was not accorded, the window was still open for a reprieve in the High Court before the 13/7/2019 when the surcharge orders was issued.
32. The 2nd respondent further submitted that the appellant was served with a notice of intention to surcharge indicating timelines within which he was supposed to show cause by writing his submissions or and letter of objection in respect to the findings.
33. The appellant acquiesced his right by not either responding timeously or not adequately addressing pertinent issues raised in the Report hence he cannot now blame the respondent for his indolence.
34. Finally, the 2nd respondent submitted that reading of the Report will only point to one inevitable conclusion that the said report is accurate and was made in accordance with the laid down procedures and the law.
35. The appellant is trying to read mischief where none exists. The allegations of malice, ill intention and biasness on the part of the Commissioner does not make sense because the report did not find the appellant alone culpable but other members of the interested party as well. The respondent was within the provisions of the law in issuing the Surcharge Orders against the appellant for Kshs 1,861.167.
36. The issues for determination in this appeal are as follows:-
 - i. Whether the Co-operative Tribunal erred in law and fact by converting the Appellant's statutory appeal into a judicial review application and subsequently dismissing it for lack of jurisdiction;
 - ii. Whether the appeal before the Tribunal was filed outside the statutory time limit, thereby depriving the Tribunal of jurisdiction;
 - iii. Whether the inquiry process and the resultant surcharge order were conducted and issued in accordance with the law, particularly regarding the principles of natural justice and the specific mandates of the *Co-operative Societies Act*;
 - iv. Whether the surcharge order was validly issued by the Commissioner for Co-operatives.
37. On the first issue, the Court finds that the Co-operative Tribunal fundamentally misdirected itself. The Appellant instituted a statutory appeal under Section 74 of the *Co-operative Societies Act*, Cap 490, challenging the merits of the surcharge decision.
38. The Tribunal's role in such an appeal is to re-evaluate the evidence and the decision of the Commissioner. However, the Tribunal erroneously recast the appeal as a challenge to the decision-making process, treating it as a judicial review application, which concerns the legality, rationality, and procedural propriety of an administrative action.



39. By conflating the two, the Tribunal abdicated its statutory mandate to hear and determine the appeal on its substantive merits, and this constitutes an error in law.
40. Regarding the second issue on the timeliness of the appeal, Section 74(1) of the *Co-operative Societies Act* stipulates that an appeal to the Tribunal must be lodged within thirty days of the decision.
41. The record indicates the surcharge order was issued on 3rd July 2019, and the appeal was filed on 10th August 2019, which is outside the 30-day window. Jurisdiction is everything, and without it, a court or tribunal must down its tools.
42. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR held that a court's jurisdiction flows from *the Constitution* or legislation and cannot be conferred by consent or acquiescence.
43. The Tribunal correctly identified this jurisdictional defect. While this finding alone would be sufficient to dispose of the appeal, the other issues raised are of significant public importance and have been fully argued, warranting this Court's consideration.
44. On the third issue, which goes to the heart of the inquiry and surcharge process, the Court finds compelling evidence of procedural impropriety.
45. The Appellant's allegation that he was not accorded a hearing during the inquiry is a grave one.
46. The principles of natural justice, encapsulated in the maxim *audi alteram partem* (hear the other side), are a cornerstone of administrative justice in Kenya.
47. Article 47 of *the Constitution* and the *Fair Administrative Action Act*, 2015, entrench the right to fair administrative action, which includes the right to be heard and to be given reasons for a decision.
48. The Respondent's assertion that the Appellant was served with a notice to show cause does not cure the defect of being denied a hearing at the initial inquiry stage, where the facts and evidence were being gathered and established.
49. Furthermore, the Appellant's contention that the inquiry was not presented to a Special General Meeting of the Interested Party for discussion and adoption, as suggested by Sections 27(1) and (6) of the Act, points to a potential deviation from the internal dispute resolution mechanisms envisioned by the Act, which would precede external intervention by the Commissioner.
50. Concerning the fourth issue, the validity of the surcharge order is questionable. Section 73 of the *Co-operative Societies Act* explicitly vests the power to surcharge in "the Commissioner."
51. The notices of intention to surcharge and the final surcharge order presented in the record were signed by one Geoffrey N. Njang'ombe, who indicated he was signing "For: Commissioner for Co-operative Development."
52. The law does not provide for the delegation of this specific power. The statutory power to surcharge is a quasi-judicial function that must be exercised personally by the Commissioner unless the statute permits delegation.
53. The Respondent provided no evidence of such delegation. Therefore, the surcharge order was issued by a person lacking the requisite authority and is consequently null and void.
54. In conclusion, while the appeal to the Tribunal was indeed filed out of time, the substantive processes leading to the surcharge were so riddled with legal infirmities that to let the decision stand would perpetuate a grave injustice.



55. The inquiry was conducted in a manner that likely violated the Appellant's right to a fair hearing, and the resultant surcharge order was issued by an unauthorized official.
56. This Court is faced with a confluence of procedural and substantive illegalities. While the appeal to the Tribunal was statute-barred, the surcharge order it sought to challenge was itself a nullity, having been issued by an unauthorized official following a process that violated the principles of natural justice.
57. To allow such a decision to stand, regardless of the Appellant's delay in challenging it, would be to sanction an abuse of power and a grave miscarriage of justice.
58. The defects identified are not mere technicalities but strike at the very root of the administrative action.
59. The proper remedy in such a circumstance is not merely to dismiss the appeal on a technicality or to quash the order and leave a vacuum.
60. The public interest in the proper management of cooperative societies demands that where an inquiry is warranted, it must be conducted in accordance with the law.
61. Therefore, the just and equitable course is to invalidate the entire flawed process and direct that it be commenced afresh, in strict compliance with the law.
62. Consequently, the appeal succeeds on the substantive grounds relating to the invalidity of the surcharge process.
63. The Appeal is hereby Allowed.
64. The judgment of the Co-operative Tribunal delivered on 8th June 2023 in Tribunal Appeal No. 22 of 2019 is set aside.
65. The Surcharge Order issued against the Appellant, Jimmy Kungu Kiragu, on 3rd July 2019 for the sum of Kshs. 1,861,167.00 is hereby quashed.
66. The matter is remitted back to the Commissioner for Co-operative Development (the 1st Respondent).
67. The Commissioner is directed to recommence the process regarding the alleged misappropriation by the Appellant from the stage of inquiry, in accordance with the law and the following specific directives;
 - i. Any inquiry conducted must accord the Appellant and any other affected party a fair hearing, including the right to be presented with the allegations and evidence against them, and the right to respond, as mandated by Article 47 of *the Constitution* and the *Fair Administrative Action Act*.
 - ii. The power to issue a surcharge order, following any inquiry, must be exercised personally by the Commissioner for Co-operative Development, or by a duly authorized officer upon proof of a lawful delegation of that specific power.
 - iii. The Commissioner shall ensure that the internal governance mechanisms of the Interested Party (Orient SACCO Ltd), as contemplated under Sections 27(1) and (6) of the *Co-operative Societies Act*, are respected and complied with where necessary, before the issuance of any final surcharge order.
68. This order does not preclude the Commissioner, upon a proper and lawful inquiry, from arriving at the same conclusion and issuing a fresh surcharge order, provided it is done in strict compliance with the law as directed herein.



69. The Commissioner to take action within 30 days of this date.

70. Each party shall bear its own costs of this appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2025.

A. ONGERI

JUDGE

Judgment virtually delivered in the presence of:

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