



Nyati Sacco Society Limited v Sacco Societies Regulatory Authority; Kenya Union of Savings & Credit Co-operatives Limited (Interested Party) (Judicial Review E048 of 2025) [2025] KEHC 15657 (KLR) (Judicial Review) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E048 OF 2025
JM CHIGITI, J
OCTOBER 3, 2025**

BETWEEN

NYATI SACCO SOCIETY LIMITED APPLICANT

AND

THE SACCO SOCIETIES REGULATORY AUTHORITY RESPONDENT

AND

KENYA UNION OF SAVINGS & CREDIT CO-OPERATIVES LIMITED INTERESTED PARTY

JUDGMENT

1. The Application before the court for determination is the one dated 10th February, 2025 wherein the Applicant seeks: -
 1. An Order of Certiorari be issued to bring into this Honorable Court and for purposes of quashing and to quash Respondent's Guideline Ref. No. SASRA/700/721/VOL.1(67) issued on 14th January, 2025, directed to Regulated Sacco Societies.
 2. Any other order(s) or further orders and/or writs and/or directions as the Honorable Court may deem fit to grant.
 3. Costs of the Application be provided for.



Applicants Case;

2. The Applicant is a society that receives funds from its members. Amongst other things, it invests the members' funds in the interested parties inter alia and in April 2024, the Applicant had invested the sum, a colloidal sum of money belonging to its members.
3. In May 2024 the Applicant was expecting to receive its funds for onward transmission to its Members from the interested party. Unfortunately, the funds were not released as expected.
4. Instead and in a surprising twist, the Applicant argues that on 14th January, 2025 the Respondent issued Guideline Ref. No. SASRA/700/721/VOL.1(67), directed to Regulated Sacco Societies which has triggered the filing of this suit.
5. The Applicant is concerned and troubled that it might never recover its money which will leave the people who had deposited money with it counting their losses.
6. The Applicant is also aggrieved since the guidelines were generated without public participation.
7. The Applicant is concerned given that it had issued a notice protesting the regulation. The Applicant wants a more inclusive arrangement which incorporates the stakeholder sentiment, including itself.

The Applicant's Submissions;

8. The Applicant is among many other Sacco Societies who invested funds in the interested party in form of acquisition of shares, savings and special deposits under Central Finance Fund.
9. It submits that on 14th January, 2025, the Respondent herein unilaterally issued a Guideline directing Regulated Sacco Societies, to start recognizing impairment loss and make provision for future write offs arising from financial investments in the Kenya Union of Savings & Credit Cooperatives Limited (KUSCCO) in their financial statements for the period ending 2024 effective immediately.
10. It is concerned that the Respondent argues in paragraph 13, 14, and 15 of its Replying Affidavit that the impugned guideline is merely advisory. However, that Applicant submits that this is not the case as demonstrated by wording of the guideline in question, which stated as follows:

“...the authority expects the Sacco Society to immediately start recognizing impairment loss and make provisions for future write-offs that may arise from the said financial investments in the financial statements. Kindly take note and deal accordingly.”
11. The Applicant submits that the Respondent never invited feedback or participation of the Applicant or other Sacco Societies and key stakeholders in the sector, and neither did it leave room for optional compliance. The Guideline was not optional but couched in mandatory terms.
12. The Applicant herein reiterates that the guideline was made contrary to the public duty imposed on the Respondent to protect the Sacco Societies' members' funds.
13. Most significantly, the guideline was made unilaterally and the key stakeholders in the sector were never involved, including the regulated Sacco societies, the Institute of Certified Public Accountants Kenya (ICPAK) among others.
14. There is nothing before the court to indicate that the situation with KUSCCO is so grave so as to warrant the directive by the Respondent and The Respondent overreached in issuing the Guideline irregularly regardless of the purported intent.



15. It submits that the impugned guideline appears ultra vires for the following reasons:
 - a. While SASRA is empowered to regulate and supervise Sacco societies (under Section 5(b) of the *Sacco Societies Act*), the directive imposes a specific accounting treatment without clear statutory backing under the Act. Unless the Act explicitly grants SASRA authority to mandate accounting standards for non-deposit related investments (e.g., in KUSCCO), this oversteps its regulatory scope.
 - b. The directive encroaches on the role of accounting bodies or the Sacco societies' own governance.
 - c. The guideline lacks reference to a lawful direction by the Minister (under Section 5(e) of the *Sacco Societies Act*) or another written law (under Section 5(f) of the *Sacco Societies Act*) justifying this specific intervention. If such authority exists, it must be explicitly cited.
 - d. A blanket order effective immediately for 2024 financials, without consultation or phased implementation, must be deemed unreasonable.
16. It submits that The Respondent issued the impugned guideline without legal authority, as the *Sacco Societies Act* does not empower it to impose the said regulations.
17. It is its case that the guideline imposes new obligations/restrictions not contemplated under the Act, thereby unlawfully expanding the Respondent's regulatory scope.
18. It relies in the case of *Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others* [2021] eKLR where the court held:

“An act of ultra vires (occurs) when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality.”
19. It is further its case that procedural unfairness and lack of consultation strike at the heart of justice and good governance. It is the Applicant's case that when decisions are imposed without transparency, dialogue, or consideration for those affected, trust erodes. It is not merely about flawed outcomes, but the denial of voice—the refusal to listen before acting. Such exclusion breeds resentment, as people rightfully demand fairness in process, not just in result. To ignore this is to undermine legitimacy itself.
20. The Applicant submits that the Respondent acted contrary to its core-object(s) of regulating and supervision of the running of the Sacco societies.
21. The guideline has a dangerous effect of shielding the Interested Party from its financial obligations. It also has issues with the requirement for immediate implementation of the guideline that have given such a short notice, especially in the absence of any credible evidence that the situation at KUSCCO is so dire such as to warrant the dangerous directive.
22. There was no room for objection accorded to the Applicant and all other affected Sacco Societies, hence the reason the Applicant moved this court for recourse.
23. In its opinion, stakeholder participation would have been crucial for ensuring that the Guideline is well aligned with the needs and concerns of Sacco Societies. The Applicant's perspectives and concerns were ignored. The guideline will definitely have far-reaching ramifications not only to the Applicant but in the entire industry since many Sacco Societies are affected.



24. The Applicant is reasonably apprehensive that should the impugned guideline be implemented, it shall be subjected to huge losses by being compelled to write-off its financial investments with KUSCCO, while the aforesaid investments are still fully recoverable.
25. In the case of *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party) (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR) (12 January 2022) (Judgment)*, the court held that:

“Public participation is the centerpiece of every decision made by state agencies and even non state agencies in Kenya. *The Constitution* requires that every decision whether administrative, regulatory or statutory in so far as it affected the lives of the people, had to have key component of public participation...

Consultations or stakeholder’s engagement tended to give more latitude to key stakeholders in a given field to take part in the process towards making laws or formulations of administrative decisions which to a large extent impacted on them. Such key stakeholders were mostly affected by the law, policy or decisions in a profound way.

Therefore, in appropriate instance a government agency or a public officer undertaking public participation could have to consider incorporating the aspect of consultation or stakeholder’s engagement.”
26. In the above cited case, the court was also of the view that the affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held.
27. It argues that the fact that the guideline required immediate compliance was acting in utopia without catering for the concerns, needs and current situations of the Applicant as well as other Sacco Societies.
28. It submits that the Respondent has no record of how many Sacco Societies are affected by its directive, how many had their investments already mature and how many had theirs yet to mature. It submits that the Respondent issued the guideline in haste based on alleged unverified reports.
29. It further submits that IFRS 9 did not contemplate writing off or providing for a likely loss as required by Respondent in the instant matter.
30. The Interested Party presented itself like a financial institution with capability to secure and advance interest of Saccos by getting deposits from them in various forms including fixed deposits with defined interests thereon. The Applicant herein had a fixed account with the Interested Party.
31. The Interested Party has not been declared insolvent and/or placed under receivership. It wonders why the regulator would wish to interfere with such a contractual arrangement. It is trite law that parties are bound by their contractual obligations and no party can be granted an opportunity to rewrite such privity of contract not even a regulator.
32. It submits that impairment of a financial asset which in the instant matter were fixed deposits can only be done if the financial institution in issue (holding the fixed deposits) is under statutory management or has been formally declared insolvent.
33. The Applicant submits that the Respondent failed to conduct mandatory public participation as required under Section 5(1) (a) of the *Fair Administrative Action Act*, 2015 and Article 47 of *the Constitution* denying the Applicant a fair opportunity to be heard.
34. On another front, it is its case that the impugned guideline constitutes Wednesbury unreasonableness because it is so irrational that no reasonable authority could have made it, for the following reasons:



- a. Lack of Proportionality – The directive mandates immediate recognition of impairment losses and provisions for KUSCCO investments without clear evidence of systemic risk to Saccos or phased consultation. A reasonable regulator would assess financial impacts and allow transitional periods.
- b. Absence of Factual Basis – SASRA issued the order without demonstrating that all Saccos face imminent losses from KUSCCO investments, and therefore the blanket requirement is arbitrary. A rational decision must be grounded in objective risk assessment.
- c. Disproportionate Burden – Forcing uniform write-offs regardless of individual Saccos' exposure levels or recovery prospects is excessively punitive, violating the principle that regulatory action must balance public interest with fairness.
- d. Procedural Unfairness – Saccos were not given prior notice or opportunity to present financial data before the abrupt 2024 deadline, and hence the impugned decision lacks procedural rationality.

35. The Applicant places reliance on the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [2018] eKLR (para. 84), where the Court stated thus:

“The test of *Wednesbury* unreasonableness has been stated to be that the impugned decision must be “objectively so devoid of any plausible justification that no reasonable body of persons could have reached it”

The Court went on to further state (para.85): “A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”

36. According to the Applicant, the guideline is so unreasonable that no reasonable regulator would have issued it, as it imposes burdensome, impractical, or disproportionate requirements on Sacco societies.
37. The Respondent failed to consider relevant factors, such as the economic impact on Saccos, while issuing the guideline. It is further its case that the principle of legitimate expectation was violated.
38. The Applicant places reliance on the case of *Oindi Zaippeline & 39 Others v Karatina University & Another* [2015] eKLR where the Court held that;

“Legitimate expectation” is a doctrine well recognized within the realm of administrative law. In *re Westminster City Council*, [1986] A.C. 668 at 692 (Lord Bridge): “...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation. Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise.”

39. It submits that the impugned SASRA directive violates the principle of legitimate expectation for the following reasons:



- a. Saccos historically followed a different accounting treatment for KUSCCO investments (e.g., delayed impairment recognition based on past regulatory tolerance or industry norms), the sudden, retroactive imposition of write-offs for 2024 financials breaches their expectation of consistency.
 - b. A reasonable expectation exists that material changes in financial reporting standards would involve stakeholder engagement or advance warning. The immediate effective date denies Saccos a fair opportunity to adjust and organize their affairs appropriately.
 - c. SASRA had previously not enforced such requirements. Saccos therefore legitimately expect that any future changes would be prospective, not retroactive.
 - d. Applying the directive to already-prepared 2024 financial statements undermines reliance on existing rules, prejudicing Saccos' financial planning and audits.
40. The Applicant submits that the directive violates the following provisions of the Kenyan Constitution:
- a. Article 47 (Fair Administrative Action) – The abrupt, mandatory imposition of impairment losses without prior notice, consultation, or reasonable transition period amounts to unfair administrative action, denying the Applicant procedural fairness.
 - b. Article 40 (Protection of Property) – Forcing immediate write-downs of investments without due process or justification constitutes an arbitrary deprivation of property (financial assets) unless proven necessary for public interest—which SASRA must demonstrate. SASRA has not demonstrated any public interest informing its impugned decision.
 - c. Article 46 (Consumer Rights) – The directive leads to sudden financial instability for Saccos (e.g., reduced dividends or liquidity crises), and this has indirectly harmed members' economic interests without adequate safeguards.
 - d. Article 10 (National Values – Equity & Public Participation) – The lack of stakeholder engagement before issuing the guideline contradicts constitutional principles of inclusive governance and reasonableness in regulatory actions.

The Respondent's Case:

41. The Respondent is the Government's principal agency responsible for the licensing, regulation and supervision of SACCO Societies in Kenya under the [Sacco Societies Act](#) (Cap 490 B).
42. It is its case that since it licenses the Applicant, the Applicant is bound to comply with the provisions of the aforesaid Act and Regulations made thereunder.
43. It argues that it exercises the;
 - a. Powers to license SACCO Societies to undertake Deposit - Taking Business and regulate and supervise such SACCO Societies in accordance with section 5 of the Act as read with the regulations made thereunder.
 - b. Powers to prescribe prudential standards to be adhered to by SACCO Societies including such incidental powers as maybe necessary or requisite to effectively to carry out its functions as provided in section 48 (2) (a) and (b) of the Act as read with the Regulations made thereunder.
 - c. Powers to access and inspect SACCO Societies and their books, accounts and records as provided in section 49 of the Act as read with the Regulations made thereunder.



- d. Powers to advice and issue directions to SACCO Societies in the manner to conduct of their businesses from time to time and any given time in accordance with section 50 of the Act as read with the Regulations made thereunder.
 - e. Powers to impose and issue supervisory actions against a SACCO Society or an officer of a SACCO Society in an event of non-compliance as provided in section 51 of the Act as read with the Regulations made thereunder.
44. It argues that the main regulatory and supervisory objectives of the regulatory framework provided under the *SACCO Societies Act* is to secure the safety of public deposits and funds held in such SACCO Societies including the deposits and funds held by the Applicant SACCO Society, and to meet these objectives the Authority from time to-time exercises any of the statutory powers herein above mentioned.
45. It argues that it got credible information that some SACCO Societies which it regulates and supervises could not access their investments in the interested party.
46. It argues that driven by the complaints lodged by SACCO Societies to the Authority on their inability to access their investments from KUSCCO LTD it had to take the action.
47. Many Saccos were unable to realize or recover their investments in the short term and consequently as a matter of international accounting and auditing standards, such SACCO Societies were expected to make appropriate provisions in their financial statements for the impairments of their investments in the said entity.
48. It is its case that Section 40 (3) of the SACCO-*Societies Act* requires SACCO Societies to comply with the International Financial Reporting Standards (IFRS).
49. It is further their case that making provisions in the accounts and financial statements of SACCO Societies for the impairments of any assets or investments is one of the requirements of IFRS standards and in particular IFRS 9 which requires institutions to make provisions for any impaired assets or investments immediately upon realization that short-term recoverability is doubtful per IFRS-9.
50. It further argues that Section 33 (3) (b) and (c) of the Act requires SACCO Societies to establish an asset review system-which is capable of identifying risks and assuring the adequacy of provisions for losses associated with any such risks.
51. It is its case that it saw the risks associated with the inability of KUSCCO LTD to meets its obligations owed to SACCO Societies by paying the investments held by it on behalf of such SACCO Societies advised SACCO Societies to recognize the fact the investments held in the KUSCCO LTD had become doubtful and appropriate provisioning for their impairments of the investments ought to be recognized in the SACCO Societies' accounts and other financial statements as required by IFRS-9 as read with section 40 (3) of the Act.
52. According to the Respondent there was a general advisory issued pursuant to Section 50 of the Act to SACCO Societies which may have had investments in the said KUSCCO LTD to commence the process of recognizing the attendant risks associated with the doubtful realization of the said investments in KUSCCO LTD.
53. It wanted to bring up a system that would facilitate the flagging out cases where recovery was not assured in the short term as per the individual SACCO Societies' asset review system.



54. The drive behind this move according to the Respondent was so as to curb the violation of Section 40 (3) of the Act as well as the IFRS-9, and also to ensure that the accounts and financial statements of SACCO Societies which do not reflect a true and fair state of their affairs contrary to section 40 (2) of the Act are identified and tamed.
55. The effect of this was to eradicate the risk of loss of members' deposits and savings held in the SACCO Societies. According to the Respondent this is a prudential accounting standard aimed at ensuring that financial institutions do not over state their assets and income.
56. It argues that in any event some of the SACCO Societies made the provisioning of their impaired assets in KUSCCO Ltd on their own volition and prior to the issuance of the advisory.
57. It is further its case that when the advisory was issued the Applicant did not complain or lodge any objections. It complied.
58. It argues that different SACCO Societies have made different recognitions and provisions for the impairment of their investments in KUSCCO LTD based on their individual asset review systems as provided in Section 33 (3) (b) of the Act.
59. It finally argues that the Authorities communication being challenged dated 14th January 2025 issued in exercise of the Respondent's supervisory and regulatory powers as provided in the [Sacco Societies Act](#).
60. It is its case that the directive is not ultra vires the Authority's powers and neither was it irregular or unfair or contrary to the objects or functions of the Authority.
61. It argues that the Applicant had the option to comply with it or raise objections if any to the advisory based on its assets review system established under section 33 (3) (b) of the Act.
62. The Respondent argues that the Applicant SACCO Society did not raise any objection or difficulty with the advisory but instead complied with it.
63. The decisions by SACCO Societies in Kenya to invest their funds in non-regulated entities is an individual board of directors' decision and the Authority's supervisory and regulatory interventions in the making of such investments by SACCO Society is only as provided in section 38 of the Act as read with Regulation 48 (4) of the Sacco Societies (Deposits Taking Business) Regulations, 2010 where the prescribed thresholds are breached.
64. In case such investments become doubtful as is the case with the investments in KUSCCO LTD, then appropriate recognition and provisions must be made.
65. In reacting to the allegation by the Applicant that the said KUSCCO has not been declared insolvent by a court of law or that there is no basis for the Authority's communication of the said KUSCCO LTD facing financial challenges it argues that this is completely without merit because if KUSCCO LTD was not facing any financial challenges then.
66. It argues that the fact that the Applicant has admitted that it has been unable to realize its investments including maturing savings and deposits from KUSCCO LTD is itself a testament that KUSCCO is facing financial challenges and unable to meet its obligations as they arise, and as such, setting in the automatic Application of IFRS 9 as read with section 40 (3) of the Act for immediate provisioning and recognition of the said investments as doubtful assets.
67. If indeed KUSCCO LTD was not facing financial challenges, then nothing would have been easier than KUSCCO LTD releasing the funds held on behalf of SACCO Societies including those of the Applicant according to the Respondent.



The Respondents Submissions:

68. The Respondent relies in the case of Kenya National Examinations Council Vs Republic [1997] KECA 411 (KLR) wherein the Court of Appeal set out the principles which govern the grant of the prerogative remedies of Certiorari, Prohibition and Mandamus. It rendered itself as follows with regard to the order of Certiorari: -
- “Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.” [Emphasis added]
69. It emphasized that Judicial Review is concerned with the decision-making process, not with the merits of the decision itself.
70. It submits that The Sacco Societies Regulatory Authority is established pursuant to the Sacco Societies Act, with the mandate to undertake the following acts pursuant to Section 5 of the said act: -
- a. license Sacco societies to carry out deposit-taking business in accordance with this Act;
 - b. regulate and supervise Sacco societies;
 - c. hold, manage and apply the General Fund of the Authority in accordance with the provisions of this Act;
 - d. levy contributions in accordance with this Act;
 - e. do all such other things as may be lawfully directed by the Cabinet Secretary; and
 - f. perform such other functions as are conferred on it by this Act or by any other written law.
71. The Respondent submits that it has jurisdiction to issue the guideline of 14th January 2025 under Section 5 (b) of the Sacco Societies Act as amplified at Part V (Regulation and Supervision of Sacco Societies) of the Sacco Societies Act at Section 48 (2) (a) & (b) which grants the Authority power to prescribe prudential standards to be adhered to by Sacco Societies and power to undertake inspections or require a Sacco Society to submit information and reports on its financial affairs of the deposit-taking business to enable the Authority evaluate the society's financial condition.
72. It submits that the main regulatory and supervisory objective of the regulatory framework laid out by the Sacco Societies Act is to secure the safety of public deposits and funds held by the Applicant Sacco Society and others within the remit of the said framework.
73. It submits that in the course of the exercise of its supervisory and regulatory mandate the Respondent received credible information that some Sacco Societies which it regulates and supervises could not access their investments from the Kenya Union of Savings and Credit Cooperatives Limited (KUSCCO Ltd-an Interested Party herein).
74. It is its submission that upon consideration of both the short-term and long-term effects of investments made by Saccos in the interested Party, the Respondent invoked the provisions of Section 33 (3) (b)& (c) and 40 (3) of the Sacco Societies Act to safeguard public monies which had been invested by Saccos in form of various investment ventures and or platforms operated by the interested party herein.
75. Section 33 (3) (b) & (c) and 40 (3) of the Sacco Societies Act stipulates:
33. Application for loan or credit facility



(3) Every Sacco society shall prescribe in writing—

SUBPARA (a)

- (b) an asset review system, which shall accurately identify risk and assure the adequacy of the provisions for losses account;
- (c) a system of reviewing the entire asset portfolio including contingent accounts or off-balance sheet items and adequate provisioning for losses at periodic monthly intervals."

40. Form of accounts

- (3) The accounts and other financial records of a Sacco society shall be denominated in Kenya shillings and shall comply with the international financial reporting standards and such other requirements as the Authority may prescribe."

76. Accordingly, it is submitted that the provisions of the Sacco Societies oust contentions by the Applicant. It is submitted that the other objective was to arrest the risk of loss posed to investments made with the interested party herein namely KUSCCO, which has since crystallized, with far-reaching financial consequences across many sectors within the Republic of Kenya.
77. The Respondent urges the Court to take judicial notice of the dissolution of KUSCCO's Board and the appearance of a cross-section of Directors in a competent Court of Law to answer to charges of embezzling colossal sums of money belonging to various Saccos across the Country.
78. The Respondent submits that it had such a situation in active contemplation at the time it issued the Guideline in question.
79. On another front it is submitted that the rationale for the Guideline was to make a provision for any impaired assets or investments immediately upon realization that short-term recoverability was doubtful. It further submits that the guideline is an advisory issued to Saccos pursuant to Section 50 of the *Sacco Societies Act*.
80. It submits that the Guideline in question is a prudential accounting standard aimed at ensuring that financial institutions do not overstate their assets and income. It seeks to preserve the value of existing deposits or savings.
81. The Guideline in question was geared towards ensuring business continuity on the part of the Applicant and other Saccos lending credence to earlier submission that the Respondent was alive to its statutory mandate as it issued the Guideline in question.
82. It submits that it is disingenuous for the Applicant to be challenging the Guideline in question in one breath; and implementing the same fully in the next breath.
83. Majority of Saccos have since made a provision for impairment of doubtful investments and or assets for periods convenient to their membership and suitable to their income levels in keeping with the Guideline issued by the Respondent. In response to the commissioning of the Annexures to the Respondent's Replying Affidavit sworn on 3rd March 2025.
84. It concedes to the existence of a variation between the date on which the Respondent's Replying Affidavit was sworn and the date on which the Annexures thereto were commissioned.
85. It is submitted that the anomaly occurred out of inadvertence rather than a deliberate act.



86. It is submitted that parties are bound by pleadings. Reliance is placed in the case of Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] KECA 215 (KLR) confirm as much. In the same breath, Order 2 Rule 11 of the Civil Procedure Rules sets out the general rule for admissions and denials, which rule has found reinforcement in case law, which we take on this occasion from Raghai Singh Chatte Vs. National Bank Of Kenya Limited [1996] eKLR; wherein Akiwumi, JA (as he then was) rendered himself thus: -

“The following comments on the corresponding English rule namely 018 r13, which appear in the Supreme Court Practice 1993, vol. 1 PART 1 p.323 para 18/13/1, also clearly supports [the] view that in a suit for a liquidated demand where the facts are clearly set out in the plaint as in the present appeal, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in defense but also that the defense discloses no reasonable defense:” This rule enforces a cardinal principle of the system of pleadings. that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it this rule god r.14 is to bring the parties by their pleading; to an issue. and indeed, to narrow them down to definite issues and diminish expense and delay, especially regards the amount pf testimony required p neither side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him.” [Emphasis added]

87. It submits that it is telling therefore in light of the foregoing that the Applicant selectively rebutted Paragraphs 18 and 23 of the Respondent's Replying Affidavit sworn by its CEO on 3rd March 2025.

88. It reproduced the said paragraphs hereunder for appreciation of their full import:

“18. That I do wish to state that when the advisory was issued herein to SACCO Societies the Applicant did not complain or lodge any objections to it but on the contrary the Applicant prepared its accounts and financial statements and made provisions for their investments in the said KUSCCO LTD as per the attached approved audited financial statements marked PN 6.” [Emphasis added]

23. That the Applicant SACCO Society did not raise any objection or difficulty with the advisory but instead complied with it just like other SACCO Societies which had investments in KUSCCO LTD also complied with it in different ways as demonstrated herein above.” [Emphasis added]

89. The Respondent submits that in line with the finding of Akiwumi, JA (as he then was) from the Raghbir Singh Chatte case which we have set out hereinabove, the highlighted portions above stand admitted and form the crux of the dispute between the parties herein.

90. Having made the foregoing, according to the Respondent there is no dispute between the parties since the Applicant has since implemented the Guideline now the subject of this suit.



91. On the place of submissions reliance is placed in Paniel Toroitich Arap M0i Vs Mwangi Stephen Muriithi & Another [2014] KECA 642, the Court of Appeal rendered itself as follows on the subject of Submissions:

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.” [Emphasis added].

92. The Respondent’s case is that this Court should not entertain matters to do with: Irrationality and or Wednesbury unreasonableness, the Principle of Legitimate Expectation; and the question of alleged violation of the Applicant’s constitutional rights since these were not pleaded and ought to be struck out.

93. It is its submission that the default in compliance with the Guideline in question will not lead to revocation or denial of license to the Applicant. It submits that Annexure VB-4’ annexed to the Applicant’s Supplementary Affidavit does not qualify to be termed as a reservation. It is a Demand Letter (Ref: Adm I Nyati 104 / 25 dated 30th January 2025) addressed to the Interested Party herein in the first instance with the subject being: “RE: Demand For KSH 86, 433, 5831= Deposits Owed to Nyati Savings and Credit Co-Operative Society”; and subsequently to the Interested Party’s Advocates: M/S MW& Co Advocates LLP.

94. On the issue of public Participation reliance is placed in the case of British American Tobacco Kenya Plc Vs Cabinet Secretary for The Ministry of Health& 2 Others: Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR) at paragraph 96 to wit: -

Guiding Principles for public participation.

- i. a constitutional principle under article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.



- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 - viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 - ix. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."
95. It submits that the Guideline in question did not warrant Public Participation in the manner brought out by the Applicant in its pleadings and written submissions and in light of the criteria set out at (v), (vi), (vii) and (viii) in the BAT Case above.
96. The Respondent submits that, time was the essence and it was in the public interest that any monies which were likely to be lost from investments made by Saccos in Kenya with the Interested Party be secured without any undue delay.

The Interested Party's Case;

97. The Interested Party confirms that The Respondent issued the impugned guideline.
98. It acknowledges its financial obligations to the Applicant and other saccos and is actively working towards restructuring and fulfilling them and it is addressing the financial constraints and explore feasible solutions.
99. It is its case that it has not refused to pay its obligations but is working within the constraints of the prevailing economic conditions to honor its commitments.
100. It is its case that this was a necessary regulatory measure aimed at ensuring proper financial disclosures in compliance with Section 40(3) of the *SACCO Societies Act* and IFRS9 reporting standards.
101. It argues that the advisory provides guidance on proper financial recognition of impairments in line with best accounting practices.
102. The directive was made pursuant to IFRS-9 and Section 40(3) of the *SACCO Societies Act* which mandate financial institutions to recognize potential risks in their financial statements.
103. It is their case that the inability of Saccos to access their investments in KUSCCO, including the Applicant's stated investments, is a matter of concern that necessitated regulatory guidance to ensure financial stability within the Sacco sector.



104. It is its case that the advisory seeks to ensure prudent financial reporting and safeguard the Saccos members' funds. It aligns with the regulatory framework governing Saccos and is in the best interests of the sector to promote financial transparency and risk management.
105. Provisioning for impairment of assets is a globally accepted accounting standard (IFRS-9) that Saccos must comply with to ensure a true and fair reflection of their financial position.
106. The Applicant's failure to raise any objections to the advisory before initiating this suit further affirms the reasonableness of the Respondent's actions.
107. It is its case that several Saccos have already undertaken provisions for impairment losses in accordance with the advisory and IFRS-9, demonstrating industry-wide acceptance of the financial reporting practices.
108. The advisory by the Respondent does not absolve it of its financial obligations but rather ensures that Saccos recognize and account for potential financial risks in their audited financial statements.
109. It is its case that the advisory is neither ultra vires nor irregular, as it falls squarely within the Respondent's statutory mandate under the *SACCO Societies Act*, 2008, but is in the best interest of Saccos and their members to ensure financial stability and prevent further risks to members' funds.

The Interested Party's Submissions;

110. It submits that the impugned guideline was issued pursuant to the Respondent's supervisory and regulatory mandate under the *Sacco Societies Act*, 2008, and advised all regulated SACCOs to evaluate and, where necessary, recognize impairment losses in respect of funds invested in the Interested Party, in accordance with the applicable International Financial Reporting Standards (specifically IFRS-9).
111. It submits that the Guideline was neither punitive nor binding but instead constituted a sector-wide advisory aimed at promoting prudent financial reporting, particularly in view of delays experienced by several SACCOs in recovering their investments.
112. It submits that since the Applicant has already complied with the advisory and its recourse to judicial review, after voluntarily acting upon the advisory, amounts to approbation and reprobation.
113. It submits that the Applicant has failed to demonstrate any illegality, irrationality, or procedural impropriety that would warrant the intervention of this Honourable Court.
114. It submits that the Respondent is established under Section 4 of the *Sacco Societies Act*, 2008, with the statutory mandate to supervise, license, and regulate deposit-taking SACCOs in Kenya.
115. Section 5 of the Act provides for the mandate of the Respondent as follows;
 - “ 5. Objects and functions of the Authority
The objects and functions of the Authority shall be to—
 - (a) license Sacco societies to carry out deposit-taking business in accordance with this Act;
 - (b) regulate and supervise Sacco societies;
 - (c) hold, manage and apply the General Fund of the Authority in accordance with the provisions of this Act;
 - (d) levy contributions in accordance with this Act;



- (e) do all such other things as may be lawfully directed by the Cabinet Secretary; and Other form such other functions as are conferred on it by this Act or by any other written law. "

116. Section 50(4) of the Act further empowers the Respondent to issue directions to SACCOs in the interest of stability, transparency, and deposit protection;

Powers of the Authority to advise and direct

- (5) The Authority may issue directions to a Sacco society generally, and where appropriate provide exceptions to those directions to be detailed at time of issuance for the better carrying out of its functions under this Act and in particular, with respect to—
 - (a) the prudential standards to be adhered to by a Sacco society in the conduct of its business in Kenya; and
 - (b) regulations to be adhered to by Sacco societies in order to maintain a stable and efficient deposit-taking Sacco movement and financial system.

117. Additionally, it submits that Section 40(3) of the Act obligates SACCOs to prepare financial statements in accordance with International Financial Reporting Standards (IFRS), including IFRS-9, which requires recognition of expected credit losses where recoverability of financial assets is doubtful, even in the absence of default or insolvency.

118. It submits that the impugned Guideline, dated 14th January 2025, was issued to all regulated SACCOs following reports from several SACCOs, including the Applicant, that they were unable to access matured deposits placed with the Interested Party.

119. It is submitted that The Respondent, in exercising its powers under Section 33 (3) (b) and (c) and Section 40(3) of the Act, advised SACCOs to assess and recognize impairment of such investments in compliance with IFRS-9. Sections provide as follows;

“ 33. Application for loan or credit facility

- (3) Every Sacco society shall prescribe in writing—
 - (b) an asset review system, which shall accurately identify risk and assure the adequacy of the provisions for losses account;
 - (c) a system of reviewing the entire asset portfolio including contingent accounts or off-balance sheet items and adequate provisioning for losses at periodic monthly intervals.”

“40. Form of accounts

- (3) The accounts and other financial records of a Sacco society shall be denominated in Kenya shillings and shall comply with the international financial reporting standards and such other requirements as the Authority may prescribe.”

120. It submits that the Guideline issued by the Respondent was thus grounded in its statutory mandate and was necessitated by credible and documented sectoral risks.



121. Several SACCOs, including the Applicant, had reported delays in recovering mature deposits invested with the Interested Party.
122. The Respondent, acting responsibly, issued the Guideline urging SACCOs to assess such exposures for impairment and reflect them transparently in their financial statements. This action was both necessary and proportionate.
123. The courts have often reinforced that it cannot interfere with the statutory mandate of a regulatory authority as stated in *Republic v Kenya Revenue Authority Ex parte Yaya Towers Ltd* [2008] eKLR, where the court stated as follows; "The courts act with circumspection not to encroach on the statutory obligation of public authorities and paralyze their operations."
124. The court further clarified the purview of judicial remedies with regard to regulatory authorities exercising their statutory mandate as follows;

"Judicial review powers is a special jurisdiction of the High Court duly meant to provide remedy whenever necessary to correct various improprieties that may be committed by those who exercise public authority."
125. Reliance is also placed in *Republic v Director of Immigration Services & 2 others Ex parte OZamiZekan Gbenqa Fasuui & 2 others* [2018/ eKLR, the Court reiterated that: "Judicial Review is about the decision-making process, not the decision itself... As long as the process followed is proper and the decision within the confines of the law, the court will not interfere."
126. In this instant case, it is submitted, the Guidelines issued by the Respondent were not only lawful, but consistent with sound regulatory and financial disclosure practices.
127. It submits that since general, sector-wide advisory applying to all regulated SACCOs it did not trigger the procedural protections of Article 47 or Section 4 of the *Fair Administrative Action Act*.
128. Section 40(3) of the *Sacco Societies Act* mandates that SACCOs prepare financial statements "in accordance with International Financial Reporting Standards and such other requirements as the Authority may prescribe." Moreover, Section 33(3) (c) requires SACCOs to implement asset review systems capable of identifying financial risks and making provisions.
129. The inability of the Applicant to access its matured deposits from KUSCCO triggered an obligation to review impairment risks. The advisory was both timely and legally justified. It further submits that the Guideline did not exempt the Interested Party from scrutiny.
130. The Applicant has not demonstrated that the advisory insulated the Interested Party from oversight or accountability.

Analysis and Determination;

Follow all the issues for determination:

1. Whether or not the Application has merit.
2. Who shall bear the costs?

Whether or not the Application has merit.

131. It is not denied that the Respondent as pleaded issued the impugned guideline that the Applicant is challenging.



The court will first address the issue of the Defective Replying Affidavit:

132. A challenge was mounted that the court should not admit of the Respondent's Replying Affidavit given that it was defective. On its part, the Respondent concedes to the existence of a variation between the date on which the Respondent's Replying Affidavit was sworn and the date on which the Annexures thereto were commissioned. The Respondent argued that the anomaly occurred out of inadvertence rather than a deliberate act.
133. It argued that Order 19, Rule 7 of the Civil Procedure Rules provides that, the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.
134. It is this court's finding and I so hold that Article 159 of *the Constitution* can and shall cure the lapse. The other parties shall suffer no prejudice if the Replying Affidavit is admitted as part of the record. Instead the broader interest of justice will be promoted if it is admitted being a curable technicality under Article 159 of Constitution.

The court shall now deal with the legal framework that guided the Respondent in issuing the impugned guidelines.

135. Section 5 of the Act provides as follows;

“ 5. Objects and functions of the Authority”

The objects and functions of the Authority shall be to—

- (a) license Sacco societies to carry out deposit-taking business in accordance with this Act;
- (b) regulate and supervise Sacco societies;
- (c) hold, manage and apply the General Fund of the Authority in accordance with the provisions of this Act;
- (d) levy contributions in accordance with this Act;
- (e) do all such other things as may be lawfully directed by the Cabinet Secretary; and Other form such other functions as are conferred on it by this Act or by any other written law.”

136. Section 50(4) of the Act further empowers the Respondent to issue directions to SACCOs in the interest of stability, transparency, arid deposit protection; Powers of the Authority to advise and direct

“(5) The Authority may issue directions to a Sacco society generally, and where appropriate provide exceptions to those directions to be detailed at time of issuance for the better carrying out of its functions under this Act and in particular, with respect to—

- (a) the prudential standards to be adhered to by a Sacco society in the conduct of its business in Kenya; and
- (b) regulations to be adhered to by Sacco societies in order to maintain a stable and efficient deposit-taking Sacco movement and financial system.”



137. Section 40(3) of the Act obligates SACCOs to prepare financial statements in accordance with International Financial Reporting Standards (IFRS), including IFRS-9, which requires recognition of expected credit losses where recoverability of financial assets is doubtful, even in the absence of default or insolvency.
138. According to the Respondent, the impugned guideline, dated 14th January 2025, was issued to all regulated SACCOs following reports from several SACCOs, including the Applicant, that they were unable to access matured deposits placed with the Interested Party.
139. The Respondent argued that in exercising its powers under Section 33 (3) (b) and (c) of the Act, it advised SACCOs to assess and recognize impairment of such investments in compliance with IFRS-9.
140. The Section provides as follows;

“ 33. Application for loan or credit facility

(3) Every Sacco society shall prescribe in writing—

- (b) an asset review system, which shall accurately identify risk and assure the adequacy of the provisions for losses account;
- (c) a system of reviewing the entire asset portfolio including contingent accounts or off-balance sheet items and adequate provisioning for losses at periodic monthly intervals.”

141. The judicial review court has a duty to ensure that the decision makers like the Respondent operates within the principles as enunciated in the case of in the case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 where it was held:

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

142. In the instant suit the court has noted that the last Paragraph of the impugned guideline has directed saccos in express and clear terms to take action that includes some that is retrospective in nature.



143. A directive that has a retrospective application is prejudicial and impossible to comply with. It is irrational and illegal for all intents and purposes.
144. Laws cannot be made to affect or bind the Applicants and other saccos for past financial events. The law is always supposed to be prospective. A guideline or a regulation that has a retrospective application undermines the rule of law for uncertainty.
145. The impugned guideline indicates that the Respondent expects that it should take effect immediately. Even though there is an objective and weighty concern that the Respondent seeks to arrest through the guideline, this cannot be achieved at the expense of the right to fair administrative action guaranteed under Article 47 of *The Constitution*.
146. As the statutory regulator, the Respondent is under a duty to at all times uphold procedural propriety during all the decision-making processes if the decision affects or has an economic or financial impact on the constituent's members or the saccos that it regulates.

On the question whether there was a need for public participation;

147. According to the Respondent several SACCOs, including the Applicant, had reported delays in recovering mature deposits invested with the Interested Party.
148. It is further the Respondents' case that the inability of the Applicant to access its matured deposits from Interested Party triggered an obligation to review impairment risks.
149. The Respondent argued that upon consideration of both the short-term and long-term effects of investments made by Saccos in the interested Party, the Respondent invoked the provisions of Section 33 (3) (b)& (c) and 40 (3) of the *Sacco Societies Act* to safeguard public monies which had been invested by Saccos in form of various investment ventures and or platforms operated by the interested party herein.
150. The Respondent further argued that the other objective behind the guideline was to arrest the risk of loss posed to investments made with the interested party which have since crystallized, with far-reaching financial consequences across many sectors within the Republic of Kenya.
151. The Respondent also argued that the time was of the essence and that it was in the public interest that any monies that were likely to be lost from investments made by Saccos in Kenya with the Interested Party be secured without any undue delay.
152. The court is of the view that the impugned guideline affects and has an impact on the Applicant, other Saccos, the public and many investors at various level and in different economic ways.
153. The court has no doubt that the guideline is inspired and driven by a call to promote good governance.
154. The foregoing considerations that the Respondent has advanced clearly called for the input of the saccos and other stakeholders before the implementation of the guideline in the opinion of the court.
155. This court is guided by the case of *British American Tobacco Kenya Plc Vs Cabinet Secretary for The Ministry of Health & 2 Others: Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) supra.
156. Given that the Respondent is the regulator of Saccos in Kenya and given that it is the body the issues licenses to Saccos, it would have been at the minimum easy for it to carry out a Sacco's based public participation.



157. The South African Constitutional Court decision, *Doctors for Life International v. Speaker of the National Assembly and others*[2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) which also considered the role of the public in the law-making process in part stated as follows:

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”

116. Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy”

158. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*,[2014] eKLR. We stated inter alia:

“Public participation is the cornerstone of sustainable development and it is so provided in *the Constitution*...

(381) Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of *the Constitution* would both be subverted.”

159. In *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Exparte National Super Alliance (NASA) Kenya & 6 others* Judicial Review No 378 of 2017; [2017] eKLR among the issues for consideration before the High Court was whether the IEBC was constitutionally obliged to facilitate public participation as part of the tendering process. The High Court allowed the Petition and quashed the award of the tender for lack of public participation. It ordered that the procurement process begin de novo in accordance with *the Constitution*. IEBC appealed to the Court of Appeal. In upholding the appeal, setting aside the High Court decision, the Court of Appeal considered the big issue of justifiability and enforceability of article 10 of *the Constitution*, which encompasses the principle of public participation. The appellate court in *Independent Electoral and Boundaries Commission*



(IEBC) v National Super Alliance(NASA) Kenya & 6 others, Civil Appeal No 224 of 2017; [2017] eKLR held that article 10(2) and the principles therein are for immediate realization, thus:

“

“ 80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles.

We agree with this pronouncement and reiterate that the principle of public participation as anchored in article 10 of *the Constitution* is alive and the same is equally justiciable before our courts.”

160. The Respondent’s notice is in any event and by nature very short. Further, the guideline offered no avenue for the Saccos to challenge the same. It is this court’s finding that the guideline would have achieved a legitimate outcome had the affected Saccos been given a platform to express or voice their sentiments before rolling out the guideline.
161. The economic impact that is going to flow from the impugned guideline is no doubt colossal. The Respondent does not tell the court why it decided not to notify, inform or invite the input of the Saccos that it regulates.
162. The members of public, the Applicant and other societies who are affected by the guidelines have a national footprint under Article 1 of *the Constitution* as a result of which the Respondent should have involved them in the decision-making process before arriving at the impound guideline.
163. The Respondent did not argue nor advance any proof of the difficulty or the challenges it would have encountered in embracing a participatory approach.
164. Public participation is incomplete when the stakeholders or the people affected by a decision are shut out or are not given a chance to express themselves.
165. One of the reasons why Article 10 of *the constitution* is part of our Constitution is to ensure that there is inclusion of the people at all levels of decision making. This is not negotiable.
166. The National value in public participation is seated in Article 1 of *the Constitution* which simply means that power belongs to the people. Any decision like the impugned one that is arrived at without the people’s input stands on quicksand. The people must at all times own the political, social economic processes that affects them. This accords with Article 47 of *the Constitution*. Any decision that is devoid of this is illegal.
167. In instant suit, the Applicant, and other Saccos were not given or notified of the reasons informing the rushed decision that was made y the Respondent. The fact that the Respondent is given supervisory statutory Power does not permit it to embrace procedural illegalities.
168. The right to fair administrative action is provided for under Article 47 of *the constitution* which was a well thought out inclusion framework on the part of the committee of experts.
169. Failing to include or accommodate the Applicant and other Saccos in the decision-making while arriving at the impugned decision that has far reaching ramifications amounts to a procedure impropriety that vitiates the decision.



- The court shall now look at the effect of the failure by the Applicant to issue a notice or a protested before suing.
170. The Respondent was and remains under a duty to at all times uphold, protect and fulfill the rights of the Applicant and all the Saccos that it regulates irrespective of whether they protest or not.
 171. Given the impact that the directive has on the right to property to the Applicants and other Sacco members then the Respondent should have invoked Article 25 of *the Constitution* in adopting an approach that accorded with proportionality and reasonableness and not wait for protests from the affected parties.
 172. The Respondent should have considered a less restrictive method to limit the Applicant's rights from inception. The court is of the view that a public participation process would have culminated in an inclusive, informed, acceptable and more effective eventuality. Such an open engagement would have created room to secure input from key instrumental players like statutory accounting organizations and the interested party.
 173. There is no proportional nexus between the objective and the rationality or justification whatsoever in the guideline that was advanced that was satisfactory to the court. The guideline is unreasonable, unproportional and unconstitutional whether or not there was a protest.
 174. There is no reasonability that the Respondent showed or manifested to the Applicant or the advanced to the stakeholder that informed the decision to promulgate the guidelines. There being none, then the court is of the view that the unilateral decision was arbitrary. The protest issue is immaterial.
 175. The Respondents' argument that the Applicant and other Societies have already complied with the directive is neither here nor there. The conduct of the Applicant cannot sanitize nor convert an illegality into valid a guideline. You cannot put life into guidelines which have been found to be void ab initio and I so hold.
 176. Whether the *Wednesbury* unreasonableness applies;

Wednesbury's unreasonableness (*Associated Provincial Picture Houses Ltd. v. Wednesbury's Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."
 177. The fact that the Applicant did not plead or raise the *Wednesbury* reasonability in its application cannot form a bar to invoking the same in advancing their case in judicial review proceedings in its submissions.
 178. The question or the issue of unreasonableness in the impugned conduct and impugned guideline by the regulator who is the duty bearer can arise any time. The law is always alive. The court is satisfied that the Respondent's action was unreasonable and irrational.



On another front, the Applicant submitted that its legitimate expectation right was taken away.

179. In addressing this issue this court is guided by De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6thEdn. Sweet & Maxwell page 609:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

180. In the case of Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR paragraph 55;

“It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”.

181. In the instant suit, this court makes an informed finding that the Applicant had a legitimate expectation that the Respondent who is its regulator would embrace its statutory supervisory role in regulating the troubled Sacco space in a procedurally fair and legal manner. It didn’t.

Costs;

182. Costs ordinarily follow the event. The Applicants shall get the costs of the suit.

Disposition:

183. The Application has merit.

Order:

1. An Order of Certiorari is hereby issued bringing into this Court quashing the Respondent’s Guideline Ref. No. SASRA/700/721/VOL.1(67) issued on 14th January, 2025, directed to Regulated Sacco Societies.
2. Costs to the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.

.....

J. CHIGITI (SC)

JUDGE

