

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E530 OF 2021**

**BETWEEN**

**WELLINGTON A.  
OTIENDE.....PETITIONER**

**VERSUS**

**SACCO SOCIETIES REGULATORY AUTHORITY....  
..... RESPONDENT**

**AND**

**MWALIMU NATIONAL SACCO SOCIETY LIMITED..  
INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

1. The Petition dated 2<sup>nd</sup> December 2021 is supported by the Petitioner's affidavit in support of similar date.
2. This Petitioner challenges the alleged unlawful suspension as the Interested Party's Chairman and the subsequent ban from holding any other office in Saccos throughout Kenya by the Respondent.
3. The Petitioner contends that the Respondent's action violated the constitutional principles on due process and fair administrative action under Articles 47 and 50 of the Constitution.

4. Accordingly, the Petitioner seeks the following reliefs:

- i. A declaration that the 1<sup>st</sup> Respondent has contravened Articles 2, 3, 10, 25, 27, 28, 40, 43, 47 and 50 of the Constitution by purporting to unjustly and unfairly remove the Petitioner as the elected Chairperson of the Interested Party and further bar him from holding any office in any SACCO Society in Kenya.***
- ii. In light of (a) above, an order of certiorari quashing the decision of the 1<sup>st</sup> Respondent to remove the Petitioner as the Chairperson of the Interested Party and further barring him from holding any office in a SACCO Society in Kenya as contained in the letter dated 29<sup>th</sup> September, 2021.***
- iii. An order of mandamus compelling the Respondents herein to forthwith reinstate the Petitioner to his elected position of the Chairperson of the Board of the Interested Party and cease any interference thereof with the lawful administration and management of the Interested Party.***
- iv. Damages for breach of the Petitioner's rights to fair trial and fair administrative action.***
- v. Costs of this Petition.***
- vi. Any other reliefs the Court may deem fit, just and expedient to grant.***

#### **Petitioner's Case**

5. The Petitioner depones that he is the Interested Party's Chairperson having been elected as the Chairman of its Board of Directors on 28<sup>th</sup> February 2019. This term

ran for 3 years. He states that upon its conclusion, he was re-elected on 23<sup>rd</sup> March 2021.

6. He depones that he has attained numerous milestones during his leadership such as ensuring prudent servicing of liabilities, the re-negotiation of lease rentals for FOSA branches in 2020, thus saving the SACCO millions of shillings in rental costs to ease the burden on members, he initiated a process which led to the enlargement of loan repayment periods for advanced loans from 12 months to an 18-month repayment period and from 24 months to 36 months for loans previously due after two years among other notable achievements. He emphasizes that his leadership has been focused on improvement of the Interested Party's productivity and enhanced viability.
7. He depones that following his re-election, one of his competitors threatened to have him removed from office before completion of his term. He claims that the Respondent was used in this ploy to depose his leadership by fabricating sham grounds for his removal and in addition ban him from ever holding such an office again.
8. He asserts this plot was carried out on 11<sup>th</sup> June 2021 unlawfully when the Respondent suspended him from office and issued him with a Notice to Show Cause (NTSC). He states that the suspension was based on an alleged inspection of the Interested Party by the Respondent. He

asserts that the alleged inspection was not actually conducted as purported and no Report issued in that regard.

9. Further to this, the Petitioner alleges that the reasons given in the NTSC letter were extraneous and without merit since they were premised on the allegation that, between 1<sup>st</sup> January 2021 and 31<sup>st</sup> March 2021, he executed letters of guarantee on behalf of the Interested Party in favor of its subsidiaries being Spire Bank and Mwalimu Asset Management Ltd.
10. He averred that the said guarantees are Board decisions and thus was incapable of making such decisions singlehandedly as purported. He notes that the same were necessary business requirements to ensure that Spire Bank Ltd does not become insolvent before it is sold. Further, that these guarantees had always been issued since the year 2016.
11. Moreover, he contends that his suspension was ultra vires and irregular as the Respondent lacks the requisite authority to unilaterally suspend an elected official without affording him any form of hearing as guaranteed under Article 47 and 50 of the Constitution.
12. The Petitioner depones that he responded to the Respondent's allegations in his correspondence dated 9<sup>th</sup> July 2021 and 25<sup>th</sup> August 2021. He states that the Interested Party did not conduct any hearing or contact him. Instead,

the Interested Party on 30<sup>th</sup> September 2021 forwarded to him the Respondent's decision dated 29<sup>th</sup> September 2021.

13. The Petitioner, in addition to challenging the Respondent's decision in this matter, contended that even the inspection Report relied upon by the was not prepared in conformity with requirements of Section 49 of Sacco Societies Act.
14. Aggrieved by the decision of the Respondent, the Petitioner submitted his appeal pursuant to Regulation 72(8) of the Sacco Societies (Deposit -taking Sacco Business) Regulations, 2010.
15. The Petitioner claims that he has learned that the Respondent's Chief Executive Officer is pressurizing the Interested Party to reconstitute a new Board and appoint a new Chairperson. He postulates that this move is aimed at defeating this Petition.
16. The Petitioner as such seeks this Court's intervention as he stands to suffer irreparable loss being that he not only has been unlawfully suspended from office but also banned from holding office in any SACCO society in Kenya, with no justification. He claims that the Respondent's actions are discriminatory, baseless and self-serving.
17. Additionally, the Petitioner states that the appeal to the Cabinet Secretary does not provide an efficacious remedy for purposes of resolving this matter, hence filing of this suit.

## **Respondent's case**

18. In opposition to the Petition, the Respondent through its Chief Executive Officer, Peter Njuguna filed a Replying Affidavit sworn on 9<sup>th</sup> February 2022.
19. He avers that the Respondent established under the Sacco Societies Act is the regulatory body that supervises and regulates Sacco societies such as the Interested Party, pursuant to the provisions of the Act as read with the SACCO Societies (Deposit-taking Sacco Business) Regulations, 2010. In this regard, he avers that the Respondent is empowered to intervene where Sacco officials run the business of the Sacco contrary to the dictates of the Act and has powers to remove such officials.
20. In regard to this matter, the Respondent determined that *there were reasonable grounds to believe* that the Petitioner alongside other officials, were conducting the Interested Party's financial affairs in a manner that was:
  - a) *Contrary to the provisions of Sacco Societies Act, and the Regulations made thereunder, within the meaning of the provisions of Section 51 of the Sacco Societies Act, as read with Regulation 67 of the Regulations 2010.*
  - b) *Unsafe and unsound, without paying due regard to diligence and prudence of an ordinary business man within the meaning of the provisions of Section 51 of the Sacco Societies Act, as read with Regulation 67 of the Regulations 2010.*
  - c) *Detrimental to, and not being in the best interests of Sacco members and members of the public at*

*large within the meaning of the provisions of Section 51 of the Sacco Societies Act, as read with Regulation 67 of the Regulations 2010 which puts to risk the continued sustainability and financial stability of the said SACCO Society.*

21. He depones that in light of this, the Respondent on 11<sup>th</sup> June 2021 intervened by issuing several remedial administrative directives to the Interested Party and further suspended the Petitioner and one Alphonse Kaio, the Interested Party's Chief Executive Officer.
22. He states that in the issued NTSC, the Petitioner in addition to being told of his 90-day suspension was informed of the allegations leveled against him, which required his response within 30 days.
23. He avers that the Petitioner in a letter dated 6<sup>th</sup> July 2021 through his Counsel, Wanam Sale Advocates, requested an additional 14 days to furnish his response and also sought a couple of documents. He notes that this extension was granted on 9<sup>th</sup> July 2021. Soon thereafter, the Petitioner filed his response on 12<sup>th</sup> July 2021 in person.
24. He depones that the Respondent sought further clarification from the Petitioner on some of the issues, in a letter dated 23<sup>rd</sup> July 2021. He avers that vide a letter dated 30<sup>th</sup> July 2021, the Respondent was informed that the Petitioner was hospitalized and so required 30 more days to provide a response. This request was granted and served on the

Petitioner via email and his last known postal address. Subsequently, the Petitioner gave his response in a letter dated 25<sup>th</sup> August 2021 and indicated that he would be representing himself going forward.

25. He depones that upon consideration of the Petitioner's response to the underscored issues, the Respondent determined that the allegations leveled against him were proved as the Petitioner had not shown sufficient cause otherwise. Particularly, he claims that it was proven that:

- a) *The Petitioner unilaterally executed the said Letters of Guarantee without a written resolution of the Board of Directors of the said SACCO Society contrary to the provisions of the Cooperative Societies Act and the SACCO Society's By-Laws.*
- b) *The Petitioner unilaterally executed the said Letters of Agreements contrary to the express administrative directives issued by the Authority on 10th August 2018 and 1th October, 2018.*
- c) *Letters of Guarantee were solely signed and executed by the Petitioner alone, contrary to the express provisions of the SACCO Society's By-Laws which required that at least three (3) Directors and witnessed by the Chief Executive Officer.*
- d) *Execution of the said Letters of Guarantee committed the SACCO Society to incur substantial liabilities for and on behalf of the said entities thereby leading to loss of members' funds which are not recoverable.*

26. He states that this determination was communicated to the Petitioner in the letter dated 29<sup>th</sup> September 2021. The

Respondent in line with its power under Section 51(c) of the Sacco Societies Act as read with Regulation 67 and 72, thereafter ordered as follows:

- a) *The removal of the Petitioner as an officer of the said SACCO Society with effect from 29<sup>th</sup> September 2021.*
- b) *Prohibited the Petitioner from holding office as an officer of a SACCO Society in Kenya for a period of three (3) years with effect from 29<sup>th</sup> September, 2021 by virtue of having been removed from office.*

27. According to him, the outlined chronology of events indicates that the Respondent undertook a fair and efficient supervisory administrative proceeding against the Petitioner in line with Article 47 of the Constitution as read with the Fair Administrative Actions Act. He stresses that the provisions of Article 50 of the Constitution are not applicable in administrative proceedings.

28. He enlightens that the Interested Party's financial condition has over the years deteriorated thereby resulting in multiple interventions by the Respondent, through the appropriate regulatory and supervisory administrative directions and sanctions in order to safeguard members' funds and deposits therein, as seen in the years between 2018 and 2021. Considering this, he opposes that the Petitioner's leadership was not stellar as deponed in the Petition. In fact, he claims that some of the actions which the Petitioner

undertook resulted in massive loss of members' funds and deposits.

29. He further denies the allusion of the scheme deponed by the Petitioner. Nonetheless, he points out that the Petitioner did not adduce any evidence to corroborate the existence of such a claim. He adds that the Petitioner did not also report the matter to the Respondent.
30. He equally stresses that the Petitioner did not demonstrate how the Respondent's decision was unlawful and made with an ulterior motive or also how his constitutional rights were violated as alleged. Further to this, he informs that the supervisory enforcement action was also taken out against the former Chief Executive Officer and 8 other Board members thus not only against the Petitioner.
31. He depones that the Interested Party on 6<sup>th</sup> October 2021 reconstituted its Board of Directors and one John Ochieng elected as the Chairman. On this premise, he argues that the orders sought in this regard are overtaken by events. In view of the foregoing, he urges that the Petition be dismissed.

### **Interested Party's Case**

32. This party's response and submissions are not in the Court file or Court Online Platform (CTS).

### **Petitioner's Submissions**

33. In support of his case, the Petitioner through Prof. Albert Mumma and Company Advocates filed submissions dated 28<sup>th</sup> February 2025 where the issues for discussion were outlined as:

- a) whether the Petitioner's Petition is moot,**
- b) whether the Respondent's actions herein violated the Petitioner's right to fair administrative action and the natural justice principle of audi alteram partem,**
- c) whether the Respondent could lawfully proffer complaints against the Petitioner, investigate the same complaints, determine the complaints, and proceed to punish the Petitioner on the basis of its own complaints and findings and,**
- d) whether by unfairly singling the Petitioner out and punishing him for collective decisions made by the Interested Party's Board of directors, the Respondent discriminated the Petitioner and violated his right to equality and freedom from discrimination**

34. On whether the Petition is moot, Counsel argued that it is not. Whereas the Petitioner admitted that the Petitioner's term in office ended in 2024, Counsel argued that the main reason why this Petition is still live is because the Respondent did not only unjustly and unfairly remove him as the Interested Party's Chairperson but also barred him from holding any office in any Sacco Society in Kenya, a decision that still stands.

35. Reliance was placed in **Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)** where it was held that:

*“Albeit not raised by the parties, it is imperative for this court to pronounce itself on the issue of mootness of some aspects of this appeal. The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”*

36. Like dependence was placed in **Borowski v Canada (Attorney General) [1989] 1 SC.**

37. In addition, Counsel submitted that other than the irregular decision, the Respondent made discriminatory findings against the Petitioner by holding him personally liable for the actions carried out by the Interested Party's Board. Counsel submitted that the Respondent in acted unjustly in singling out the Petitioner for punishment and discriminated against him thereby violating his constitutional rights to equality and freedom from discrimination.

38. To buttress this point reliance was placed in **Republic v Kenya Maritime Authority & another; Zam Zam**

**Shipping Limited (Interested Party)) [2021] KEHC 309**

**(KLR)** where it was held that:

*“In the above case, I observed that mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged or in which claims have been settled. A case is not moot so long as the plaintiff continues to have an injury for which the court can award relief even if entitlement to the primary relief has been mooted and what remains is small.”*

39. That said, Counsel informed that the Petitioner has since **abandoned prayer c** as he no longer desires to be reinstated as the Interested Party’s Chairman.
40. Counsel submitted in the next issue that the Respondent was indeed guilty of violating the Petitioner’s right to a fair administrative action and the rules of natural justice. Counsel stated that the NTSC effectively suspended a duly elected Chairperson in breach of the letter and spirit of the Sacco Societies Act, which does not envisage such an action. Counsel stressed that a reading of Sections 48, 49, 50, 51, and 52 of the Sacco Societies Act makes it plain that the Respondent does not have statutory power to directly suspend or remove the Petitioner as the Chairperson.
41. Counsel avers that the Respondent in line with Section 50(4) and 51(c) of the Sacco Societies Act was required to instead direct the Interested Party to suspend or remove the Petitioner from office after according him the right to be heard in line with Article 47 and 50 of the Constitution.

Reliance was placed in **Isaac Ngugi v Nairobi Hospital & Another [2013] eKLR** where it was held that:

*"Where a decision is taken without proper legal authority or in contravention of established statutory procedures, such decision must be regarded as ultra vires and consequently void."*

42. As such, Counsel submitted that the Respondent in this regard acted ultra vires and in violation of Article 47 and 50 of the Constitution. Dependence was placed in **Republic v National Police Service Commission Ex parte Daniel Chacha Chacha [2016] eKLR** where the Court pronounced that:

*"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule..."*

43. Similar reliance was placed in **Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR, Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR, Judicial Service Commission vs. Mbalu Mutava & Another**

**[2015] eKLR and R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007.**

44. On the following issue, Counsel underscored that the Respondent made the allegations against the Petitioner and proceeded to conduct an inspection which was neither attended to by the Petitioner or the Interested Party. The Respondent thereafter went on to issue the NTSC and eventually made the adverse decision against him. Counsel argued that the Respondent in this matter was the complainant, prosecutor, judge, jury, and executioner. This action is said to be unlawful in light of the natural justice principle of *nemo judex in causa sua* which means no man shall judge his own case.
45. Counsel emphasized that owing to this circumstance, the Respondent's decision to remove the Petitioner from his position as chairman of the Interested Party and further bar him from holding any office in any Sacco societies was manifestly biased, thus null and void. Furthermore, Counsel submitted that the Respondent had an interest in the removal of the Petitioner from his position as chairperson of the Interested Party, which compounds the bias.
46. Reliance was placed in **Capital Markets Authority v Okumu (Civil Appeal 302 of 2018) [2023] KECA 1212 (KLR)** where it was held that:

*“The test of bias or apprehension of bias is now well settled. It is whether a fairminded observer, having considered all the relevant facts of a matter would conclude that there was a real possibility of bias. See*

*this Court's decision in Kalpana H. Rawal V. Judicial Service Commission & 2 others [2016] eKLR. In that matter the seven- judge bench, in adopting the aforesaid test, cited with approval the decision by the East Africa Court of Justice in Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 others, EACJ Application No. 5 of 2007 where the court held that:*

*"We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially?"*

47. Further reliance was placed in **Chadwick Okumu v Capital Markets Authority [2018] eKLR, Emst & Young LLP vs Capital Markets Authority & Another [2017] eKLR, Re Murchison, 349 U.S. 133, 136 (1955), R v. Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233** and **George Mburugu Ikiara v. National Police Service Commission [2021] eKLR.**
48. On the fourth issue, Counsel submitted that Respondent by singling out the Petitioner in its allegations and punishing him for the Board's action discriminated against him in violation of Article 27(1) and (2) of the Constitution.
49. Counsel pointed out that ordinarily any decision made by a Board of Directors whether in public or private bodies, requires ratification by a majority of the Board members. Equally that, the decisions are made after deliberation by its board members and upon backing by majority of the members in this case the impugned guarantees to Spire

Bank. Counsel contended that the Respondent this notwithstanding, proceeded to absurdly single out the Petitioner and suspend him.

50. To buttress this point reliance was placed in **East African Portland Cement Company Limited V Attorney General & Another [2013]eKLR** where it was held that:

*“Equal protection and equal benefit of the law, requires that persons who are similarly situated, are entitled to similar treatment. All persons are to be treated equally. in the application of the procedural and substantive laws. The right also implies that persons, who are differently circumstanced, are treated differently. The Law and Courts are justified in treating marginalized groups and minorities differently from other persons in the mainstream of the society... ”*

51. Additional support was placed on **Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] KEHC 450 (KLR)**.

52. In view of the foregoing, Counsel submitted that the Petitioner is indeed entitled to the reliefs sought. Counsel relied in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it was held that:

*“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing*

*about what matters could have persuaded him to decide in the manner he decided ... Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a rule, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair ... Denial of the right to be heard renders any decision made null and void ab initio."*

### **Respondent's Submissions**

53. Rachier and Amollo LLP filed submissions dated 24<sup>th</sup> March 2025 and identified the issues for determination as:
- *whether the Petitioner's subject petition is moot,*
  - *whether the respondent's actions violated the Petitioner's right to fair administrative action and the natural justice principle of audi alteram partem,*
  - *whether the Respondent lawfully exercised its mandate in investigating and making determinations regarding the Petitioner's conduct and,*
  - *Whether the Respondent discriminated against the Petitioner.*
54. Counsel submitted at the start that the Petition is moot and non-justiciable as the Petitioner's term as the Chairperson of the Interested Party ended by effluxion of time in 2024. Equally, Counsel argued that prohibition of the

Petitioner from holding office as an officer of a Sacco Society in Kenya for a period of three years with ***effect from 29<sup>th</sup> September 2021 has equally run its course.***

55. On this premise, Counsel submitted that the Court should not determine hypothetical matters. Reliance was placed in **Okiya Omtatah Okoiti v Communications Authority of Kenya & 8 others [2018] KEHC 7513 (KLR)** where it was held that once the subject matter of litigation ceases to exist, the case should be dismissed. The Court further stated that the existence of a dispute is the primary condition for a Court to exercise its judicial function.
56. Like dependence was placed in **Republic v Kenya Maritime Authority & another; Zam Zam Shipping Limited (Interested Party) [2021] KEHC 309 (KLR).**
57. On the next issue, Counsel submitted that the Respondent had undertaken fair and efficient supervisory administrative proceedings against the Petitioner, with full observance of the provisions of Article 47 of the Constitution, the Fair Administrative Actions Act and the rules of natural justice.
58. Counsel noted that the actions taken by the Respondent were purely administrative in nature as they relate to the enforcement of statutory obligations, in this case, Regulations 66 (1)(7)(8) of the SACCO Societies (Deposit-taking Sacco Business) Regulations.

59. Counsel stated that whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. Recapping the Respondent's averments, Counsel submitted that the Respondent was acting within its mandate as provided by the Regulations and nothing therein provides for its cross-examination or its officers when fulfilling its regulatory mandate.
60. Reliance was placed in **Kenya Revenue Authority v Menginya Salim Murgani [2010]eKLR** where it was held that:
- “However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.”*
61. With regard to Article 50 of the Constitution, Counsel argued that this applies to criminal or civil proceedings and not administrative actions as held in **Judicial Service Commission v Hon. Justice Mutava Mbalu & another (2015) eKLR**.
62. Like dependence was placed in **Republic v Energy Regulatory Commission Ex Parte - Pekenya Gas Supplies Limited [2016] eKLR** and **Mohamed v Director of Immigration Services & 2 others [2022] KEHC 15867 (KLR)**.

63. Counsel stressed that the Petitioner was afforded an opportunity to be heard on the allegations against him. Additionally, that it was not mandatory for the Respondent to hold an oral hearing or to provide a chance to cross-examine the Respondent's officers.
64. Further, Counsel submitted that the Respondent's action of investigating, charging and sanctioning the Petitioner were lawful, fair and in accordance with its statutory mandate. It was stated that it derives its authority from Section 5, 48, 51(c) and (q) the Sacco Societies Act as read with Regulations 66 and 72(6).
65. Accordingly, Counsel submitted that the Respondent as per these provisions has statutory mandate to supervise Saccos, inspect their records and where appropriate, issue sanctions including removing an officer. For this reason, the Petitioner's claim is deemed baseless. Reliance was placed in **Popat & 7 others v Capital Markets Authority [2020] KESC 3 (KLR)** where it was held that:

*"The natural justice nemo judex in causa sua esse principle is one of the fundamental principles in literally all common law jurisdictions... An important exception to the nemo judex in causa sua esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of Re W. D. Latimer Co. and Attorney-General for Ontario (1973), 2 O.R. (2d) 391, affirmed sub nom. Re W. D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, Dubin, JA stated:*

*"Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the*

*ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”*

66. Counsel further argued that the Petitioner had not demonstrated any possibility of real bias beyond making mere assertions. It was contended that the decision to suspend and remove the Petitioner from office was based on findings from investigations, not pre-conceived bias.
67. To buttress this point reliance was placed in **Capital Markets Authority v Okumu (2023) KECA 1212 KLR** where the Court of Appeal held that:

*“With respect, we do not think the trial court’s finding on apprehension of bias was well founded. The test of bias or apprehension of bias is now well settled. It is whether a fair-minded observer, having considered all the relevant facts of a matter would conclude that there was a real possibility of bias...As such, it is not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it is clear from the empowering legislation that certain activities which might otherwise be considered "biased" form an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of "reasonable apprehension of bias" per se cannot be sustained. The Commission’s structure and responsibilities as well as the manner of the discharge of its mandate must, inter alia, be considered.*

*We agree wholly with this view. It is clear that administrative tribunals are not supposed to operate like courts of law. This is why they are allowed to be*

*masters of their own procedure although they must act fairly.*

*In the circumstances, we persuaded that the overlapping mandate of the appellant under Section 11(3) of the appellant Act does not per se render the proceedings before the appellant unfair and hence denying parties such as the respondent a right to a fair administrative action.”*

68. On discrimination, Counsel submitted that the allegation is unfounded as the Respondent took action against several other officers as outlined in the Replying affidavit. Counsel further argued that the Petitioner, as the Chairperson of the Interested Party, exercised a distinct and higher level of responsibility, including signing of resolutions and ensuring compliance with regulatory frameworks. As such, Counsel argued that the role of a chairperson is distinct from that of an ordinary board member as the Chairperson provides oversight and leadership, making him directly accountable for the decisions of the Board.
69. It was noted that the Petitioner unilaterally executed the said letters contrary to the express administrative directives issued by the Respondent and express provisions of the Sacco Society’s By-Laws. Counsel submitted ultimately that the Respondent had the legal mandate and authority to remove the Petitioner and reconstitute the Board of the Interested Party. Counsel admonished thus that the Petitioner is not entitled to the relief sought.

### **Analysis and Determination**

70. It is my humble view that the issues that arise for determination in this matter are:

- i. Whether the Petition is moot.***
- ii. Whether the Respondent violated the Petitioner's right to a fair administrative action and hearing under Article 47 and 50 of the Constitution respectively before suspending him.***
- iii. Whether the Respondent discriminated against the Petitioner in violation of Article 27(1) and (2) of the Constitution.***
- iv. Whether the Petitioner is entitled to the relief sought.***

***Whether the Petition is moot.***

71. Mootness is a jurisdictional issue under the justiciability principle. It refers to a dispute that no longer has any real or tangible effect to the litigants before the Court either because the underlying issues have resolved or circumstances have since changed and the reliefs that Court may give are thereby overtaken by events. In **Okoti & 2 others v Attorney General & 7 others [2020] KECA 589 (KLR)** the Court of Appeal relying on the Black's Law Dictionary defined mootness as follows:

***“64. In Black's Law Dictionary, 8th edition, a “moot case” is defined as “a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights”, and as a verb, as meaning “to render a question as of no practical significance.”***

72. The Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 8 others [2017] KECA 170 (KLR) stated as follows:

***“[14] ... In an article entitled “Federal Jurisdiction to Decide Moot Cases” published in the University of Pennsylvania Law Review [1946] Vol. 94 - No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:***

***“Common - law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.”***

***[14.1] In the United States of America, it is a constitutional requirement that federal judicial power extends to “cases” and to “controversies” [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. It follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy - that is, rationing scarce judicial resources amongst competing claimants.***

***[14.2] Authorities show that mootness is a complex doctrine which should be applied with caution and not mechanistically in every factual situation and that there is no***

**sharp demarcation between moot and live controversies. The mootness doctrine and the relevant factors in the application of mootness doctrine as an aid to judicial economy were considered in the Canadian case of *Borowski v The Attorney General of Canada* [1989] 1 SCR 342. In the furtherance of judicial economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if inter alia, the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court's determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.**

**[14.3] The Supreme Court of the Philippines-Manilla in *Greco Antonious Bedo B Belgila and four others v Honourable Executive Secretary Paquito N. Ochoa JR and two others - GR No. 208566 consolidated with G-R No. 208493 & 209251* after a finding against mootness continued:**

**“Even on assumption of mootness, jurisprudence, nevertheless, dictates that “the moot and academic principle” is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the Constitution; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to**

**guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.”**

73. The Respondent contended that the Petition is moot and non-justiciable as the Petitioner’s term as the Chairperson of the Interested Party ended by effluxion of time in the year 2024. Further, even the prohibition against the Petitioner from holding office as an officer of a Sacco Society in Kenya was for a period of three years with effect from 29<sup>th</sup> September 2021 ran its course and is no longer applicable.
74. The Petitioner countered that although his term in office ended in 2024, this Petition is still live because the Respondent had not only instigated that he be unjustly and unfairly removed as the Interested Party’s Chairperson but had also prohibited from holding any office in any Sacco Society in Kenya which decision still stands.
75. The Petitioner conceded that the issue of reinstatement into office is no longer a live issue hence withdrew *prayer c* in the Petition. This specific limb of the Petition in so far as it challenges his removal as the Chairman of the Interested Party is thus no longer an issue in controversy and is therefore moot. What remains is to consider whether the alleged ban from holding office in any Sacco in Kenya was for a specific period of three years as submitted by the

Respondent or unspecified and, therefore, still a live issue as submitted by the Petitioner.

76. In the letter dated 11/6/2021 ref. SASRA/SS/CS/2265/ENF/VOL 1 (1) - annexure WO 2; REF: SUSPENSION AND NOTICE TO SHOW CAUSE OF INTENTION TO REMOVE OFFICIAL OF SACCO SOCIETY that was addressed to the Petitioner- Wellington A Otiende. The letter outlined the detailed facts that the Petitioner was to provide explanation to or show cause within 30 days. Sanctions for non-compliance were the following stated actions:

- a) ***DIRECT YOUR PERMANENT REMOVAL*** from the service of the said SACCO Society in the position of an officer thereof, and in particular as a member of its Board of Directors, and/or as an officer thereof whatsoever, ***UNLESS***, you show sufficient cause in writing on why the Authority should not and/or ought take, the aforesaid supervisory enforcement action, and further; not any
- b) ***DIRECT YOUR PERMANENT PROHIBITION*** from serving as an officer in SACCO Society in Kenya for a period of ***not less than three (3) years***; ***UNLESS***, you show sufficient cause in writing on why the Authority should not and/or ought to not take the aforesaid supervisory enforcement action

77. Thereafter, the Petitioner submitted a response via a letter dated 9/7/21 together with attachments. In reaction, the Respondent wrote on 23/7/2021 seeking clarification on some of the responses and evidence to support some statements made without back up evidence by the Petitioner. The Petitioner wrote on 30/7/2021 and sought an

extension of 30 days to provide the clarification, which request was accepted via Respondent letter of 2/8/2021. On 25/8/21, the Petitioner forwarded the clarification to the items in his letter of 9/7/2021 that the Respondent had identified and flagged up.

78. After this, the Respondent wrote to the Petitioner on 29/9/2021 ref: SASRA/SS/CS.2265/ENF/VOL III (1) referenced: *FINDINGS AND OBSERVATIONS ON THE RESPONSE TO NOTICE OF INTENTION TO REMOVE AS AN OFFICER OF A SACCO SOCIETY; AND AN ORDER OF REMOVAL AS AN OFFICER OF A SACCO SOCIETY; AND PROHIBITION FROM SERVING AS AN OFFICER OF A SACCO SOCIETY.*
79. Here, the Respondent provided details of facts describing the irregularities that the Petitioner had been confronted with, the responses that he had provided to each of the accusation levelled against him and, the findings by the Respondent on each accusation hence the conclusion which was rendered as follows:

**CONSEQUENTLY, THE AUTHORITY HEREBY DETERMINES:**

1. *THAT the statements of facts constituting grounds for the intention to remove, and reasons for prohibition dated 11<sup>th</sup> June, 2021 and duly served upon you have been **proven in Grounds 1, 2, 3, 4, 5 and 6**, in the manner and to the extent particularly elaborated in the FINDINGS AND OBSERVATIONS ON THE GROUNDS FOR AND REASONS FOR PROHIBITION ANNEXED HEREWITH;*

2. THAT, the totality and substance of your response dated **9<sup>th</sup> July, 2021**, and further clarifications dated 25<sup>th</sup> August, 2021, do not therefore in the aggregate provide or offer sufficient or any reasonable cause or explanation why the Authority ought not to take enforcement actions of -

- a) directing your removal as an officer of the M/S Mwalimu National SACCO Society Ltd in accordance with the notice dated 11th June, 2021; on account of the statements of facts constituting grounds for the intention to remove, and reasons for prohibition dated 11th June, 2021 having been proven against you; and
- b) further the prohibiting you from serving as an officer of any SACCO Society in Kenya within the meaning of the Sacco Societies Act, 2008 and Regulations 2010 made thereunder, in accordance with the notice dated 11<sup>th</sup> June 2021, on account of the statements of facts constituting grounds for notice to remove and reasons for prohibition dated 11<sup>th</sup> June 2021; having been proven against you.

80. The prohibition that was to apply **that the one within the meaning of the Sacco Societies Act, 2008 and Regulations 2010 and in accordance with the notice dated 11<sup>th</sup> June, 2021**. What therefore is the prescribed period of prohibition under the Sacco Societies Act, 2010 as read with Regulations, 2010 before turning to what was stated in the Notice dated 11<sup>th</sup> June, 2021?

81. The Sacco Societies Act, 2008, Section 51 states:

**Supervisory enforcement actions**

Where the Authority determines that a Sacco society conducts its business in a manner contrary to the provisions of this Act or of any regulations made thereunder or any other Act or in any manner detrimental to or not in the best interests of its members or members of the public, or a Sacco society is undercapitalized, the Authority shall—

- (a) restrict, suspend or prohibit the payment of dividends by the society;
- (b) prohibit the conversion of any profits of the society into capital;
- (c) **direct the suspension or removal of any officer involved in such conduct from the service of society;**
- (d) require the society to reconstitute its board of directors;
- (e) withhold branch or other corporate approval with respect to such society;
- (f) undertake regular inspections of that society;
- (g) order the society to submit to the Authority within forty-five days a capital restoration plan to restore the society to capital adequacy as prescribed in section 29 or in the case of issues unrelated to capital such as violations of law, a plan to resolve all deficiencies to the satisfaction of the Authority;
- (h) prohibit the society from awarding any bonuses, or increments in salary, emoluments and other benefits of all directors and officers of the society;
- (i) appoint a person suitably qualified and competent in the opinion of the Authority to advise and assist the society in designing and implementing the capital restoration plan or

*other corrective action plan and the person appointed shall regularly report to the Authority on the progress of the plan;*

- (j) impose restrictions on growth of assets or liabilities of the society as it deems fit;*
- (k) restrict the rate of interest on deposits payable by the society to such rates as the Authority shall determine; and*
- (l) order the society to do any or take such other action that the Authority may deem necessary to rectify a capital deficiency or other weakness;*
- (m) impose financial penalties on the society;*
- (n) issue an order placing the society under statutory management; (o) restrict the withdrawal of deposits from the society;*
- (o) institute legal proceedings against any officer, director, committee member, employee or agent of the society;*
- (q) issue such administrative directives as the Authority may deem necessary.*

82. Under the Interpretation section, that is, Section 2 of the Sacco Societies Act, the word officer is defined as follows:

***“officer”*** in relation to a Sacco society, **means a director or any other person**, by whatever name or title he may be called or described, who carries out or is empowered to carry out functions relating to the overall direction in Kenya of that deposit-taking Sacco society or takes part in the general management thereof in Kenya;

83. Clearly therefore, the sanction under **Section 51 (c)** of the Act can be imposed by the Authority against the any officer,

and this includes directors. The Act does not differentiate between elected and non-elected officer's contrary to the Petitioners submissions.

84. Turning back to the duration of such suspension, the answer lies in the **Sacco Societies (Deposit Taking Sacco Business) Regulation, 2010.**

Regulation 72 is on prohibitions and removal of officers.

**Regulation 72 (3) states:**

*'A person against whom disciplinary action has been taken by way of removal from office **shall be ineligible to hold office in any Sacco Society for a period of three years or such other period as may be determined by the Authority.**'*

85. This regulation merely provides for a **default minimum period of three years** but the Respondent is given the discretion, depending on the circumstances of the case, to decide on a lesser, longer or even maintain the same period. That is because after the three years, there is the phrase '***or such period as may be determined by the authority.***' This effectively means that **if the Authority**, (in this case, the Respondent) **does not specify the period**, the prohibition will run for three years **as the default period**. If it specifies a different period, it is the different period that it specifies that would apply.

86. In the notice dated 11<sup>th</sup> June 2021 dubbed 'Notice to remove and reasons for the intended prohibition' the Respondent indicated that the prohibition it was considering to impose in

case sufficient cause was not shown was a period of '**not less than three years.**' In communicating its findings vide its letter of 29/1/2021; it did not specify the exact period but it stated that the prohibition was in accordance with the notice of 11<sup>th</sup> June 2021. That being the case, it means the period stated in the Notice of 11<sup>th</sup> June, 2021 of '*not less than three years.*

87. The formulation is itself vague because '*no other fixed period was added*' by the Respondent. It means that the ineligibility period defaulted to three years specified in **Regulation 73 (3) of Sacco Societies (Deposit Taking Sacco Business) Regulation, 2010.**
88. That being the case, there is no existing suspension or prohibition that is still in force that is capable of sustaining the reliefs sought in this Petition. The substratum of the Petition has been swept off by the effluxion of time rendering it moot. The Petition no longer presents a live controversy capable of being adjudicated upon by this Court.
89. Mootness being a jurisdictional issue, the Court is unable to determine the other issues it had framed as it is obligated to down my tools at this point.
90. The upshot is that the Petition is struck out. I make no orders as to costs.

***Dated, signed and delivered virtually at Nairobi this 26<sup>th</sup>  
day of February, 2026.***

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**L N MUGAMBI**

**JUDGE**

ORIGINAL