



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipkemboi v Sacco Societies Regulatory Authority & another (Civil Appeal 76 of 2015) [2018] KECA 570 (KLR) (17 May 2018) (Judgment)**

*Silas Kipkemboi v Sacco Societies Regulatory Authority & another [2018] eKLR*

Neutral citation: [2018] KECA 570 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT ELDORET**  
**CIVIL APPEAL 76 OF 2015**  
**EM GITHINJI, HM OKWENGU & J MOHAMMED, JJA**

**MAY 17, 2018**

**BETWEEN**

**SILAS KIPKEMBOI ..... APPELLANT**

**AND**

**SACCO SOCIETIES REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NANDI HEKIMA SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the judgment and/decree of the High Court of Kenya at Eldoret, (Kimondo, J.) dated 4th August, 2014 in High Court Constitutional Petition No. 5 of 2013 Pursuant to the Notice of Appeal Lodged on 12th August, 2012)*

**JUDGMENT**

1. This is an appeal from the judgment and decree of the High Court, (Kimondo, J.), dismissing the appellant's constitutional petition with costs to the 1<sup>st</sup> respondent.
2. The appellant was employed by the second respondent herein as Chief Executive Officer under a two years contract from 5<sup>th</sup> September, 2011 to 5<sup>th</sup> September, 2013.

The 2<sup>nd</sup> respondent is a Sacco duly registered under the Sacco Society Act as a deposit-taking Sacco.

The 1<sup>st</sup> respondent is a Statutory State Corporation established under the Sacco Society Act 2008 – No. 14 of 2008. By a letter dated 3<sup>rd</sup> August, 2013, the 1<sup>st</sup> respondent suspended the appellant from the service of the 2<sup>nd</sup> respondent as a Chief Executive officer for 60 days with effect from the date of the



service of the letter. The grounds for suspension were specified in the letter. The letter further stated in part:-

“ Take further notice that the Authority hereby requires you to submit within fifteen (15) days from the date of service of this Notice, a written explanation on why the Authority should not remove you permanently from service of the Sacco as the Chief Executive Officer/ Manager thereof, and to further prohibit you from holding office in any Sacco Society in the Republic of Kenya as provided by law.”

By a letter dated 26<sup>th</sup> September, 2012, the 1<sup>st</sup> respondent removed the appellant from the service of the 2<sup>nd</sup> respondent as a Chief Executive Officer/ Manager with immediate effect, held him ineligible to hold any office in any Sacco and prohibited him from holding office in any Sacco for a period of three years with effect from the date of removal.

3. By a Constitutional Petition dated 12<sup>th</sup> March, 2013, brought under Articles 19, 21, 22, 41, 47 and 50 of the Constitution, the appellant alleged that the 1<sup>st</sup> respondent had violated the appellant’s right to:
  - (a) a hearing that was fair, efficient, lawful, reasonable and procedural,
  - (b) fair administrative action in contravention to Article 47,
  - (c) dignity as enshrined in Article 19(2), and, violated the Constitution;
  - (d) by failing to take policy and other measures including the setting of standards to achieve the realization of the appellant’s rights,
  - (e) by adopting a malicious and skewed interpretation of the laws in flagrant violation of Article 10 thereby occasioning a gross injustice to the appellant,
  - (f) in dismissing the appellant without fair administrative action and without according the appellant a right to be punished and disciplined by the 2<sup>nd</sup> respondent who was the employer.

The appellant sought several declarations of violation of his constitutional rights and general and punitive damages from the respondents jointly and severally for violation of the appellant’s fundamental rights.

The petition was supported by an affidavit. The 1<sup>st</sup> respondent filed a detailed replying affidavit denying the allegations of violation of the appellant’s constitutional rights and asserted that it has statutory power to remove the appellant from office. The 2<sup>nd</sup> respondent neither filed an answer to the petition nor participated in the proceedings.

4. The main findings of the High Court may be summarized as follows:
  - (i) The 2<sup>nd</sup> respondent was not a necessary party and no claim lies against it in the action.
  - (ii) By virtue of conducting deposit-taking business, the 2<sup>nd</sup> respondent falls under the supervisory regulation of the 1<sup>st</sup> respondent which may extend to the business of the Sacco or conduct of its board.
  - (iii) By virtue of also being a co-operative society, the 2<sup>nd</sup> respondent is also subject to Co-operative Societies Act and the directors of a Sacco are required by both Acts and Regulations to exercise prudence and diligence of ordinary men of business.



- (iv) Sections 50, 51 as read with Regulations 67 and 72 of Sacco Societies Act grant the 1<sup>st</sup> respondent enormous powers over the management of Saccos and the security of depositors' funds including suspension or removal of any officer from service of the society.
  - (v) The allegations against the appellant were serious allegations of mismanagement or financial impropriety.
  - (vi) The removal of the appellant constituted an administrative action.
  - (vii) The appellant was notified in writing of the charges, granted adequate notice of 15 days to respond, failed to respond and the 1<sup>st</sup> respondent then became entitled to remove him from the board for failure to show cause.
  - (viii) The appellant slept on his rights, failed to discharge onus of proof that 1<sup>st</sup> respondent violated any of his rights under the Constitution and the 1<sup>st</sup> respondent did not commit breaches of the appellant's constitutional rights as alleged.
  - (ix) The appellant was not seeking reinstatement and as the 1<sup>st</sup> respondent did not commit any breach of the appellant's constitutional rights, the claim for damages had no foundation.
5. Two main issues arise from the appellant's numerous grounds of appeal namely; whether the learned Judge erred in law in holding that the 1<sup>st</sup> respondent had power and authority to suspend and remove the appellant and whether the learned Judge erred in law and in fact in holding that the appellant had failed to discharge his onus of proof of violation of constitutional rights.

Mr. Magare, the learned counsel for the appellant submitted, inter alia, that the appellant was removed from office by a body other than the employer which had no power to remove him, that suspension and removal of the appellant are within the jurisdiction of the Board and the annual delegates meeting and that Regulation 72(6) of Sacco Societies (Deposit-taking Sacco Business) gives the Sacco Society or the 1<sup>st</sup> respondent power to remove an officer from office and, that, when the appellant failed to show cause, disciplinary proceedings should have been held giving the appellant an opportunity to be heard.

On the other hand, Mr. Wakwaya, learned counsel for the 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent had power under Section 51 of the *Sacco Societies Act* as read with Regulation 72(6) and 67(4) to suspend and remove the appellant, that when the appellant failed to show cause, the 1<sup>st</sup> respondent properly acted in accordance with Section 51 of *Sacco Societies Act* and Regulation 72(6) and that the dispute should have been filed in the Employment and Labour Relations Court.

6. The constitutional application was in essence a constitutional review of the administrative action of the 1<sup>st</sup> respondent suspending and ultimately removing the appellant as an officer of the 2<sup>nd</sup> respondent. The empowering law cited by the 1<sup>st</sup> respondent in suspending the appellant is Section 51 (c) of the *Sacco Societies Act*, 2008 and Regulations 67 and 72 of the *Sacco Societies (Deposit-taking Sacco Business) Regulations 20*.

Section 51 aforesaid provides:-

“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 a manner detrimental to or not in the best interest of its members or members of the public, or a Sacco Society is undercapitalized, the Authority shall –

- (a) ---



- (b) ---
- (4) direct the suspension or removal of any officer involved in such conduct from service of society;”

Rule 67(4) aforesaid provides, inter alia, that where the Authority has reasonable grounds to believe that an officer of a Sacco Society is engaged in any act or practice which has occasioned a contravention of the provisions of the Act in any manner detrimental to the best interest of its members, members of public, or survival of the Sacco Society, it shall impose sanctions to be taken against the officer as it may deem fit.

Lastly, Regulations 72(6) gives either the Sacco Society or the 1<sup>st</sup> respondent power to remove an officer of the Sacco Society from office if the officer has committed any of the acts specified therein.

7. The letter dated 3<sup>rd</sup> August, 2012 has a heading thus:-

“Suspension & Notice Of Intention To Remove As An Officer Of A Sacco Society.”

It is a four-page letter containing grounds for suspension and specific statement of facts constituting grounds for removal. Similarly, the letter dated 26<sup>th</sup> September, 2012 removing the appellant as officer of a Sacco Society cites the provisions of Section 51 (c), Regulations 67 and 72 aforementioned as the empowering provisions of the law. It is a six-page document containing grounds of removal and prohibition and reasons for prohibition. The letter of suspension and the notice of intention to remove the appellant contained a notice requiring the appellant to submit within 15 days from the date of service a written explanation why he should not be removed and prohibited. The 1<sup>st</sup> respondent by the replying affidavit averred that the letter containing the notice to show cause was personally served on the appellant which fact was admitted in paragraph 8 of the petition and in the supporting affidavit.

8. The appellant was employed by the 2<sup>nd</sup> respondent under a contract of service. Ordinarily, it is the employer who is authorized to take disciplinary proceedings and terminate the employment pursuant to the employment contract and the Employment Act. However, Section 92 (2) of the Employment Act provides:

“Except where otherwise provided, the provisions of this Act shall be in addition to, and not in substitution for or in derogation of the provisions of any other act.”

The 1<sup>st</sup> respondent, as its name shows, is a Regulatory Authority under whose superintendence the Sacco Societies fall and by Section 51 (c) of the Sacco Societies Act, Parliament conferred upon it power to direct the suspension or removal of any officer from the service of the employer Sacco Society if he is involved in the conduct prohibited by the Sacco Societies Act. That power of suspension or removal is reinforced by the Sacco Societies (Deposit-taking Sacco Business) Regulations 2010 particularly rule 72(6) aforementioned. Thus the power to suspend or remove is expressly provided by empowering statute.

9. We are satisfied that the learned Judge correctly construed the provisions of the empowering statute and that the 1<sup>st</sup> respondent indeed has statutory power to suspend and remove an officer employed by the Sacco Society if it has grounds to believe that such officer has acted in contravention of the Sacco law.

10. By Article 47 of the Constitution,

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has a right to be given written reasons for the action.”

The National Assembly has enacted the *Fair Administrative Action Act*, 2015 (2015 Act) pursuant to Article 47(3) of the Constitution.

By Section 4 (3) of the 2015 *Act*, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is required to give the person affected, amongst other things, a prior and adequate notice of the nature and reasons for the proposed administrative action, an opportunity to be heard and to make representations and, to give a statement of reasons for which the action was taken.

- 11 It is self-evident in this case that the appellant was given a prior and adequate notice of the nature and reasons for the proposed removal as officer of a Sacco Society. We have also said that the notice was a four-page letter containing grounds for suspension and statement of facts constituting grounds for removal.

The appellant was also given an opportunity to be heard by requiring him to give a written explanation on why he should not be removed and prohibited from service of a Sacco Society. The appellant elected not to give a written explanation. It has not been contended that the grounds given by the 1<sup>st</sup> respondent for the proposed removal of the appellant could not constitute a breach of Sacco laws.

Indeed, the learned Judge made a finding that there were serious allegations of mismanagement or financial impropriety. Had the appellant made a written representation refuting the facts that would have necessitated full blown disciplinary proceedings at which the appellant would have been given an opportunity to give evidence, cross-examine witnesses and to call witnesses. The contention by the appellant’s counsel that disciplinary proceedings should have been held in spite of the failure by the appellant to give written representation is, in our view, fallacious. There would have been no reason to hold disciplinary proceedings because there was nothing to investigate, the appellant having failed to refute the factual basis of the proposed removal or otherwise to raise any objection. The appellant stated categorically at the trial that he was not seeking reinstatement. That probably was the reason why he did not respond to the allegations.

- 12 In addition, the six-page letter relating to removal contained detailed grounds for removal. Thus, the appellant was given a detailed statement of the reasons for removal in compliance with Section 4 (3) of the 2015 *Act*.
- 13 For the foregoing reasons, the appeal has no merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.

As the 2<sup>nd</sup> respondent did not participate in the appeal we make no orders as to costs.

**DATED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF MAY, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**



.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

