Sacco Societies Regulatory Authority v Biashara Sacco Society Ltd (Civil Appeal 7 of 2013) [2015] KECA 942 (KLR) (24 February 2015) (Judgment)

Sacco Societies Regulatory Authority v Biashara Sacco Society Ltd [2015] eKLR

Neutral citation: [2015] KECA 942 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 7 OF 2013

AA VISRAM, MK KOOME & JO ODEK, JJA

FEBRUARY 24, 2015

BETWEEN

SACCO SOCIETIES REGULATORY AUTHORITY ..... APPELLANT

AND

BIASHARA SACCO SOCIETY LTD ..... RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated 17th August, 2012 in Misc. Applic. No. 40 of 2011)

JUDGMENT

1. The respondent filed a Chamber Summons application on 15th September, 2011seeking *inter alia*:-

   · That the applicant be granted leave to file an application for:-

   a) An order of certiorari to remove into the High Court and quash the decision of the Sacco Societies Regulatory Authority (the appellant) dated 15th August, 2011 in as far as it relates to the applicant.

   b) An order of prohibition forbidding the appellant from demanding Kshs. 136,603.00/= as Sacco Societies levy.

   · That the leave so granted do operate as stay until the determination of the cause.

   By an order dated 16th September, 2011 the High Court granted leave to the respondent to file the substantive application.

2. It is imperative that we set out the background of the aforementioned application. The respondent offers savings and credit facilities to its members. On 15th August, 2011 the appellant vide an invoice demanded Kshs. 136,603/= from the respondent as levy for deposits held by the respondent.

3. Mr. Joseph Kamau Njamuku, the respondent's chairman, deposed that the aforementioned levy amounted to double taxation because the respondent had already paid its licensing fee to the appellant; the deposits made by the respondent's members are repayable with or without interest either on demand or at a time agreed between the member and the respondent; the levy on the deposits would affect the aforementioned arrangement between the respondent and its members. He further deposed that Section 15 of the *Sacco Societies Act*, 2008 which empowers the appellant to impose the said levy was in contradiction to the spirit of the *Co-operative Societies Act*. The said levy was illegal and was imposed on the respondent without affording it an opportunity to be heard contrary to the rules of natural justice.

4. Joseph deposed that Section 15 of the *Sacco Societies Act* is not couched in mandatory terms hence the levy in dispute is not mandatory; the import of the said section is that individual Sacco Societies must be involved before the said levy is imposed.

5. In reply, the appellant filed an affidavit sworn by its Chief Executive Officer, Carilus Ademba. He deposed that the appellant is a statutory corporation whose mandate includes licensing, regulating and supervising deposit Sacco Societies. The appellant is empowered under Section 15 of the *Sacco Societies Act*, 2008 to impose a levy known as Sacco Societies levy on the deposits held by the respondent and other deposit taking Sacco Societies. It was pursuant to the aforementioned section that the appellant imposed the levy in dispute which was published in the Kenya Gazette on 21st December, 2010.

6. According to Carilus, the appellant engaged in wide consultations with the key stakeholders prior to the implementation of the said levy. In addition, the appellant embarked on a countrywide sensitization programme and met with the respondent's officers including its chairman, Joseph Kamau Njamuku. After the aforementioned consultations only one complaint was received from the Kenya Union of Savings & Credit Co-operative Societies (KUSCCO); the complaint was in regard to the rate of charging the levy and not on the appellant's authority to charge the said levy; KUSCCO contended that the proposed rate was too high. He maintained that the respondent never raised any objection to the said levy.

7. Carilus further deposed that following the said complaint the appellant begun the process of reviewing the said rate and advised all the Sacco Societies of the same. By a circular dated 16th September, 2011 the appellant invited all stakeholders to forward their views and proposals on a suitable rate. According to Carilus, the provisions relating to charging of licensing fees and Sacco levy are two distinct provisions which are in addition to each other and not in the alternative.

8. After taking into consideration the aforementioned application and submissions by parties, the High Court (Sergon, J.) vide a ruling dated 17th August, 2012 allowed the respondent's application. Aggrieved with that decision, the appellant has filed this appeal based on the following grounds:The honourable Judge erred in law and fact in finding that there had been no prior consultation of the respondent prior to the decision to levy the contested fee.The honourable Judge erred in law and fact in failing to interrogate or even consider the annextures and pleadings filed by the appellants.The honourable Judge erred in law and fact in failing to provide any clear or tangible reasons for his decision.The honourable Judge erred in law and fact in failing to find that the substantive decision capable of being quashed was the gazette notice No. 208 of 27th December, 2010 and not the invoice issued to the respondent.The honourable Judge erred in law and fact in failing to find that there was no decision or order dated 15th August, 2011 before him capable of being quashed.The honourable Judge erred in law and fact in holding that there was a legal requirement to publish in the Kenya Gazette the intention to impose a levy.The honourable Judge erred in failing to note and appreciate the express and minuted proof of countrywide consultation undertaken by the appellant before imposition of the

levy.The honourable Judge erred in law and fact in finding that the Notice of Motion was meritorious at all.The honourable Judge erred in law and fact in holding that the appellant breached the principles of natural justice in imposing the levy.The honourable court erred in law and fact in failing to hold that the Notice of Motion was challenging the merits of the decision made to impose a levy.Paragraph 9.

9. Mr. Gichamba, learned counsel for the appellant, submitted that the learned Judge erred in finding that the appellant had not made any consultations with the relevant stake holders before imposing the levy on deposit. According to him, the learned Judge failed to give reasons for the conclusion he made. He submitted that after the levy on deposits was gazetted the respondent never raised any objection to the same.

10. Mr. Gichamba submitted that the appellant did not in any way violate the principles of natural justice. He stated that the respondent never denied the presence of its agents/officers at the consultations that were made by the appellant. Mr. Gichamba faulted the learned Judge's decision to quash the invoice in respect of the levy. He argued that the learned Judge misapprehended the facts in the case and came to the wrong conclusion. He urged us to allow the appeal.

11. Mr. Nganga, learned counsel for the respondent, in opposing the appeal submitted that the sensitization workshops were in respect of licensing and not on the levy on deposits. While admitting that the *Sacco Societies Act*, 2008 does not require the appellant to consult before imposing the levy he argued that consultation was necessary since it was an integral part of the principles of natural justice. He urged us to dismiss the appeal.

12. We have anxiously considered the record, submissions by counsel and the law. The learned Judge (Sergon, J.) in the judgment dated 17th August, 2012 expressed himself as herein under: -

> " After a careful consideration of the rival submissions, I have come to the conclusion that before the respondent can exercise its power to impose a levy under Section 15 of the Sacco Societies Act, the applicant and other affected parties, there must be prior consultation. In other words, the principle of natural justice is one of the considerations to be taken into account before taking an action to impose a levy. The only question to be determined here is whether or not that principle was applied by the respondent before imposing a levy as complained by the applicant. The law enjoins the respondent to publish in the Kenya Gazette or through any other media its intention to levy a given levy. By so doing, the stakeholders and those likely to be affected by the levy will give their views before a final levy is imposed and published through the Kenya Gazette. In the matter before this court, it would appear the respondent simply exercised its power by imposing 0.15% on all deposits held by Sacco Societies vide legal notice No. 208 of 27th December, 2010. That gazette notice was questioned by those affected by the decision. The objectors prompted the respondent to invite comments leading them to review the rate downwards from 0.15% to 0.1%, I think, I agree with the submissions of Mr. Nganga that the respondent did not make prior consultations before imposing the levy. The respondent therefore breached that natural justice principle ..."

Based on the foregoing, the issue that arises for consideration is whether the above findings by the High Court were sound in law, taking into consideration the efficacy and scope of the remedies available in judicial review proceedings.

13. This Court in *Ismael S. Mboya & 2 others v Mohammed Haji Issa & another*- Civil Appeal No. 232 of 2004 held,

> " As earlier stated, the orders sought in the application before the superior court were under Order LIII Rule 3(1) of the *Civil Procedure Rules*. The orders were those of Certiorari and Prohibition. The remedies of Certiorari and Prohibition as well as that of Mandamus are of a prerogative nature and are only available against public bodies including the registrar of societies which are inferior to the High Court. They are made not only for excess of jurisdiction or absence of it but also for a departure from rules of natural justice or in contravention of the laws of the land. – *Kenya National Examination Council v Republic- Exparte Geoffrey Gathenji Njoroge & 9 others*- Civil Appeal No. 266 of 1996..."

In the case of *Commissioner of Lands v Kunste Hotel Ltd.* – Civil Appeal No. 234 of 1995 this Court observed as follows: -

> " But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected to. See *R v Secretary of State for Education and Science exparte Avon County Council* (1991) 1 ALL ER 282.

14. From the foregoing it is clear that in judicial review proceedings a court is only concerned with the decision making process and not the merits of the decision. The court is called upon to determine whether the decision in question was made in accordance with the procedure set out and principles of natural justice. It is not open for a court in judicial review proceedings to substitute its own opinion with that of the public entity charged by law to decide the matter in question. See this Court's decision in *Biren Amritlal Shah & another v Republic & 3 others*- Civil Appeal No. 186 of 2004.

15. The High Court vide an order of certiorari quashed the appellant's invoice dated 15th August, 2011 demanding Kshs. 136,603/= from the respondent as levy on the deposits held by the respondent. The respondent's contention was that the appellant imposed the levy without consulting it or giving it an opportunity to be heard on the same. In *Kenya National Examination Council v Republic- Exparte Geoffrey Gathenji Njoroge & 9 others* (supra) while considering the scope of the order of certiorari, this Court expressed thus:-

> " 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 excess jurisdiction or where the rules of natural justice are not complied with or for such like reason."

16. It is not in dispute that the invoice in question was issued pursuant to Section 15 of the *Sacco Societies Act* which provides in part as follows:-

> " 15
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> (1) The Authority may by order published in the Gazette, impose a levy to be known as the Sacco Societies levy on deposits held in deposit taking Sacco Societies.....
>
> (2) A levy imposed under this section shall be payable at such rate as may be specified in the order..." Emphasis added.

The aforementioned provision grants the appellant the discretion to impose levy on deposits and sets out the procedure to be followed in imposing the same. The provision is clear that the appellant is only required to publish the levy imposed in the Kenya Gazette which it did on 21st December, 2010. There is no statutory requirement for the appellant to gazette its intention to impose the levy and then carry out consultations with the relevant stake holders before publishing the final levy in the Kenya Gazette. As hereinabove set out a court in judicial review proceedings is only concerned with the decision making process, that is, whether the decision in question was made in accordance with the procedure given. In Ismael S. Mboya & 2 others-vs- Mohammed Haji Issa & another(*supra*) it was held that the judicial review remedies do not lie to correct the course, practice or procedure of inferior tribunals. In this case, we find that the appellant did adhere to the procedure set out in the Sacco Societies Act in imposing the levy in question. We find that there was no basis for the High Court to issue the order of certiorari.

17. Notwithstanding the foregoing, we cannot help but note from the record that contrary to the respondent's contention, the appellant did indeed make countrywide consultations and sensitization of the levy in dispute. From the attendance lists on record the respondent was represented in the said consultations by its officers and at no point did the respondent raise any objection over the levy. We are of the considered view that though KUSCCO raised a complaint, the same was on the rate at which the levy was to be charged and not on the appellant's authority to impose the levy. We also find that it was within the appellant's discretion as stipulated under Section 15 of the *Sacco Societies Act* to invite stakeholders to give their views in respect of the rate at which the levy ought to be charged and to review the rate it had earlier imposed.

18. The High Court also issued an order of prohibition restraining the appellant from demanding the levy on deposits from the respondent as per the invoice in question and in future. In *Ismael S. Mboya & 2 others-vs- Mohammed Haji Issa & another*(*supra*) it was held that :-

> "We are minded that an order of prohibition is one issued by the High Court to forbid an inferior tribunal or body from carrying out a quasi-judicial function which that inferior body has no jurisdiction to do or that it cannot do it in excess of its jurisdiction-See Kenya National Examination Council v Republic- Exparte Geoffrey Gathenji Njoroge & 9 others (supra). Prohibition orders look to the future and prohibit what is intended to happen before it is done, but it cannot be issued to affect what has already been done."

19. We find that the learned Judge erred in granting the order of prohibition because firstly, an order of prohibition could not be issued in respect of the invoice demanding Kshs. 136,603/= since it had already been issued and served upon the respondent. Secondly, an order of prohibition could not be issued to restrain the appellant from carrying out its lawful duties under Section 15 of the *Sacco Societies Act*.

20. The upshot of the foregoing is that we find that the appeal has merit and is hereby allowed. We hereby set aside the High Court's ruling dated 17th August, 2012 and dismiss the respondent's application dated 27th September, 2011. The appellant shall have costs of this appeal, and of costs in the High Court.

DATED AND DELIVERED THIS 24TH DAY OF FEBRUARY, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR