



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 136 OF 2019

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND CERTIORARI
AND FOR LEAVE TO INSTITUTE AN APPLICATION FOR SUCH RELIEF**

IN THE MATTER OF: CO-OPERATIVES SOCIETIES ACT (CHAPTER 490) OF THE LAWS OF KENYA

BETWEEN

STEPHEN CHASE KISAKA.....APPLICANT

VERSUS

COMMISSIONER FOR CO-OPERATIVE

DEVELOPMENT.....1st RESPONDENT

CONCORD SAVINGS & CREDIT

COOPERATIVE SOCIETY LTD.....2nd RESPONDENT

JUDGMENT

1. On 1 October 2019, the Court granted Stephen Chase Kisaka (applicant) leave to commence judicial review proceedings against the Commissioner for Cooperatives Development (1st Respondent (did not participate) and Concord Savings & Credit Cooperative Society Ltd (the Saccho).
2. The Court also ordered that the leave operates as a limited stay on certain conditions.
3. The applicant filed the substantive motion on 7 October 2019 and the Saccho filed its grounds of objection and a replying affidavit sworn by the Chief Executive Officer on 18 October 2019.
4. The applicant also filed further affidavits sworn by the Board Chairperson, Board Secretary and Board Treasurer of the Saccho on 27 November 2019.
5. Pursuant to directions by the Court, the applicant should have filed and served his submissions by 9 December 2019. The submissions and those of the 1st Respondent were not on file by this morning. The Saccho filed its submissions on 11 December 2019. The Court has considered the pleadings, affidavits and submissions on record.

Background

6. It was not disputed that the applicant joined the Saccho as a member and that around 21 February 2019, the applicant applied for nomination as a Board member.
7. It is also not disputed that in a meeting held on 6 March 2019, the Nominations Committee of the Saccho disqualified the applicant on the ground that he was *delinquent on loans*.
8. The applicant appealed against the disqualification and on 14 March 2019, the Nominations Committee declined to consider the appeal. It referred the appeal to the Board of Directors and the Board overturned the disqualification decision and directed that the applicant be issued with a nomination certificate.

9. However, on 18 March 2019, the District Cooperative Officer, Westlands overturned the decision by the Board on the nomination of the applicant.
10. The applicant appealed on 19 March 2019 and on 20 March 2019, the Chief Officer – Cooperatives and Tourism cleared him for the nominations.
11. The elections were held on 23 March 2019 and the applicant was one of those elected to serve as part of the Board of Directors.
12. On 27 March 2019, the applicant was elected to serve as the Vice-Chair of the Education Committee.
13. The 1st Respondent, pursuant to powers reserved to his office by section 60A of the Cooperative Societies Act wrote to the Saccho to notify it that an impromptu inspection would be carried out starting on 27 May 2019.
14. Subsequently, an Inspection Report was issued dated May 2019.
15. Some of the recommendations of the Inspection Report was that the applicant be disqualified from any leadership position in the Saccho and further that he be removed from membership of the management committee by dint of section 28(4) of the Cooperative Societies Act (the section provides for disqualifications from serving as a member of a committee of a cooperative society).
16. The Inspection Report was presented to the Board of Directors of the Saccho on 29 August 2019.
17. On 23 September 2019, the Chairperson of the Saccho formally wrote to the applicant to notify him that he had ceased to be a Board Member pursuant to the Inspection Report.
18. The applicant was aggrieved hence the instant proceedings.
19. The Court has considered the record and the submissions and condensed the Issues arising for determination as examined hereunder.

Prematurity of the proceedings

20. Section 76(1)(b) of the Co-Operative Societies Act provides for resolution of disputes *inter alia* between members and a cooperative society at the first instance by the Co-operative Tribunal.
21. The applicant did not attempt to have the dispute over his removal as an official of the Saccho adjudicated by the Tribunal.
22. On that ground, the Court is of the considered view that the applicant jumped the legal-gun. He should have exhausted the statutory dispute resolution mechanisms outlined in the primary governing Act.
23. In that respect, the Court finds these proceedings incompetent for prematurity/failure to comply with dispute resolution mechanisms under the Cooperative Societies Act.

Employment relationship

24. The applicant contended that he was in an employment relationship with the Saccho and therefore this Court was the appropriate forum to ventilate his complaints.
25. Section 2 of the Employment Act, 2007 has defined an employee as means a person employed for wages or a salary and includes an apprentice and indentured learner.
26. The definition, in the view of the Court, is so rudimentary that it should not be in our statutes in this time and age.
27. However, using all the tests which have been developed to determine who is an employee, a board member of cooperative savings and credit society would not in the view of the Court fit the categorisation of an employee, even if allowances are paid to the member.

Merits of the application

28. Judicial review orders are discretionary orders which may not be granted even where merited.
29. The Court has already observed that the applicant did not utilise the statutorily provided first instance dispute resolution mechanisms.
30. The application was also founded upon, among other grounds that there was an employer/employee relationship between the applicant and the Saccho, a proposition the Court has not found favour with.
31. Is this then an appropriate case to grant the orders sought on the ground that the applicant was not afforded an opportunity to be heard?
32. The Chairperson and the Board Secretary of the Saccho appeared to support the applicant's cause in their replying affidavits. They went

to great lengths to assert that the applicant was never afforded an opportunity to be heard before he was purportedly removed from membership of the Board.

33. The Chairperson's replying affidavit threw the blame on the 1st Respondent and alleged that the office had unlawfully acted to the detriment of the applicant (there is evidence before the Court that the Inspection Team engaged with the applicant before preparation of its report).

34. However, it is noteworthy that it is the Chairperson of the Saccho who informed the applicant through a letter dated 23 September 2019 that he had ceased being a Board member.

35. She did not disclose why the Saccho did not seek to engage with the applicant upon receipt of the Inspection Report and/or offer him an opportunity to be heard.

36. In the view of the Court, this is not an appropriate case to grant the judicial review orders.

37. Before concluding, the Court wishes to observe that there the material placed before it shows unhealthy tensions between the Management and Board of the Saccho. Such tensions do not augur well for the general membership of the Saccho and their savings and investments.

Orders

38. For the above reasons, the Court declines to exercise its discretion to issue any of the judicial review orders sought by the applicant.

39. The proceedings are dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 19th day of December 2019.

Radido Stephen

Judge

Appearances

For applicant Mr. Wangila instructed by A.S. Kuloba & Wangila Advocates

For 2nd Respondent Mr. Mbugua instructed by Mbugua & Mbugua Advocates

Court Assistant Judy Maina