



Republic v Commissioner for Co-operative Development; Wambua & 3 others (Exparte Applicants) (Miscellaneous Application E141 of 2022) [2025] KEHC 1292 (KLR) (Judicial Review) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E141 OF 2022
JM CHIGITI, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT RESPONDENT

AND

CLINTON WAMBUA EXPARTE APPLICANT

CHARLES MBONDO EXPARTE APPLICANT

CAREN MIUTUA EXPARTE APPLICANT

COSMAS KALOKI EXPARTE APPLICANT

JUDGMENT

1. The application before this Court is Amended Notice of Motion dated 18th July, 2023. The application is brought under Section Order 53 Rules 3 and 4 of the Civil Procedure Rules 2010, Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya and all other enabling provisions of the law. It seeks the following orders: -

1. That this Honourable Court does issue an order of Certiorari to call into this court for purposes of being quashed the decision of the Respondent herein to surcharge Clinton Wambua, Charles Mbondo, Caren Miutua, Cosmas Kaloki sums of Kshs. 4,482,357.50, 4,869,237.50, 2,533,357.50, and 1,172,357.50 respectively as communicated vide the letter/ notice dated 7th November 2022 served on the Exparte applicant on 28th November 2022.



2. That this Honourable Court does issue an order of Prohibition prohibiting the Respondent or any of his agents or persons acting through or under him or under his directives from enforcing the surcharge orders purportedly issued under the provisions of sections 58 and 73 of the Co-operative Societies Act and communicated vide the letter/notice dated 7th November 2022, surcharging Clinton Wambua, Charles Mbondo, Caren Miutua, Cosmas Kaloki sums of Kshs. 4,482,357.50, 4,869,237.50, 2,533,357.50, and 1,172,357.50 respectively.
 3. That this Honourable Court does issue an order of Mandamus directing and or compelling the Respondent to recall, cancel, invalidate and annul the surcharge orders communicated vide his letter/ notice of 7th November 2022, Clinton Wambua, Charles Mbondo, Caren Miutua, Cosmas Kaloki sums of Kshs. 4,482,357.50, 4,869,237.50, 2,533,357.50, and 1,172,357.50 respectively.
 4. That this Honourable court does issue an order of Prohibition to restrain the Respondent from barring the Applicants from being elected to any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report, which illegally infringes against the Applicant's right to equality and non-discrimination, right to freedom of association, and right to participate in public affairs.
 5. That this Honourable court be pleased to grant the Applicants an order of Prohibition to restrain the Respondent from barring the Respondents from being employed by any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report.
 6. A declaration that the Respondent has breached the Exparte Applicants' constitutional rights, inter alia:
 - a. Right to Equality and Non-Discrimination contrary to Article 27 Constitution.
 - b. Right to Freedom of Association contrary to Article 36 of the Constitution.
 - c. Right to Participate in Public Affairs contrary to Article 38 of the Constitution.
 - d. Right to Fair Administrative Action contrary to Article 47 of the Constitution.
 - e. Discrimination contrary to Article 27 of the Constitution
 - f. Fair Administrative action contrary to Article 47 of the Constitution.
 - g. Economic Right contrary to Article 43 of the Constitution.
 7. That costs of this application be awarded to the Exparte Applicant.
2. The application is supported by a Verifying Affidavit by Clinton Wambua sworn on 18th July, 2023 and Statement of facts dated 18th July, 2023.
 3. It is the Applicants' case that the Commissioner of Cooperative Development in unlawful, illegal decision disregarded the law and surcharged them after an illegal resolution adopted at an illegal Special General Meeting held on 3rd July 2021 based on the following grounds:
 - a. That the Inquiry Report was calculated to be adopted in an SGM in the absence of the Exparte Applicants.
 - b. That as soon as a notice for convening the SGM on 12th June 2021 was published, the Chairperson of the Sacco sought a Court Order to bar the Exparte Applicants from attending



the SGM. This was politically calculated to oust them from challenging his bid for offices in the Sacco and also to prevent them from submitting against the unprocedural and substantive flaws of the Inquiry Report.

- c. That in another suit filed by members of the Sacco a different court issued Orders authorizing the attendance of all members of the Sacco in the said SGM.
 - d. That seeing that the Exparte Applicants would be allowed to attend the SGM scheduled on 12th June 2021, by virtue of the Court Order issued on 11th June 2021, the same was postponed to 3rd July 2021.
4. Further they argue that the Respondent failed to take the following relevant considerations into account:
- a. That the Magistrates Court at Milimani Commercial Courts in Civil Case No. E915 of 2021 issued injunctive status quo orders on 2nd July 2021 restricting the holding of the 1st Defendant's Special General Meeting on 3rd July 2021.
 - b. That on being served with the Court order barring the society from conducting a Special General Meeting of the Sacco, the Exparte Applicants opted not to attend the said meeting, as doing so would be in contempt of the Court Order in place.
 - c. That the findings and recommendations of the Inquiry Report were adopted at the said illegal Special General Meeting held on 3rd July 2021. The Inquiry Report was thus, illegally adopted.
 - d. That due to the absence of the Exparte Applicants in the said Special General Meeting, they were not able to make submissions objecting to the said Inquiry Report in the Meeting.
 - e. That the Exparte Applicants avers that all consequential action undertaken as resulting from the said Special General Meeting, which had been prohibited by the said Court Order is illegal.
 - f. That the Surcharge is also illegal, taking into account that it originated from resolutions made illegally in disobedience of valid court orders prohibiting the convening of the Special General Meeting on 3rd July 2021.
5. According to them the powers to surcharge are being exercised capriciously and/or maliciously and that Commissioner for Co-operative Development in arriving at the Surcharge failed to take the several relevant considerations into account.
6. The Applicants contend that Commissioner for Co-operative Development based a biased Inquiry Report surcharged former committee members and the Respondent without any lawful justification disregarded critical evidence presented by the first Exparte Applicants as to whether the Exparte Applicants were liable for surcharging and his action are in excess of jurisdiction.
7. The Applicants canvassed their application by way of written submissions dated 4th December, 2023.
8. It is their submission that Section 74 of the Co- operative *Societies Act* provides that one who is aggrieved by an order of the Commissioner under Section 73 (1) may, within thirty days, appeal to the Tribunal. Section 73 (1) of the Act donates powers to surcharge officials of cooperative societies to the Commissioner
9. In the Supreme Court in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee *& 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) with reference to Sections 129 and 130 of EMCA, held that as a general rule, parties are required to exhaust the dispute resolution mechanisms provided for by



a statute before resorting to courts. This general rule is, however, subject to several limitations, as outlined by the Supreme Court.

10. They contend that the Co-operative tribunal lacks the jurisdiction to grant the judicial review orders under Section 74 of the Act as the section does not provide for a legal framework for the following:
 - i. Prohibitory Orders, judicial review orders against the Respondent, prohibiting his office from barring the Applicants' employment by the Cooperative Societies in Kenya as recommended in paragraph 9 of the recommendations in the Inquiry Report
 - ii. Restraining the Respondent from barring the Applicants from being elected to any cooperative society in Kenya as indicated in paragraph 9 of the recommendations in the Inquiry Report.
11. It is also their submission that the said section does not provide for the Judicial Review Order of Mandamus nor does it clothe the Tribunal with the jurisdiction required to issue the orders of Certiorari to remove and quash the decision of the Respondent to surcharge the Applicants.
12. The Applicants place reliance in the case of *Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others* [2012] eKLR stated that;

“Not all grievances under the Cooperative *Societies Act* are disputes within the jurisdiction of the Tribunal”. It stated further that “The Tribunal does not have jurisdiction to issue judicial review orders which is one of the jurisdictions the Petitioners are seeking orders from”.
13. They also place reliance in the case of *Fleur Investments Ltd v Commission of Domestic Taxes & Another* [2018] eKLR which held that: -

“The exhaustion rule comes into effect only if the remedy-whether administrative or judicial is adequate to protect the asserted claim”.
14. The Applicants argue that their Application is well within the constitutional jurisdiction of this Honourable Court, and the ends of justice will be met and achieved if the same is substantively determined in this forum, as it is adequate to determine all the arising questions.
15. In *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) held that the Appellant had two options in pursuing his claims. It stated further stated that:

“The first option was to appeal to the National Environment Tribunal. The other option was to bring a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify”

“We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed in adequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief”.



16. It is their submission that the application before this honourable court raises several questions, which are not in the jurisdictional purview of the Co-operative Tribunal and it is in the interest of justice that their application should be allowed as prayed.

The Respondent's case;

17. In opposition to the Applicant's Application, the Respondent filed a Replying Affidavit by David K. Obonyo sworn on 29th June, 2023.
18. It is deponed that pursuant to the provisions of Section 58 (1) of the *Co-operative Societies Act*, Cap 490 (the Act) the Commissioner on his own accord directed the carrying out of an inquiry of Kinatwa Sacco Society Limited (Society) upon the receipt of complaints from the members of the Society and the Director of Co-operatives Kitui County alleging financial, operational and governance challenges facing the Society.
19. It followed that the Commissioner for Co-operatives Development (Commissioner) ordered an inquiry into:
- a. the by-laws;
 - b. working, financial conditions, governance structures;
 - c. the conduct of present or past management committee of Kinatwa Sacco Society Limited and in accordance with section 58 as read together with section 73 of the *Co-operative Societies Act*, Cap. 490, laws of Kenya.
20. Upon conclusion of the inquiry which was conducted lawfully and procedurally the findings of the inquiry were reported to the members of the Society in a Special General Meeting held on 12th June 2021 pursuant to Section 58(3) of the Act.
21. It is the Respondent's case that the findings of the inquiry recommended inter alia: -
- a) the former executive committee members found liable and accountable for monies of the Society totaling to Kshs. 13,057,310 be duly surcharged pursuant to Section 73 of the Act.
 - b) that the Applicants in the instant suit were found liable and accountable for a total of Kshs. 13,057,310 belonging to the Society
22. The Respondent contends that under Section 28(4)(k) of the Act any member of a committee of the Society adversely mentioned in the Inquiry Report is not eligible to serve in such capacity, and the said persons had contravened Section 28(6) of the Act which provides that the committee is mandated to exercise the prudence and diligence of ordinary men of business and the members shall be held, jointly and severally liable for any losses sustained through any of their acts which are contrary to the Act, rules, by-laws or the directions of any general meeting of the Society.
23. What followed after the findings of the inquiry, the Office of the Commissioner while discharging its administrative duty pursuant to Section 73 of the Act, made an order requiring the Applicants herein to repay or restore the money as duly apportioned to each individual which order was served upon the Applicants.
24. It is their case that the Co-operative Tribunal is the Court of first instance to hear and determine an appeal lodged against a surcharge order pursuant to Section 74 of the Act and the Applicants have not complied with the said provision.



25. The Respondent canvassed their application by way of written submissions dated 21st July, 2023.
26. They submit that in the case of Anthony Miano & others v Attorney General & others [2021] eKLR quoted the following cases in delving into the issue of the doctrine of exhaustion the case of Geoffrey Muthiga Kabiru & 2 Others –v- Samuel Munga Henry & 1756 Others (2015) eKLR

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

27. In *Speaker of National Assembly v Karume* [1992] KLR 21 the court held thus:

They argue that the application for determination before this honourable court is contravention of the doctrine of exhaustion which requires one to explore other avenues available of resolving that dispute at hand.

The Act clothes the Co-operative Tribunal with such powers that enables it to hear and determine such matters as the one before this Court.

28. They further submit that the instant suit is an abuse of court process as was held in the case of *Graham Rioba Sagwe and 2 Others vs Fina Bank Limited and 5 Others* (2017) eKLR:

“The concept of abuse of the court/judicial processes... involve situations where the process of Court has not been resorted to fairly, properly, honestly to the detriment of the other party.”

29. The Respondent invokes section 73 of the Act which provides:

Power to surcharge officers of co-operative society

- (1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—
- (a) has misapplied or retained or become liable or accountable for any money or property of the society; or
 - (b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.
- (2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.



- (3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.
30. It is submitted that the Commissioner ordered that the Applicants should repay or restore the monies as per the findings of the inquiry which action was within the provision of Section 73.
31. They also argue that Section 58 (3) provides that: -
- “The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.”
32. It is their case that upon conclusion of the inquiry, the Commissioner communicated the findings of the inquiry to the members of the Society on 12th June 2021 in a Special General Meeting in accordance with the above provision, this was after an inquiry be conducted on Kinatwa Sacco Society Limited, upon receiving complaints of alleged financial, operational and governance challenges facing the society. The same was published in the Kenya Gazette on 19th February 2021.
33. Reliance is placed in the case of Republic -vs- National Employment Authority and 3 Others ex parte Middle East Consultancy Services Limited (2018) eKLR where Mativo J, stated:
- “Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper and the decision is within the confines of the law a Court will not interfere.”
34. The Respondent urges this court to dismiss this Application with costs to the them.

Analysis and determination;

35. Upon perusing the pleadings and the submissions alongside the authorities cited, this court find the following issues commend themselves for determination;
- i. Whether this court has jurisdiction to determine this suit.
 - ii. Whether the Applicants have made out a case for reliefs sought.
 - iii. Who is to bear costs.
36. The process of a surcharge order is a process provided for under Section 58 of *Co-operative Societies Act* which provides that:
- i. The Commissioner may of his own accords shall on direction of Minister as the case be hold an inquiry or direct any person authorized by him in meriting to hold an inquiry into the by-laws, working and financial conditions of any Co-operative society.
 - ii. The commissioner shall report findings of his inquiry at the General Meeting and shall give directions for the implementation of the recommendations of inquiry report.
37. Section 73 Co-operative Society Act provides :
- (1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society— (a) (b) has



misapplied or retained or become liable or accountable for any money or property of the society; or has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.

- (2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.
 - (3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.
38. Upon inquiry, under sub Section 2 (1) the Commissioner may if he considers it appropriate make an order to repay or restore the money or property, as the Commissioner deems just.
 39. The Commissioner carries out its function as mandated under the Co-operative Society Act.
 40. After an inquiry report is completed it is presented to the General meeting of members for discussion. Nothing prevented the appellant from raising any issue/objection in regard to the inquiry report at that stage.
 41. After the adoption of the inquiry report in the General meeting a notice of intention to surcharge under Section 58 and 73 *Co-operative Societies Act* was issued to the Applicants vide Notice of intention dated 7th November 2022.
 42. Section 74 provides:
 - “(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.
 - (2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.”
 43. After the surcharge order was issued The Applicants herein failed to pursue their right to appeal against the Surcharge Order under Section 74 (1) *Co-operative Societies Act*.
 44. The procedure for filing an Appeal in the Co-operative Tribunal is provided for under Rule 8 Co-operative Tribunal Rules 2009.
 45. It is in not disputed that the Applicants were notified of the outcome of the inquiry. Their argument is that under Section 74 of the Act, the Tribunal cannot grant them the Judicial Review remedies that they are seeking.
 46. The Respondent has challenged jurisdiction of the court upon the doctrine of exhaustion. In the case of Court of Appeal in Speaker of National Assembly v Karume (1992) KLR the court held that:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”



47. According to the doctrine of exhaustion of remedies, they ought to appeal the order or decision of the Commissioner to the Tribunal in accordance with section 74(1) of the Act and can only come to this court on appeal against the decision of the Tribunal as provided in section 74(2).
48. The Doctrine of avoidance also plays against the Applicants' claims under the Bill of rights given that there are statutory remedies which they elected to ignore.
49. In the Supreme Court of Kenya Petition 14, 14a, 14b, & 14c of 2014(consolidated) Communication of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR:-
- “Borrowing from the Constitutional Court of South Africa in *S V Mhlungu*, 1995 (3) SA 867 (cc) and Supreme Court of US *Ashwander v Tennessee Valley Authority* 297 US. 288, 347, (1936) the court adopted the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. In essence, civil disputes should be determined in civil courts, criminal matters in criminal courts and a Court would not decide a constitutional question which was properly before it, if there are some other basis upon which the case could have been disposed of.”
50. Section 9 of the Fair Administrative Action Act embodies the doctrine of exhaustion of remedies and precludes the court from reviewing an administrative action unless all remedies available under any written law or internal mechanism in respect of the dispute before it has been exhausted. More so, section 9(3) of the said Act requires the court to direct that the applicant first exhausts such remedy provided before instituting proceedings in the court.
51. The Applicants have not provided any evidence that the remedy as provided for in Section 74 of the *Co-operative Societies Act* is ineffective or will bear no fruits to warrant exemption from the obligation as set out under Section 74 of the Act.
52. I am guided by the case of *R versus Inland Revenue Commissioners, ex p Preston* (1985) AC 835 where it was held that:
- “A remedy by way of judicial review is not to be made available where an alternative remedy exists...Judicial review is a collateral challenge: it is not an appeal. Where parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision...”

Determination;

53. The Applicants did not exhaust the available alternative dispute resolution mechanism before moving this court.
54. The Co-operative Society Tribunal is a statutory outfit that has the capacity to deal with disputes like the one that the Applicant brought before this court and I so hold.
55. Having determined that this court lacks jurisdiction then I am unable to determine the 2nd issues and I so hold

Order;

56. The Application is dismissed with costs.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

.....

J.M. CHIGITI (SC)

JUDGE

