



Republic v Commissioner for Cooperative Development & 13 others; Ndwiga & 12 others (Ex parte Applicants) (Judicial Review Miscellaneous Application E162 of 2024) [2025] KEHC 8944 (KLR) (Judicial Review) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E162 OF 2024**

RE ABURILI, J

JUNE 24, 2025

BETWEEN

REPUBLIC APPLICANT

AND

- COMMISSIONER FOR COOPERATIVE DEVELOPMENT ... 1ST RESPONDENT**
- NENO SACCO 2ND RESPONDENT**
- QWETU SACCO 3RD RESPONDENT**
- SOLUTION SACCO 4TH RESPONDENT**
- BUTALI SACCO 5TH RESPONDENT**
- IMARISHA SACCO 6TH RESPONDENT**
- MAKTABA SACCO 7TH RESPONDENT**
- APSTARDT SACCO LIMITED 8TH RESPONDENT**
- INVEST AND GROW SACCO 9TH RESPONDENT**
- NEWFORTS SACCO 10TH RESPONDENT**
- LOMPASAGO SACCO 11TH RESPONDENT**
- GUSII MWALIMU SACCO 12TH RESPONDENT**
- COSMOPOLITAN SACCO 13TH RESPONDENT**
- SHOPPERS SACCO 14TH RESPONDENT**

AND



PETER MANGA NDWIGA	EX PARTE APPLICANT
ALFRED MWADIME MLOLWA	EX PARTE APPLICANT
TARTISIO IRUKI ITUURU	EX PARTE APPLICANT
MALOVA HESBON NYIKURI	EX PARTE APPLICANT
LANGAT KIMUTAI DAVID	EX PARTE APPLICANT
JOHN KIPKEMOI SIGEI	EX PARTE APPLICANT
ANDREW AYARAH OKWACH	EX PARTE APPLICANT
DAVID KALACHI MOYIA	EX PARTE APPLICANT
GEORGE MAGUTU MWANGI	EX PARTE APPLICANT
BERNARD NJUNJIRI MAINA	EX PARTE APPLICANT
DAVID OGEA NYANG'AU	EX PARTE APPLICANT
JOHN M NJUGUNAH	EX PARTE APPLICANT
WILFRED KEMBERO AIMA	EX PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 21st December 2024, the 13 Ex parte Applicants filed a Notice of Motion dated 6th January 2025 seeking an order of Certiorari quashing the 1st Respondent's letter dated 17th December 2024 barring them from holding office as officials of the 2nd to 14th Respondents being their respective primary SACCOs and in any other Sacco; and an order of Prohibition prohibiting any other or further decisions to bar them from holding office.
2. The application is verified by the affidavit sworn by Andrew Okwach Ayarah, the 7th Exparte applicant and a statutory statement, both dated 19th December 2024.
3. The Ex parte Applicants' case is that all the members of the KUSCCO Board are originally members of primary Saccos which is a pre-condition for being elected to sit on the said KUSCCO Board. It is deposed by the 7th Ex parte Applicant that during his tenure as a Board member, he offered invaluable contributions geared towards good corporate governance.
4. Further, that cumulatively as a Board, during the time that he served, he witnessed responsible management for the benefit of all stakeholders. It is deposed that their collective tenure as a Board was brought to a halt on 6th May 2024 when they were removed unceremoniously without due process being followed. It is their case that the removal was done through a press statement released on the even date by the Cabinet Secretary in charge of the Ministry of Cooperatives and MSME Development.
5. That upon their removal, the Cabinet Secretary directed the 1st Respondent to appoint an interim Board allegedly in compliance with the Cooperative [Societies Act](#) to oversee the transformation of and rehabilitation of KUSCCO.
6. According to the exparte applicants, their removal from the KUSCCO Board is on account of alleged mismanagement and misapplication of funds based on a forensic audit that they had not set their eyes on. It is their case that the said audit was spearheaded by the interim Board.



7. The Ex parte Applicants contend that their removal on account of mismanagement was occasioned by malice as management of KUSCCO is a preserve of the management officials and the main decision-making organ of KUSCCO is the Annual Delegates Meeting.
8. It is their case that the decision to remove them was undertaken by the 1st Respondent despite having permanent representation in the KUSCCO Board since its inception and having the sole mandate of approving and giving validity to the financial statements of the Board.
9. The Ex parte Applicants aver that they have only had stints sitting at the KUSCCO Board, which Board is dynamic and their tenure based on election by the respective regions. They state that the appointment of the interim Board was done contrary to the provisions of by law 27 of the 11th Edition of KUSCCO by laws which provides for the elaborate procedure of constitution of the Board.
10. That the 1st Respondent appointed one David Mategwa as the Chairperson of the interim board despite being ineligible to serve as a member of the Board for contravening by law 29(t) of KUSCCO by-laws by having legal suits against KUSCCO.
11. That by letters dated 17th December 2024, similar in substance but addressed to the 2nd to 14th Respondents separately, the 1st Respondent took a unilateral decision to bar the Ex parte Applicants from holding office as officials in the 2nd to 14th Respondents respectively and any other co-operative forthwith.
12. The Ex parte Applicants state that notably, this directive had been applied selectively with the Chairperson of the interim Board and Director Philip Rilei, who were part of the former Board members of KUSCCO being exempted from the findings and being placed in the interim Board which spearheaded the forensic audit.
13. They further state that the 1st Respondent, in violation of its statutory mandate has now opted to further persecute them by directing that they be removed from the offices they hold in their primary saccos and any other cooperatives forthwith purportedly acting on the recommendation of the interim Board.
14. The Ex parte Applicants further state that the said decision barring them from holding offices in their primary Saccos and any other co-operative forthwith offends the specific procedure on election and removal of officials in the respective primary Saccos and was pursued without following the due process.
15. According to the exparte applicants, the decision has been undertaken in violation of the 4th Schedule of *the Constitution* which confers County Governments with the function of trade development and specifically regulation of co-operative societies and as such that the 1st Respondent has arrogated to himself a function contrary to the supreme law of the land.
16. They also state that the 1st Respondent purports to have relied on Section 93A(d) of the Cooperative *Societies Act* yet this provision does not grant overarching powers to be applied as the 1st Respondent pleases and definitely does not provide any powers that contravene *the Constitution*.
17. That in an attempt to remedy this apparent illegality, the 1st Respondent has enlisted County Directors for Cooperative Societies. It is the Ex parte Applicants' case that *the Constitution* does not envisage a duty bearer taking instructions from any party who is not constitutionally mandated to perform a constitutional duty.
18. They assert that they have not been furnished with the alleged incriminating report, have not been accorded a hearing, the 'specific culpability of each of them has not established and as such 'the reason



for the bar to hold office in their primary Saccos and any other co-operative forthwith is not established in total violation of their right to fair administrative action as guaranteed under Article 47(2) of *the Constitution*.

19. That the 2nd to 14th Respondents have proceeded to act on the 1st Respondent's recommendation and the only bar to this has been the stay orders granted by this Court, nonetheless the 7th and 13th Respondents have opted to disobey the Court orders necessitating the urgency in removing the 1st Respondent's decision to avert a miscarriage of justice.

The Ex parte Applicant's Further Affidavit

20. The Ex parte Applicants also filed a Further Affidavit sworn 26th March 2025 by Andrew Okwach Ayarah. In the said affidavit, it is deposed that despite KUSCCO being an umbrella union of SACCOs, it is not governed by Sacco Societies Regulatory Authority as averred by the 1st Respondent. Further that under KUSCCO By-laws and the *Co-operative Societies Act* Cap. 490, KUSCCO is defined as a Cooperative Union of Primary SACCOs and not a SACCO, that it is an umbrella union of primary SACCOs regulated by the *Co-operative Societies Act* Cap. 490 and its membership is restricted to primary SACCOs and that it is only primary SACCOs that are governed by SASRA.
21. The Applicants state that whilst the books of accounts and By laws of primary SACCOs are approved by SASRA, those of KUSCCO are approved by the 1st Respondent himself and that despite being assigned the above mandate, the 1st Respondent's allegations on acts of illegality are a mere afterthought as he signed and approved the by-laws and books of accounts which act of signing only alludes to a conclusion that the 1st Respondent admits the business of KUSCCO.
22. The Ex parte Applicants also aver that in the said by laws, paragraph 3(h) provides that one of the objects of KUSCCO is to establish a Central Finance facility for inter-lending among its members and provide money remittance services which acts the 1st Respondent claim to be illegal despite approving the said by laws.
23. They state that at no point of the approvals did the 1st Respondent make a determination that KUSCCO is dealing in fraudulent and illegal actions and the subsequent claims are only afterthoughts to pursue political interests as against them.
24. It is their case that in disregard to the rules of natural justice, the 1st Respondent who has a permanent representative in the Board of KUSCCO, not only approved the books of account, that are now being challenged but that he is also the prosecutor, the investigator and judge in this matter in a clear violation of the said rules. They urge that without a doubt, justice is not even faintly seen to be done as against them.
25. According to the applicants, paragraph 3(u) of the bylaws provides for the objective of creating KUSCCO subsidiaries in Insurance, ICT, Housing Cooperative Foundation save for the fact that the 1st Respondent approved the bylaws of KUSCCO which clearly delineate and outline the said objectives.
26. It is stated that the spirit of the drafters of *the Constitution* was to place Co-operative Societies under the County Governments for avoidance of political interference from the national government thus the Cabinet Secretary has no powers and mandate to regulate co-operative societies and his actions on the Ex parte Applicants' removal from their primary SACCOs is unconstitutional.



27. They also urge that the instant suit does not in fact contest their removal from the Board of Directors of KUSCCO as claimed by the 1st Respondent but contests their removal from the primary SACCOs which actions of the 1st Respondent on the same is in total violation of Schedule 4 of *the Constitution*.
28. They also state that while the 1st Respondent claims that the accounts were doctored one Mr. Javel M. Murira, an auditor for the 1st Respondent approved and signed the books of accounts to reflect the true financial position of the institution. In addition, that it is the 1st Respondent who provides for the list of approved auditors who verify the books of accounts.
29. The Ex parte Applicant's further assertion is that routine inspections were conducted on 11th January 2024 which exonerated the Board as there were no acts of illegality. Further, that the recommendations of the inspection was to re-organize the entire Board and not for removal of the Directors as performed by the 1st Respondent. According to them, the Board had commenced the re-organization as recommended by the inspection report.
30. They state that Section 93 of the Co-operatives *Societies Act* which mandates the Cabinet Secretary to direct the 1st Respondent to exercise his powers and duties is in total violation of Schedule 4 of *the Constitution* which powers are accorded to the County Governments and that the decision taken by the 1st Respondent was thus taken in his own capacity and was not inclusive of the County Government mandated with the same tasks.
31. The Applicants also state that with respect to KUSCCO financial irregularities, the 1st Respondent is put to strict proof as KUSCCO was operating as per the bylaws and the audited accounts approved by the 1st Respondent confirmed that KUSCCO was making profits.
32. It is the Ex parte Applicants' case that the said audit was conducted by Omenye & Associates duly approved by the 1st Respondent to conduct the audit.
33. The Ex parte Applicants state that the 1st Respondent attends the annual delegates meeting and has never raised any issue as to actions of illegality and the need to obtain requisite licenses. Also, that it is in contravention of the law to state that KUSCCO ought to have obtained license from SASRA yet in reality it is governed by the *Co-operative Societies Act* and not under SASRA. They urge that it is known to the 1st Respondent, that KUSCCO is under the supervision of the Ministry of Cooperatives.
34. According to the applicants, the Inspection Report given on 11th January 2024 only recommended the reconstitution of the Board and by no chance, did it recommend removal of the Board of Directors. Additionally, that the Board's role is to formulate policies and is not responsible for the day-to-day management of KUSCCO.
35. The ex parte applicants state that the 1st Respondent had a personal representative who acts as a technical advisor to the Board in the process of conducting its business and that upon approval of a report by the Board, the report is taken to the 1st Respondent for approval and subject to the 1st Respondent's approval, a subsequent approval is later done in the Annual Delegates Meeting. It is urged that the entire process is conducted with the aid of an internal auditor.
36. It is the Ex parte Applicants' case that the appointment of Mr. David Mategwa whom some of the Ex Parte Applicants passed a vote of no-confidence has created vilification and hatred against them contrary to the spirit of Article 33(2)(d) of *the Constitution*. The 1st Respondent's actions are said to be discriminatory.
37. That the effect of culpability being taken only on immediate former members leaving out long-term serving members of the Board is in total violation of *the Constitution* and impairs the right not to be



- discriminated under Article 27 of the Constitution in that; five members who were appointed to the Board on 29th May 2021 are being blamed for alleged systemic long-term mismanagement yet members who have been serving in the Board from 2010 are excluded from culpability and are in fact appointed to the interim Board.
38. The Ex parte Applicants argue that despite a consultative meeting being held on 25th April 2024, from the onset, the Board was not aware of the existence of the meeting and were only invited on the day of its occurrence.
 39. Consequently, that the membership of the organization comprises of 3500 members as noted in Paragraph 4 which members were not properly represented as majority attendances represented SACCOs from Nairobi Region being 120, Rift Valley 11, Mt. Kenya 61 and Coast Region 21. Notably, that there was no representation from the Western Kenya Region in totality.
 40. Their case is that the meeting for the removal of the Board was not properly constituted and was in contravention of paragraph 24 (c) (ii) of the bylaws which provides for the constituting of a Special Delegates meeting with at least one half of the delegates. Further, that the 1st Respondent ought to have constituted a delegates meeting and not a general meeting, worse off, composed of some few and carefully handpicked SACCOs.
 41. It is their case that insolvency is not an out of court structure, and therefore a company can only be declared insolvent upon a court's determination of its inability to pay debts and the mere fact that there exists a need to restructure the organization does not declare a company insolvent.
 42. According to the Ex parte Applicants, in the said minutes of the meeting, misappropriation of funds is not mentioned anywhere and consequently non-regulation of the Central Finance Fund is not a ground for removal from the Board of the Organization
 43. They also argue that in utter surprise, the Interim Board appointed constitutes a team of 14 members despite the resolutions suggesting a team of 7 members. That the selective reliance on the recommendations is a clear demonstration of bad faith on the part of the 1st Respondent and vested interest. The Ex parte Applicants deny knowledge of any forensic audit report.
 44. That there being no forensic report or audit produced in their unprocedural removal undermines their right to fair hearing under Article 50 and Freedom of Association guaranteed under Article 35 as it secludes them from joining other associations. They also urge that their respective primary SACCOs have nothing whatsoever against them and that if existent, channels for removal in the respective bylaws can be explored.

Responses

1st Respondent's Replying Affidavit

45. The 1st Respondent filed grounds of opposition dated 31st January 2025 and a Replying Affidavit sworn on even date by David Obonyo, the 1st Respondent's Office holder.
46. The 1st Respondent contends that the instant application as filed offends the provision of Section 9 (2) of the Fair Administrative Action Act and sections 76 and 77 of the Co-operative Society Act.
47. It is also urged that the former employer of the Ex parte Applicants, Kenya Union of Savings and Credit Co-operatives Limited (KUSCCO) is a Cooperative Society registered on 19th September 1973, registration number CS/2171, under the Co-operative Societies Act Cap. 490 and the subsidiary legislation thereunder.



48. Further, that KUSCCO is the umbrella Union of Savings and Credit Cooperative Societies (Saccos) in the country, governed by the [Sacco Societies Act](#) and the attendant Regulations, including the Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010 and the Sacco Societies (Non-Deposit-Taking Business) Regulations, 2020. Also, that it is governed by the Sacco Societies Regulatory Authority (SASRA).
49. The 1st Respondent urges that the main objective of KUSCCO includes, the promotion of Saccos (both internationally and locally), spokesman ship and advocacy; representation; risk management services; Central Finance Fund; education and training and corporate affairs and marketing.
50. According to him, the common bond of KUSCCO was expanded to admit individual members. In addition, that the Union diversified its activities to include housing, mortgage, insurance and registered subsidiaries, namely, KUSCCO Housing Co-operative Society Limited and KUSCCO Mutual Assurance Limited.
51. That KUSCCO has a share capital of Kes. 3.3 billion, Kes. 15.3 billion deposits and savings both amounting to Kes. 18.6 billion and loans to members of Kes. 14 billion. The 1st Respondent states that the State Department for Co-operatives is responsible for among other functions, growth and development of co-operatives including formulation, adoption and implementation of policy and legal framework for the development and growth of all cooperatives in keeping with the overall national development policies and priorities.
52. He argues that the Co-operatives Act under Section 3(1) establishes the office of the Commissioner for Co-operative Development and Section 3(3) of the Act provides for the role of the Commissioner. Section 60A of the Act is said to empower the Commissioner to carry out routine inspection. Section 93 is said to provide that the Minister may at any time and on any matter direct the Commissioner as to the exercise of his powers and duties under the Act.
53. It is argued that concerns by various quarters were raised to the Ministry responsible for co-operatives in respect to KUSCCO's financial irregularities, operational inefficiencies, failure to adhere to regulatory requirements among other issues. The said concerns were met with consternation and rightly so, as the impact to the members, economy and the society at large would be dire.
54. According to the 1st Respondent, the member SACCOS would incur financial loses running into billions of shillings inevitably leading to their collapse, reduced trust and credibility and operational disruptions.
55. That in addressing the concerns, the Cabinet Secretary responsible for Cooperatives and Micro, Small and Medium Enterprises (MSMEs) Development provided policy and strategic guidance on the matter and the Commissioner undertook various interventions in accordance with the requisite law.
56. The 1st Respondent's further contention is that it is the mandate of the Cabinet Secretary and Commissioner to address concerns and complaints raised in respect to cooperative societies including KUSCCOs, expeditiously and in accordance with the requisite law, failure to which would be tantamount to disregarding duty.
57. As such, that it was agreed that a review of the financial status of KUSCCO be carried out to inform any further necessary action. Consequently, the Commissioner undertook a review of the accounts for KUSCCO, with a view to establishing its financial status and the authenticity of the financial statements presented to members.



58. That the inspection is said to have revealed that despite the financial statements of KUSCCO obtaining unqualified auditors' opinion in 2022, the value of the assets and liabilities materially differed from available primary documents. This rendered the audit opinion questionable.
59. The 1st Respondent asserts in deposition that the inspection also revealed that KUSCCO did not meet the required prudential standards as contained in the Sacco Societies Act, Cap 490B and Sacco Societies (Deposit-Taking Sacco Business) Regulations as it had a material asset deficiency of Kes. 12.5 billion and an even larger liquidity deficit of approximately Kes. 14.9 billion.
60. That despite holding substantial amounts of members deposits and operating Deposit-Taking Business, KUSCCO had failed to obtain the requisite licenses from SASRA to operate Deposit-Taking Business pursuant to Regulation 4 of the Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010 and the requisite approval to operate as a Non-Withdrawable Deposit-Taking Business in accordance with Regulation 5 of the Sacco Societies (Non-Deposit-Taking Business) Regulations, 2020. Thus, KUSCCO was operating in contravention of the law.
61. The aforesaid preliminary findings were discussed during subsequent meetings held with the then Board of Directors (Ex parte Applicants) of KUSCCO on 8th and 15th December 2023.
62. That taking into account Section 28(5) and (6) of the Act and Clause 30 and 31 of the KUSCCO By laws Eleventh Edition (amended) 2020, the then board members (Exparte Applicants) cannot delegate responsibility and accountability so as to absolve themselves from the losses KUSCCO suffered. The 1st Respondent states that they failed to carry out the business of the Union with the prudence and diligence of ordinary businessmen as is required by the Act and the By-laws.
63. It is the 1st Respondent's case that it is only after carrying out investigations and appointing the Auditors Firm of Grant Thornton that the Commissioner discovered systematic deficiencies in the management of resources, including creative and unreliable financial records. Further, that it's worth noting that the interim Board is properly constituted.
64. The 1st Respondent states that a consultative meeting with KUSCCO and its affiliates was held on 25th April 2024 at All Saints Cathedral, Nairobi, convened by the Commissioner pursuant to Section 27(8) of the Act and that the only way to pursue a restructure of KUSCCO obligations was through consensual out of court restructure (corporate restructuring), company voluntary insolvency arrangement or through administration as per the Insolvency Act.
65. The attendees of the said meeting are said to have included the then Board of Directors (Ex parte Applicants) and Management of KUSCCO, Chairpersons and Executive Officers of member SACCOs of KUSCCO, the Cabinet Secretary in charge of cooperatives and the Commissioner of Cooperatives.
66. The 1st Respondent's case is that members were informed of the financial mismanagement and irregularities which were so acute that they severely hindered KUSCCO's ability to operate efficiently. These included inter alia:- challenges in respect to the Central Finance Fund (CFF) including; Rapid and panic withdrawals of deposits by members critically affecting liquidity; On regulation of Central Finance Fund; Acute liquidity crunch; Inability to meet loan demands; Long term/ slow maturing investments; Mismatch of investments and reduced market confidence
67. That the CFF is a platform used by all deposit-taking SACCOs affiliated to KUSCCO which operates on the same principles as the inter-bank lending facility used by banks. The financial capital for KUSCCO's CFF is sourced from regular deposits by deposit-taking SACCOs with KUSCCO paying



- interest on the deposits, which are then disbursed quarterly to its member Societies. Consequently, any loss of funds of the CFF means that the deposits of the deposit taking SACCOs are essentially lost.
68. The 1st Respondent argues that cooperatives in this regard KUSCCO is autonomous and operates on democratic member control. Section 27(1) of the Act which refers to the supreme authority of a co-operative as being vested in the general meeting is referred to.
 69. That accordingly, during the meeting held on 25th April 2024, the officials of the members of KUSCCO aired their grievances, with the apprehension of the loss of their deposits and demanded the refund of their deposits and following lengthy deliberations by the members of KUSCCO, the members unanimously agreed and resolved on a recovery plan for KUSCCO.
 70. This plan included; A moratorium of one-year interest of funds held at CFF; The appointment of an interim Board; The appointment of an interim Board in tandem with the one-year moratorium on interest of funds; The membership of the interim Board to comprise of seven members drawn from small SACCOs and one big SACCO and the five KUSCCO regions according to shareholding and the Commissioner to appoint the interim board.
 71. According to the 1st Respondent, the Ex parte Applicants were removed from being in the Board as a result of the findings of the forensic audit conducted on the affairs of KUSCCO that revealed mismanagement, outright theft and falsification of accounts to conceal the losses of Kes. 12.5 billion by the Union.
 72. It is the 1st Respondent's case that the fraudulent aspect(s) revealed by the said forensic audit has led it to be in the custody of investigative agencies and subject of investigation by these agencies.
 73. The Commissioner, it is argued, appointed the interim Board and took remedial measures as provided for under Section 93A of the Co-operatives Act and Rule 54 of the Co-operative Societies Rules. The interim Board is said to have had the following Terms of Reference:-Develop and implement a recovery strategy of the Union; Cause the reconstruction of the books of accounts to reflect the true and fair view of the Union affairs; Oversee the completion and implementation of the statutory audit; Amend the Union by laws to accommodate the recommendations of the recovery strategy and plan, oversee and facilitate the election of the delegates and the Board.
 74. The 1st Respondent states that one of the ways the interim Board will attain the recovery strategy of the Union was by carrying out a forensic audit, for this would reflect the true and fair state of KUSCCO's affairs. Further that there was need for the Ex parte Applicants to be removed from their positions as Board members to facilitate a comprehensive audit of the Union's operations and financial records.
 75. That after the investigations and forensic audit there was need to stop the Ex parte Applicants from holding positions in their primary cooperatives because they had acted contrary to Section 28(6) of the Act and this is a preventative measure to ensure they do not mismanage the funds in their primary co-operatives.
 76. According to the 1st Respondent, in dismissing the Ex parte Applicants from being officials in their respective primary cooperatives, he acted within his mandate as provided for under Sections 3(3) and 93A(d) of the Act and Rule 54 of the Co-operative Societies Rules 2004.
 77. That the 1st Respondent appreciates cooperatives is a devolved function under *the Constitution* and therefore he had to inform the respective County Directors for Cooperatives of his decision. Therefore, in no way did his actions contravene *the Constitution*.



The 4th Respondent's Replying Affidavit

78. The 4th Respondent filed a Replying Affidavit sworn by Francis Murithi Rimberia who introduces himself as the Chairman of the Board of Directors of the 4th Respondent. The Affidavit was sworn on 20th March 2025.
79. Mr. Murithi in his affidavit states that the 4th Respondent, Solution Sacco, is a Savings and Credit Co-operative Society registered under the *Co-operative Societies Act* Cap 490 whose mandate amongst others includes receiving deposits from members and issuing loans for the growth of member's welfare.
80. He depones that the 4th Respondent aligns itself with the averments of the Commissioner for Co-operative Development in the Ministry of Cooperatives and Micro, Small and Medium Enterprises, State Departments for Cooperatives.
81. The 4th Respondent's case is that as a result of the actions of KUSSCO'S management, the 4th Respondent, entrusted to hold its member's deposits was at the risk of losing a substantive amount of the said deposits.
82. It is deposed that the 4th Respondent is still at risk of losing Kshs. 294,402,915 as at 20th March 2025 which is invested in various products at KUSCCO, hence keen to have KUSCCO recover in order to avert the loss of members funds invested therein.
83. The deponent. Mr. Murithi states that it was imperative that the Commissioner appointed an Interim Board in compliance with the *Co-operative Societies Act* Cap 490 in order to oversee the recovery of KUSCCO which holds a substantive amount of money belonging to the 4th Respondent's members.
84. According to him, the Ex parte Applicants have failed to demonstrate a prima facie case to warrant court to grant the orders sought as the 1st Respondent acted within his mandate as provided in law and the orders sought seek to unlawfully curtail the constitutional and statutory mandate of the 1st Respondent.

The 13th Respondent's Replying Affidavit

85. The 13th Respondent filed a Replying Affidavit sworn on 6th February 2025 by Elizabeth Wambui Njoroge who introduces herself as the Chief Executive Officer of the 13th Respondent.
86. In the affidavit Ms. Wambui states that the instant application offends the legal doctrine of exhaustion as the Ex parte Applicants have not exhausted internal mechanisms for appeal or review as provided for under section 76 and 77 of the Co-operative Society Act and section 9 (2) of the *Fair Administrative Action Act*.
87. It is also the 13th Respondent's case that the Ex parte Applicants ought to have served a notice of intention to sue upon the 13th Respondent as mandatorily required hence the application offends the provision of rule 5 of Fair Administrative Action Rules.
88. It is the deponent's case that on 20th December, 2024 she received the letter dated 17th December 2024 addressed to her from the Commissioner for Cooperative Development under the Ministry of Co-operatives and Micro, Small and Medium Enterprises (MSME) Development through the County Directors for Co-operatives directing that the immediate former elected officials of KUSCCO cease being officials in the primary and any other cooperatives forthwith.
89. She states that the County Directors for Cooperatives were asked to ensure compliance of the said order. That on the same day and in compliance to the directive, she wrote a letter to the 12th Ex parte



Applicant notifying him of the directive from the Commissioner for Cooperative Development and further informed him that he ceased to be a director representing Naivasha/Longonot electoral zone in the 13th Respondent with immediate effect.

90. That subsequently on 23rd December, 2024, the 13th Respondent received an order issued by this honourable court from the firm of Prof. Tom Ojienda & Associates Advocates and at the time the 13th Respondent had already implemented the directives contained in the letter dated 17th December 2024 by issuing a termination letter dated 20th December 2024. The 13th Respondent urges that the orders issued herein have been overtaken by events.

Submissions

91. The application was canvassed by way of oral submissions made before the Court on 6th May 2025.
92. In his submissions Mr. Okore, counsel for the Ex parte Applicants submitted that the decision taken by the 1st Respondent was a directive barring the immediate former Directors of KUSSCO from holding office in their primary Saccos communicated by specific letters addressed to CEO's of the 2nd to 14th Respondents to ensure that the 1st to 13th Ex parte Applicants are ejected from the Boards of their respective Saccos. That the decision was taken after a series of events. It was also submitted that the Cabinet Secretary of Cooperatives took a unilateral decision to dismiss the Board members of KUSSCO.
93. Further, that the decision removing the applicants from their primary Saccos was made contrary to the principles of natural justice and Article 47 of *the Constitution* which guarantees the right to fair administrative justice. According to counsel the instant matter is not premature.
94. He also submitted that Section 76 of the Cooperative *Societies Act* provides for disputes that can be referred to the Tribunal. Also, that a dispute involving Board members of an umbrella Cooperative Society and the 1st Respondent is not a dispute under Section 76 of the Cooperative *Societies Act*. Counsel submitted that the Commissioner refers disputes to the Tribunal hence it would be prejudicial.
95. According to Mr. Okore the question before the court is on violation of constitutional right hence the instant dispute is properly before this court. Reliance was placed in the case of Republic vs IEBC exparte NASA & Others [2017] eKLR. On the doctrine of exhaustion, it was submitted that the same can be by passed in exceptional circumstances and to support this position reliance was placed in the case of Flair Investments Ltd vs Comm of Domestic Taxes & Another [2018] eKLR.
96. It was also submitted that this court is the bastion of justice. It cannot sit back and tick boxes. Also, that the Applicants were removed without an opportunity to be heard. It was argued that the Commissioner in unilaterally removing the Directors from their primary Saccos did not follow the rules of natural justice. Counsel relied on the case of Republic vs. NGO's Coordination Board exparte Evans Kidero Foundation [2017] eKLR.
97. Counsel also submitted that there were no complaints raised by primary Saccos. He also emphasised on the importance of being given written reasons for the decision on the lawfulness of the decision. He relied on the cases of James Willy Kingori v Chairman Extra Ordinary Meeting of Michimikuru Factory Limited & 2 others; Maurice Kobia Dickson (Interested Party)[2022] eKLR, Muigana & 16 others *v County Government of Nyandarua (Petition E007 of 2023)* [2024] KEHC 960 (KLR) (8 February 2024) (Judgment) and Republic v Registrar of Companies Ex parte Charles Kariuki Githongo (Miscellaneous Application 63 of 2001) [2001] KEHC 828 (KLR) (Civ) (6 February 2001) (Ruling).



98. Mr. Okore also relied Republic vs. Commissioner for Cooperative Development & 69 Others [2026] eKLR. It was submitted that the National Government cannot purport to undertake functions of counties and that the decision of the 1st Respondent is unconstitutional.
99. On behalf of the 1st respondent, Mr. Munene Wanjohi submitted that by dint of Section 9(2) of the FAA Act, and Section 76 of the Cooperatives *Societies Act*, Sections 76 & 77 of the Cooperative *Societies Act* disputes such as the ones raised by the Ex parte Applicants ought to be referred to the Cooperatives Tribunal and to support this position he relied on the case of Republic vs Kenyatta University ex parte Ochieng Orwa & 7 Others [2018] eKLR.
100. According to counsel, the exemption under Section 9(4) of the *Fair Administrative Action Act* can only be granted where there was an application for exemption however in the instant case there was no such application. It was submitted that the Replying Affidavit explains the process through which the decision was taken. Further that all the Applicants were present and they signed an attendance list.
101. It was also Mr. Munene's submission that the principles of Judicial Review are settled and that the court looks at the process not merits. He further stated that the annexures include an audit report which goes into merits of the case. This according to him is not allowed and he relied on the case of R vs. PPARB vs. KRC [2012] eKLR on the principles of judicial review.
102. Mr. Munene also submitted that the application should be dismissed. Also, that the Commissioner did not direct Directors of Counties to act but that the letters were just copied to them. It was also his submission that the Commissioner of Cooperatives cannot direct on who becomes a member of the Board of Directors of primary Sacco Societies he can only guide.
103. Mr. Mbaabu counsel for the 4th Respondent submitted reiterating that the 4th Respondent has invested heavily in KUSSCO to the tune of Kshs.294,402,915 as at 20th March 2025 which is members money which is at risk in the event that KUSSCO goes down.
104. It was also his submission that the interim Board was to rescue KUSSCO so that members money can be saved. He submitted that the process was followed and the he also supported the 1st Respondent that the matter should have been filed at the Tribunal first. He relied on the case of Francis Mutuku vs Wiper Democratic Movement [2014] eKLR and Emily Mbasau vs Godfrey Fundi Mwangi & ODM [2017] eKLR. It was his case that the courts held that the Tribunals should first have heard the cases. According to him the primary Saccos were in the process of holding elections. Also, that KUSSCO held its AGM.
105. Mr. Ojou counsel for the 13th Respondent submitted that the motion offends the doctrine of exhaustion of remedies and that the Ex parte Applicants have not complied with Sections 76 & 77 of Cap 490 Laws of Kenya, as read with Section 9(2) of FAA Act and Rule 5 of the Fair Administrative Action Rules as no Notice of intention to sue was served.
106. It was also his submission that Rule 11 of Fair Administrative Action Rules was also breached and that the Applicants should have filed an Originating Motion not notice of motion.
107. According to counsel, the motion is overtaken by events as the 13th Respondent already complied with the directive of the 1st Respondent by terminating services of the 12th Ex parte Applicant, John Njugunah.
108. In a rejoinder to these submissions Mr. Okore submitted that on the question of exhaustion of remedies, the court ought to examine the provisions of Section 76 and 77 of the Cap 490 and the



bylaws of KUSSCO which define members to be primary Saccos. According to counsel, there is no contemplation of this kind of dispute in Cap 490 and in the bylaws.

109. It was also submitted that the instant motion is not about rescuing KUSSCO. He also urged that all decision cited by Mr. Mbaabu were about election disputes not relevant to this case. It was submitted that Rule 5 of FAA Rules applies to mandamus proceedings not certiorari as is the case herein. On Rule 11 of FAA Rules, counsel urged that there is no difference in substance between an Originating Motion and Notice of Motion. He relied on Article 159(2) (d) of *the Constitution*.

Analysis and Determination

110. Having considered the application, the extensive responses and oral submissions by counsel, the questions for determination are as follows:
- i. Whether this court has jurisdiction to hear the instant proceedings as filed;
 - ii. Whether the Commissioner's directive barring the Ex parte Applicants from holding office in their primary co-operative Societies was ultra vires;
 - iii. Whether the Commissioner's actions violated the Ex parte Applicants' right to fair administrative action under Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*;
 - iv. Whether the Ex parte Applicants are entitled to the judicial review remedy of certiorari.

Whether this court has jurisdiction to hear the instant application.

111. The Respondents have raised an objection premised on the doctrine of exhaustion, citing Sections 76 and 77 of the *Co-operative Societies Act* and Section 9(2) of the *Fair Administrative Action Act* (FAAA).
112. In response, the Ex parte Applicants have argued that Section 76 of the Cooperative *Societies Act* provides for disputes that can be referred to the Tribunal and that a dispute involving Board members of an umbrella Cooperative Society and the 1st Respondent is not a dispute under Section 76 of the Cooperative *Societies Act*. It is also the Ex parte Applicants' argument that the question before the court is on violation of constitutional rights hence the instant dispute is properly before this court.
113. For avoidance of doubt on whether or not section 76 of the Co-operative Society's Act applies to the dispute before this court, it is important for the court to reproduce the said sections herein.
114. Section 76 of the Cooperative *Societies Act* provides as follows;
1. If any dispute concerning the business of a co-operative society arises:—
 - a. among members, past members and persons claiming through members, past members and deceased members; or
 - b. between members, past members or deceased members, and the society, its committee or any officer of the society; or
 - c. between the society and any other co-operative Society;it shall be referred to the Tribunal.
 - (2) A dispute for the purpose of this section shall include—



- (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
- (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.
- (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

115. The doctrine of exhaustion requires that a party must exhaust all available statutory or administrative remedies before seeking redress from the High Court.

116. This principle is captured under Section 9(2) and (3) of the *Fair Administrative Action Act* (FAAA), 2015, which provides:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

117. However, Section 9(4) provides a statutory exception:

“Notwithstanding subsection (2), the High Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

118. This Court has considered whether the dispute falls within the jurisdiction of the Co-operative Tribunal under Section 76 of the *Co-operative Societies Act*. That provision is limited to disputes between a member, past member, or the legal representative of a deceased member and a society, its committee or officers, and only where such disputes relate to the business of the society, *the constitution* of the society, or the rights and obligations of the parties as members.

119. Courts have over time held that while the doctrine of exhaustion remains a cornerstone of judicial review jurisprudence, it does not apply where the dispute raises genuine and substantial constitutional questions, particularly violations of fundamental rights. In such instances, tribunals lack the jurisdiction to determine such matters and the High Court may rightfully entertain the application without requiring prior resort to statutory remedies.

120. This position aligns with the broader principle that access to justice and enforcement of constitutional rights must not be unduly hindered, having regard to the circumstances of each case and it therefore follows that the High Court retains original and exclusive jurisdiction under Article 165(3)(b), (d), and (e) of *the Constitution*.

121. It is thus not to be assumed that whenever Parliament establishes a tribunal or other body to exercise judicial or quasi-judicial authority, such a tribunal or body is intended to displace the jurisdiction of the High Court. Where a person alleges that any of the rights guaranteed under *the Constitution* have been violated or are threatened with violation, the High Court has the mandate to hear and determine



the matter. In other words, Administrative and quasi-judicial tribunals do not have jurisdiction to determine constitutional violations.

122. In the present case, the Applicants challenge the directive by the 1st respondent for their removal from holding office of director in their respective primary co-operative societies following findings of alleged financial mismanagement at a secondary society, KUSCCO. The impugned action was taken by the Commissioner for Co-operative Development, a statutory regulator on matters policy, and the *ex parte* applicants raise serious issues of procedural fairness, legality and the scope of the Commissioner's powers under the Act. The applicants have alleged violation of their right to fair administrative action under the Bill of Rights, that the decision of the 1st Respondent was illegal and *ultra vires* and was laced with procedural impropriety, denying them an opportunity to be heard on the allegations levelled against them.
123. These are not matters that can constitute disputes of the kind contemplated under Section 76, of the Cooperative *Societies Act* , which concern internal co-operative matters between members and their societies. The Court is therefore satisfied that this dispute does not fall within the exclusive jurisdiction of the Tribunal, and is properly before this Court.
124. In my humble view, this is not a matter where the applicants can be said to have by passed the alternative remedies route as contemplated in section 9(4) of the *Fair Administrative Action Act* or that they ought to have sought for exemption under section 9(4) of the said Act.
125. In *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] KEHC 9501 (KLR) it was observed as follows:
- “ At least two principles emerge ... First, while exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue ... However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.”
- “The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.”
126. This matter indeed raises serious questions concerning the legality of the Commissioner's actions, the exercise of statutory powers, procedural fairness and potential violation of constitutional rights. These issues fall outside the jurisdiction of the Co-operative Tribunal and are properly justiciable before this Court under Article 165(3) (6) and (7) of *the Constitution*.
127. Moreover, even assuming that the exhaustion doctrine applied, which it is not, this Court is satisfied that the case meets the established exceptions under Kenyan jurisprudence. The applicants raise weighty constitutional issues that cannot be adequately addressed by the Tribunal, which lacks the jurisdiction to determine constitutional questions or grant appropriate reliefs including *certiorari* and prohibition.



128. In view of the foregoing, this Court finds that the doctrine of exhaustion as invoked by the Respondents is inapplicable to the present dispute. The removal of the Ex parte Applicants from office in their respective primary co-operative societies was not an internal dispute concerning the business or constitution of a single co-operative society within the meaning of Section 76 of the *Co-operative Societies Act*. Rather, it arose from the statutory regulatory intervention by the Commissioner for Co-operative Development, citing governance issues at KUSCCO, a secondary society.

129. Accordingly, the objection based on the doctrine of exhaustion fails.

Whether the Commissioner's directive barring the Ex parte Applicants from holding office in their primary co-operatives was ultra vires

130. Another key ground raised by the Ex parte Applicants is that the Commissioner's decision to bar them from serving as officials in their respective primary co-operatives was ultra vires, lacking statutory foundation and violating procedural safeguards.

131. In response, the 1st Respondent contends that following a forensic audit and investigations into the affairs of KUSCCO, it was necessary to take preventative action to ensure that the Ex parte Applicants having been implicated in mismanagement did not continue to hold office in their primary co-operatives. The Commissioner cites Section 28(6) of the *Co-operative Societies Act* as the legal basis for the disqualification.

132. Further, the 1st Respondent relies on Sections 3(3) and 93A(d) of the Act and Rule 54 of the Co-operative Societies Rules, 2004, asserting that the impugned action fell within the broader supervisory mandate of the Commissioner. However, these provisions are of general regulatory character and do not expressly confer power upon the Commissioner to remove elected officials of autonomous primary co-operative societies.

133. Upon close scrutiny of the statutory framework, this Court finds that the powers cited by the Commissioner do not support the action taken by the 1st Respondent. Section 93A of the *Co-operative Societies Act* empowers the Commissioner to intervene in co-operative societies that are in distress, including through the appointment of interim management.

134. Section 72 off the Act provides for power to restrain convicted persons from being officers of society in the following terms:

Any person who is convicted of an offence under sections of the Companies Act (Cap. 486) specified in section 71 shall cease to be, or remain, an officer of a co-operative society, and shall cease to be concerned in or take part in, whether directly or indirectly, the management of a co-operative society, for a period of five years from the date of his conviction, and any person acting as, or purporting to be acting as such an officer, or being so concerned in, or taking part in the management of a co-operative society during that period, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years.

135. In this case, there was no such evidence of conviction of the applicants to warrant their removal from their primary societies,



136. Further, Rule 23 of the Cooperative Societies Rules on Conduct of affairs of a Committee of the Cooperative Society provides for removal of an elected member of the Board or Committee of the Cooperative Society as follows:
- (1) The majority members of a committee may for good cause suspend the Committee member subject to ratification by a general meeting.
 - (2) If during the term of office of a committee, a vacancy occurs in the Committee, the Committee shall, if the number of members drop below five, co-opt a member of the society to serve on the Committee until the next general meeting of the society.
 - (3) Elected members of a Committee shall be removed only by a two-thirds majority of members of the society present and voting at a general meeting.
 - (4) If a general meeting removes a member of a Committee, it shall forthwith elect a new member who shall hold office for the remainder of the term of the member so removed and where the entire committee is removed from office, the general meeting may decide to elect or fix a day for election of an interim committee of not more than five members to hold office for a period not exceeding ninety days.
137. Thus, the Law provides and acknowledges the cooperative principle of democratic member control and except in cases where a Board member is convicted of an offence as stated above or is voted out by the members in the manner provided under the Act and Rules or resigns from the position, such Board member of a primary Sacco Society cannot unilaterally be removed by the Commissioner of Cooperative Development on account of having ceased to be a member of the Board of the Union or apex body.
138. If anything, the same Rule 23 (7) of the Rules made under the Act provides that (7) A person elected into a Committee of a co-operative union or apex society on the basis of his elected position at the affiliate primary co-operative society shall cease to be a Committee member of the co-operative union or apex society upon being replaced or voted out at the primary co-operative society.
139. However, the Act does not authorize the Commissioner to remove or direct the removal of a Board member of a primary Sacco society, which is a distinct legal entity governed by its own constitution, membership and governance structures and organs being either the Annual Delegates meetings ADMs or Annual General Meetings- AGMs. Any decision affecting the leadership of a primary society must originate from that society's own structures or be grounded in express statutory authority.
140. The Commissioner's letter dated 17th December 2024, went beyond the appointment of an interim Board at KUSCCO. It expressly directed that the former KUSCCO Board members "cease being officials in the primary and any other cooperative societies forthwith." This directive, issued without affording the affected officials an opportunity to be heard, or invoking the due processes contemplated under their respective societies' constitutions and bylaws, amounted to a blanket and unilateral removal from office of the Board members of primary Sacco societies of KUSCCO, contrary to the law.
141. The Court reiterates that while the Commissioner bears a regulatory mandate under Section 3(3) of the Act, and the Cabinet Secretary may issue governance guidelines under Section 93A(d), these provisions do not confer authority to the Commissioner of Cooperative Development to interfere with the internal administration of primary societies or to override decisions properly vested in the general membership.



142. The only provision under the *Co-operative Societies Act* that permits the exclusion of officials from office is found in Section 28(7), which allows the Commissioner to suspend from duty any Committee member charged in a court of law with an offence involving fraud or dishonesty pending the determination of the matter.
143. In *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte Pelt Security Services Limited* [2018] eKLR, Mativo J (as he then was) emphasized that:
- “...if a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a ‘Wednesbury unreasonable’ manner.”
144. In the present case, while the Commissioner may have deemed the audit findings at KUSCCO as justification for action, the directive that he issued removing the Ex parte Applicants from their elected positions in primary societies without affording them a hearing or invoking the lawful mechanisms fails the test of reasonableness, legality, and procedural fairness. The action was not only ultra vires but also manifestly irrational, falling afoul of the Wednesbury standard as recognized in Kenyan jurisprudence.
145. Even in the case of such a suspension under section 28(7) of the Act, it must be exercised in accordance with due process, including compliance with Article 47 of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*, which require that affected persons be given prior notice, adequate reasons and an opportunity to be heard before any adverse administrative action is taken. In the absence of criminal charges or a lawful process establishing culpability, the Commissioner had no legal basis to direct the blanket removal of the Ex parte Applicants from their respective primary societies.
146. Additionally, Rule 23(3) of the Co-operative Societies Rules, 2004 which I have cited above and which I reiterate stipulates that “elected members of a committee shall be removed only by a two-thirds majority of members of the society present and voting at a general meeting.” This provision underscores the principle of member-led governance in co-operative societies, safeguarding elected officials from arbitrary removal.
147. There is no evidence placed before this Court that any resolution was passed in respect of the Ex parte Applicants by their respective primary societies. It follows that the Commissioner’s directive purporting to remove them from office, issued without convening a general meeting or securing the requisite two-thirds majority vote against the exparte applicants, therefore contrary to the mandatory procedure set out in Rule 23(3) and reinforces the finding that the impugned action was ultra vires and procedurally improper.
148. In *Republic v Commissioner for Co-operative Development & 3 others Ex-Parte Kennedy Masese Omwancha & 7 others* [2021] KEHC 3485, the Court emphasized that all administrative decisions must satisfy Article 47 of *the Constitution* and the *Fair Administrative Action Act*, adhering to principles of legality, rationality, and procedural propriety.
149. The Court in *Mandu, Chairman Mumias Cane Farmers Cooperative Union v Washiali & another* [2025] KEHC 2554 (KLR) further affirmed that Section 28(6) of the Cooperative *Societies Act* imposes individual liability and as such it requires specific findings of fault grounded in evidence.
150. This Court is aware that the election of each of the board members of the primary Saccos may be revoked in the given circumstances including at the AGM or ADMs held annually and that some of the exparte applicants may not have been reelected subsequent to the directive by the Commissioner as impugned herein, noting that the Annual Meetings take place during the first four months of the year as stipulated in section 27(2) of the Cooperative *Societies Act*.



151. However, in the present case, no evidence has been shown that the Ex parte Applicants were lawfully disqualified from being officials or being elected as officials of their primary saccos in accordance with a procedurally fair inquiry or audit. The blanket directive issued by the Commissioner therefore exceeded the scope of his statutory powers.
152. This Court accordingly finds that the action of the Commissioner in purporting to remove the Ex parte Applicants from their positions in their primary co-operative societies was ultra vires, procedurally irregular, and not supported by any of the cited legal provisions.
153. The Court finds that while the Commissioner may, pursuant to Section 28(7) of the *Co-operative Societies Act*, disqualify individuals from holding office if they are charged in a court of law with an offence involving fraud or dishonesty, such disqualification must be based on a procedurally fair process grounded in law.
154. Importantly, Section 3(3) of the Act only mandates the Commissioner to regulate co-operative societies, and Section 93A(d) empowers the Cabinet Secretary to issue governance guidelines. Neither of these provisions authorizes the unilateral removal of elected officials from their positions in the primary societies.
155. Therefore, unless it is demonstrated that the Ex parte Applicants were lawfully and procedurally disqualified following a valid inquiry or audit process, the Commissioner's action in purporting to remove them from their positions in their primary co-operative societies is ultra vires, irregular, and cannot be justified under Sections 3(3), 93A(d), or Rule 54.

Whether the Commissioner's actions violated the Ex parte Applicants' right to fair administrative action under Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*

156. On the alleged violation of the exparte applicants' right to Fair Administrative Action, Article 47 of *the Constitution* and Section 4(3) of the *Fair Administrative Action Act*. These provisions guarantee every person the right to be given written reasons and to be heard before an adverse administrative action is taken.
157. The Respondents did not provide any evidence of notice given to the Applicants, nor is there evidence that the exparte Applicants were afforded a meaningful opportunity to know, contest, or respond to the allegations forming the basis of the impugned decision. It has not been contended by the 1st Respondent that the Ex parte Applicants' assertion that the audit was not shared with them is false.
158. Neither was that audit report filed in this court or supplied to the exparte applicants during the hearing of these proceedings. The implementation of the decision, through letters addressed to the Chief Executive Officers of Saccos, left no room for due process.
159. The Applicants had legitimate expectations to be treated fairly in accordance with the Act and their respective primary societies' constitutions and by laws. The Commissioner's actions, while perhaps motivated by the gravity of the apparent financial mismanagement of KUSCCO, and which cannot be taken lightly as members; funds are said to have been lost during the tenure of the exparte applicants as Board members, and which loss was still being investigated to establish who was culpable, could not lawfully override constitutional safeguards on the right to a fair hearing under Articles 50(1) and Fair Administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under Article 47 and which demands that (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



160. The Ex parte Applicants have also urged that some of the former KUSSCO Board members were retained and appointed to serve on the interim Board established by the 1st Respondent. This act may have been necessary, yes, but it raises concerns as to the consistency and objectivity of the decision to remove the Ex parte Applicants from their positions in the primary co-operative societies. In other words, what yardstick was used to determine who was to remain and who was to be shown the door, noting that the Commissioner of Cooperatives has a permanent representative in KUSCOO as a Board member.
161. If the rationale for their removal was to facilitate a clean break from the past management for purposes of audit and recovery, then the selective retention of other former officials appears contradictory. Such inconsistency, in the absence of a clear and reasoned basis, undermines the credibility of the process and reinforces the Ex parte Applicants' claim that the impugned decisions were arbitrary and procedurally unfair, noting that the 1st respondent has a standing representative from his office sitting on the KUSCCO Board and whether that representative was to cease being his representative is not clear.
162. It has also been argued by the 13th Respondent that since some of the Saccos already implemented the directive and held new elections, the application has been overtaken by events. The court respectfully disagrees. Judicial review is concerned not merely with consequences but with legality and procedural propriety of the impugned decisions. The law does not condone an unlawful action merely because it has been acted upon. The remedy of certiorari remains available to quash decisions made without lawful authority or in breach of natural justice.

Whether the Ex parte Applicants are entitled to the judicial review remedies sought

163. The 13th Respondent has also contended that the Applicants failed to comply with Rule 11 of the Fair Administrative Action (Judicial Review Procedure) Rules, 2021, by filing the proceedings through a Notice of Motion instead of an Originating Motion.
164. However, the record reflects that the application was brought under Order 53 of the Civil Procedure Rules and Section 8 and 9 of the *Law Reform Act*. The Applicants duly sought and obtained leave prior to filing the substantive Motion, thereby complying with the procedural requirements under the said provisions.
165. In any event, it is now well established that where judicial review proceedings are commenced under Order 53, the Fair Administrative Action Rules do not override or displace the procedure set out in the Civil Procedure Rules and the *Law Reform Act*, which remain valid avenues for seeking judicial review reliefs. This position is fortified by section 12 of the *Fair Administrative Action Act* which stipulates as follows:
12. Principles of common law and rules of natural justice
This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.
166. The objection by the 13th Respondent is therefore without merit.
167. In the end, the Court finds that the Commissioner acted beyond the scope of his lawful authority in purporting to unilaterally remove the Ex parte Applicants from office across multiple primary societies without following due process. The decision was not only ultra vires but also procedurally deficient and in violation of constitutional and statutory safeguards



168. For the foregoing reasons, I find that the decision of the Commissioner of Cooperatives dated 17th December 2024 purporting to bar the Ex parte Applicants from holding office in their primary Saccos was ultra vires the *Co-operative Societies Act* and violated the Ex parte Applicants' right to a fair hearing and fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair, as guaranteed under Article 47 of *the Constitution*.
169. Accordingly, an order of certiorari is hereby issued removing into this court for purposes of quashing this court hereby quashed the decision of the 1st Respondent dated 17th December 2024 directing that the Ex parte Applicants cease being officials of their respective primary co-operative societies.
170. For the avoidance of doubt, the effect of the order of certiorari issued herein is to quash the impugned directive issued by the 1st Respondent insofar as it purported to remove the Ex parte Applicants from office in their respective primary co-operative societies and not from being Board members of KUSCCO, the Union for SACCOS, as the applicants did not contest their removal from the Union as Board members.
171. Further, therefore, nothing in this judgment shall be construed as reinstating the Ex parte Applicants to office, noting that their positions are elective and not appointive. The effect of certiorari is limited to quashing the impugned directive, noting that leadership in the respective primary Saccos is elective by members at the annual delegates or member's meetings and therefore any subsequent actions by the respective societies must comply with the applicable law.
172. The legal foundation for those removals by the 1st respondent is therefore rendered null and void ab initio. However, this Court has not been called upon to determine the legality or validity of any subsequent elections or appointments made by the affected societies following the said directive and no specific relief has been sought in that regard.
173. Accordingly, it shall be open to the respective societies to take such lawful steps as may be necessary to regularize their governance structures in accordance with their bylaws and the applicable legal framework, including the *Co-operative Societies Act*.
174. The Court reiterates that any future action affecting the rights of officials must comply with the principles of fair administrative action as enshrined in Article 47 of *the Constitution* and the *Fair Administrative Action Act*.
175. In addition to the Order of Certiorari, the Court finds it appropriate to issue an Order of Prohibition to forestall any further unlawful interference by the 1st Respondent with the governance structures of primary co-operative societies, in the absence of lawful procedures and statutory authority.
176. Accordingly, an order of prohibition is hereby issued restraining the 1st Respondent from unilaterally barring or purporting to remove the Ex parte Applicants or any other duly elected officials from holding office in their respective primary co-operative societies, except in accordance with the *Co-operative Societies Act*, the respective societies' bylaws and the principles of fair administrative action as espoused under Article 47 of *the Constitution*.
177. Each party shall bear its own costs.
178. This file is closed.
179. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2025

R.E. ABURILI



JUDGE

