Case Number:	Application 11 of 2020
Date Delivered:	04 Feb 2022
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Jairus Ngaah
Citation:	Republic v Commissioner for Co-operatives Development & 5 others Ex parte Simon Gathogo [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Applicant's chamber summons dismissed with costs
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

APPLICATION NO. 11 OF 2020

SIMON GATHOGO.....APPLICANT

-VERSUS-

THE COMMISSIONER FOR CO-OPERATIVES DEVELOPMENT.....1ST RESPONDENT

NAIROBI CTY COUNTY.....2ND RESPONDENT

VITALIS P. LUKIRI.....3RD RESPONDENT

AFYA SACCO LIMITED.....4TH RESPONDENT

THE CO-OPERATIVE TRIBUNAL.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

On 10 January 2020, Geoffrey N. Nang'ombe, the Acting Commissioner for Co-operatives Development wrote to the applicant informing him that he was illegally in office as the vice-chairman of a Afya Sacco Society Limited.

The illegality, according to Nang'ombe, arose from a decision made in the Co-operative Tribunal Case No. 157 of 2006 delivered on 16 November 2009 that declared that the applicant unfit to hold office. The decision is said to have been upheld by this Honourable Court in Civil Appeal No. 625 of 2009.

The applicant was thus removed office with effect from 10 January 2020.

It is Nang'ombe's letter that has provoked the present application according to which the applicant has sought leave to institute a substantive motion for, *inter alia*, an order of certiorari to quash the impugned the letter and also an order of prohibition prohibiting the County Director of Cooperatives in Nairobi from convening a board meeting for purposes of reconstituting the office of Afya Sacco Society Limited.

The chamber summons is stated to be based on Articles 22(1), 23(1), 23(f), 47, 50(2), 165(3) and (6) of the Constitution and section 8 and 9 of the Law Reform Act, cap. 26 and also section 4 (3) of the Fair Administrative Action Act, 2015. The applicant has also invoked Order 53of the Civil Procedure Rules.

When the applicant first appeared before Nyamweya, J. (as she then was), he was directed to serve the application for *inter parte*

hearing. The application was served and in response to the application the 2nd respondent filed a preliminary objection dated 29th of January 2020 to the effect that this honourable court lacks the necessary jurisdiction to handle the dispute by dint of section 28. (4) (m) and 93A.(d) of the Co-operative Societies Act, cap. 490. Those two provisions read as follows:

28. (4) (m). No person shall be a member of a committee if he has been convicted of an offence under this Act or rules made thereunder.

93A(d). Without prejudice to any other powers under this Act, the Commissioner may exercise such other powers consistent with this Act as may be prescribed.

There is no proof that the applicant has been convicted of an offence under the Act; at least none has been presented before me. Again, there is nothing in section 93A (d) that suggests that the exercise of the Commissioner's powers under the Act is not subject to the scrutiny of the Honourable Court.

The only pertinent provision on the question of jurisdiction is section 76 of the of the Co-operatives Societies Act which states as follows:

76. Disputes

(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.

The tribunal referred to in this section is the co-operative tribunal established under section 77 of the Act.

Section 76 (1) (b) would be more pertinent to the question at hand and, in this regard, to the extent that the applicant has sued the society on the reconstitution of its committee, it is my humble opinion that the dispute ought to have first been referred to the tribunal under section 76 (1) of the Act.

The applicant has not given reason why he chose to overlook the procedure expressly provided by statute and invoke the judicial review jurisdiction of this Honourable Court instead.

It is trite that where there is an alternative remedy provided by an Act of Parliament which is as effective in resolution of a dispute, the court ought to ensure that the dispute is resolved in accordance with the relevant statute. This was so held in **National Assembly vs. Karume Civil Application No. Nai. 92 of 199 where the Court of Appeal said as follows:**

"In our view, there is considerable merit in the submissions 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

I note that the applicant has invoked the Fair Administrative Action Act in his application; one of the provisions in that Act that would be relevant to the issue at hand is section 9 (2) which states as follows:

9. (2) 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.

Both the decision of the Court of Appeal in the National Assembly case (supra) and section 9 (2) of the Fair Administrative Action Act point to the principal that judicial review should only be invoked as a last resort in resolution of disputes and where there is a procedure that is equally effective and convenient that procedure should be first exhausted.

In the application before court, it has not been demonstrated that the prescribed procedure would not be as effective or convenient as the judicial review one. Neither has it been demonstrated that the remedies available in the prescribed procedure are not as effective.

For the foregoing reasons, I see no reason why leave should be granted. The applicant's chamber summons dated 20 January 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED ON 4TH FEBRUARY, 2022

NGAAH JAIRUS

JUDGE