THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. CIVIL APPLICATION NO. 31 OF 2020

(Originating from Misc. Application No. 07 of 2020, in the High Court of Tanzania, at Iringa).

BETWEEN

1. ANDREW MICHAEL ULUNGI.....1ST APPLICANT

2. HENDRICK SOLOMON LUPEMBE.....2ND APPLICANT

VERSUS

1. THE REGISTRAR OF COOPERATIVES.....1ST RESPONDENT

2. THE ACTING ASSISTANT REGIONAL

REGISTRAR OF COOPERATIVES

NJOMBE REGION.....2ND RESPONDENT

3. THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

05th May & 26th July, 2022.

UTAMWA, J

This is an application for leave to appeal to the Court of Appeal of Tanzania (The CAT). The applicants, ANDREW MICHAEL ULUNGI and HENRICK SOLOMON LUPEMBE (first and second applicants respectively)

preferred the instant application under Section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (The AJA) and rules 45(a) and 47 of the Court of Appeal Rules, 2009, GN. 368 of 2009 as amended by GNs. No. 362 of 2017 and No. 344 of 2019 and any other enabling provisions of the law.

The applicant intends to appeal to the CAT against part of the decision of this court (Matogolo, J.) dated 27th day of August, 2020 (the impugned ruling) in Misc. Application No. 7 of 2020. That application was struck out, henceforth referred to (in some instances) as the struck-out application. The applicants are also seeking for costs to be provided and for any other order or relief this court may deem just and fair to grant. The application was supported by an affidavit sworn by Dr. Rugemeleza Albert Kamuhabwa Nshala, the applicants' counsel.

Briefly, the reasons for the application according to the affidavit are that, the applicants had filed their application for leave to file an application for Judicial Review in this court, i.e. leave for seeking prerogative orders against the respondents. This followed their suspension from the membership of the Board of Lupembe Farmers' Cooperative Joint Enterprises Limited (The Board) vide respective letters dated 26th February, 2020 written by first respondent. They thus, intended to challenge *inter alia*, the decision of the first respondent and the appointment of the second respondent as the Acting Assistant Regional Registrar of Cooperatives, Njombe Region. They also intended to seek orders that would stop the respondents from jeopardizing the hearing of the Appeal No. 64 of 2016 pending before the CAT. Their application however encountered a

preliminary objection (PO) from the respondents. The same was based on two limbs; namely that, the applicants had not exhausted the available means of redress, hence contravened section 7(2) of the Third Schedule of the Cooperative Societies Act, No. 6 of 2013 (henceforth the CSA). The second limb was that, the applicants' affidavits were incurably defective for containing argumentative and extraneous matters.

The affidavit further stated that, this court, in the struck-out application, and through the impugned ruling, upheld the first limb of the PO and overruled the second one though it held that some paragraphs of the applicant's affidavits were argumentative and contained legal arguments. This court thus, struck out the said application with costs. The applicants were dissatisfied by the impugned ruling and its subsequent drawn order. This was because, they (applicants) had clearly stated that, the first respondent's decision was not appealable to the Tanzania Cooperative Development Commission (The Commission) mentioned under the above cited provisions of the CSA. They had also stated that, the affidavit was neither argumentative nor contained legal arguments.

It is also in the affidavit supporting the present application that, the applicant intend to appeal against the impugned ruling to the CAT on the following grounds:

i. That, there were no available remedies that the appellants could have firstly exhausted since they were purportedly suspended by the first respondent without authority.

ii. That, the trial Judge decided on issues that could only be disposed of in the main application (for judicial review) and not during the course of seeking the leave to apply for it (the judicial review).

The affidavit supporting the present application also deponed that, the applicant filed the notice of appeal against the impugned ruling on the 10th September, 2020. It also stated that, in order for the applicant to appeal to the CA on an application that was not determined on merit by this court, leave of this same court must be sought and obtained, hence this application.

The respondents on the other hand, i. e THE REGISTRAR OF COOPERATIVES, THE ACTING ASSISTANT REGIONAL REGISTRAR OF COOPERATIVES NJOMBE REGION and THE ATTORNEY GENERAL (The first, second and third respondents respectively) objected the present application through a joint counter affidavit. The same was sworn by Mr. Francis Rogers, Senior State Attorney for the respondents. The counter affidavit did not dispute the background of the matter at hand. However, it disputed the fact that the impugned ruling affects the pending appeal before the CAT. This is because, the same is a different matter from the matter related to the impugned ruling. The counter affidavit also resisted the fact that the decision by first respondent was not appealable to the Commission. It further stated that, the impugned ruling was legally correct. The granting of the leave to appeal to the CAT sought in the present ruling is subject to law. The counter affidavit also refuted all other facts save for those expressly admitted above.

During the hearing of the application, the applicants were represented by Dr. Rugemeleza Nshala learned counsel whereas the respondents were represented by Mr. Bryson Ngulo, learned State Attorney. Parties argued the application by way of written submissions.

In his written submissions, the applicant's counsel adopted the affidavit supporting the application at hand and made further submissions. He started with the issue on the availability of another remedy under the above cited provisions of the CSA. He argued that, a remedy is available under section 7(1) [and not section 7(2)] of the Law cited above to a member of the Board who has been removed from the Board. It not available to the one who has been suspended. The learned Judge thus, erred in hold that there was a remedy to the applicants basing on the case of **Parin A. A. Jaffer and Another v. Abdulrasul Ahmed Jaffer and 2 Others (1996) TLR 110.**

Basing on the Black's Law Dictionary, Sixth edition, (Centennial Edition) (1891-1991) the applicant's counsel contended that, the meaning of the term "suspension" includes the following: to cause or to cease for a time or to stay, delay or hinder, to discontinue temporarily, but with an expectation or purpose of resumption. The term "removal from office," he argued, means *inter alia*, deprivation of office by act of competent superior officer within scope of authority. "Suspension" is also a temporary forced removal from the exercise of office while "removal" is dismissal from office. He further argued that, it is therefore, necessary for this court to grant the leave to appeal to the CAT so that it can consider the matter.

It was also the contention by the learned counsel for the applicants that, it was not proper for the learned Judge to label the applicants' application before him as a forum shopping, hence the need for the CAT to interfere so as to pronounce if that labelling was proper under the circumstances of the case.

The learned counsel for the applicant further contended that, it was wrong for the learned Judge to strike out some paragraphs in the first and second appellant's respective affidavits for being argumentative. He mentioned paragraphs 12, 16 and 17 for the first applicant's affidavit and paragraphs 11 and 12 for the second applicant as examples of the paragraphs concerned. He additionally contended that, such paragraphs were in fact factual and not argumentative.

Another argument by the applicant's counsel was that, in law a court grants leave to appeal to the CAT by exercising its discretion judicially and where the intended grounds of appeal raise issues of general importance or a novel point of law or a prima-facie arguable appeal. He supported this contention by citing the cases of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004** (unreported) and **Harban Haji Mosi and another v. Omar Hilal Seif and another, Civil Reference No. 19 of 1997, CAT** (unreported). He further supported his client's case by citing the decision of the CAT in the case of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority, Civil Application No. 154 of 2016 CAT** (Unreported). He added that, in that case it was also held that, in granting leave, the intended grounds of appeal should merit a serious judicial consideration by

the CAT. This is intended to spare the CAT from wasting its precious time on unmerited matters.

It was also the contention by the applicant's counsel that, in applications of this nature it matters not whether the complaints are genuine or not, that is a matter to be determined by the CAT. He cemented this point by the decision of the CAT in the case of **East Africa Development Bank v. Blueline Enterprises Limited, Civil Application No. 30 of 2007, CAT** (Unreported).

The applicants' counsel finally argued that, the application at hand fits into the tests set by the CAT precedents cited above. It is more so because, the learned Judge in making the impugned ruling also considered matters which could be determined in the intended application for prerogative orders. The same thus, needs the consideration of the CAT on appeal.

In the replying written submissions, the learned State Attorney for the respondents adopted the contents of the counter affidavit. He did not dispute the stance of the law as highlighted by the learned counsel for the applicants. He however, argued that, the application at hand is incompetent and unmerited.

As to the incompetence and jurisdictional issues regarding this application the learned State Attorney contended that, he had a duty to raise the points. He added that, this court lacks jurisdiction to entertain the present application because, the struck-out application was a mere academic exercise for the applicants had not exhausted remedies available

under paragraph 7(2) of the CSA. These provisions provide for a remedy to any aggrieved member of the Board to appeal to the Commission for challenging the removal of the Board. The court thus, also lacked the jurisdiction to entertain the struck out application. It could have the requisite jurisdiction only when the applicants had remained unsatisfied upon the Commission deciding their appeal.

The learned State Attorney further supported his above contentions by the case of **Tanzania Post Corporation v. Dominica A. Kalangi, Civil Appeal No. 12 of 2022, CAT** (Unreported). He submitted that, in that precedent, the applicant was terminated from his services. Instead of appealing to the Public Service Commission (PSC) as per requirement of the law, he resorted to the Commission for Mediation and Arbitration (The CMA). The CAT in that precedent held that, the CMA had no jurisdiction to entertain the matter. The applicant could resort to the PSC, and then to the President before he could properly approach the High Court of Tanzania (HCT) by way of judicial review. He additionally argued that, an issue of jurisdiction is fundamental and can be raised at any stage of the proceedings as held by the CAT in the case of **Fanuel Mantiri Ng'unda v. Helman Mantiri Ng'unda [1975] TLR 155.**

The learned State Attorney further contended that, the impugned ruling did not dismiss the said application No. 7 of 2020, but merely struck it out. It did not thus, finally determine the matter, hence unappeasable. Granting leave to the applicant (in the application at hand) to appeal to the CAT is not thus, allowable and will amount to abuse of court process. He added that, the application at hand is therefore, bad in law for

contravening section 5(2)(d) of the AJA. These provisions prohibit appeals or revisions to the CAT against orders arising from preliminary objections or interlocutory proceedings unless they have the effect of finally determining a criminal charge or suit. He further contended that, the spirit of these provisions were underscored by the CAT in the case of **Prime Catch (Exports) Limited and 5 others v. Diamond Trust Bank Tanzania Ltd, Civil Application No. 296/16 of 2017, CAT** (Unreported).

Owing to the above grounds, the learned State Attorney argued that, the application at hand is incompetent and this court lacks jurisdiction to entertain it. It has thus, to dismiss it.

It was also the submissions by the State Attorney that, without prejudice to the above arguments (on incompetence and jurisdiction), if the applicants were aggrieved by the decision of the second respondent, they had to appealed to the Commission under paragraph 7(2) of the Third Schedule to the CSA. The impugned ruling was thus, legally justified, hence there is nothing that merits the applicants to appeal to the CAT.

In another contention, the learned State Attorney charged that, the applicants were suspended pending investigation. The said investigation was latter completed and the applicants were formally removed from the Board. The suspension thus, ceased to exist, hence the justification for them to appeal to the Commission under paragraph 7(2) of the law cited earlier.

Restating the law on leave to appeal, the learned State Attorney argued that, leave to appeal is granted when the applicant has demonstrate that the proposed appeal raises contentious issues. Such issues have to be worth taking to the CAT or of public importance, or serious or related to misdirection or non-direction likely to result in a failure of justice. In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious. It cannot look at or decide either way on the merits or otherwise of the proposed grounds of appeal. In supporting his legal stance the learned State Attorney cited decisions of this court in the cases of **Atupakiswe Mwakikuti v. Sekela Mwakikuti and another, HCT at Mbeya** (Unreported) and **Citibank Tanzania Limited v. Tanzania Telecommunications Company Ltd and 5 others, HCT (Commercial Division), Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam** (unreported). He further cited the case of **Sango Bay Estates Ltd and another v. Dresdner Bank [1971] EA. 17 (2)** which held that, leave to appeal is granted where prima-facie, it appears that there are grounds of appeal which merit serious judicial consideration.

The learned State Attorney further referred this court to the case of **Saidi Ramadhani Mnyanga v. Abdallah Salehe [1996] TLR. 74** in which he argued, it was held that, leave to appeal is granted where the application demonstrates that there are serious and contentious issues of the law or fact for consideration by the CAT.

The learned State Attorney concluded that, for the above reasons, the present application does not meet the test for granting it. It must thus, be dismissed and costs be in the course.

In his rejoinder submissions, the learned counsel for the applicants reiterated his submissions in chief and concurred with the learned State Attorney on the stance of the law governing leave to appeal to the CAT. Nonetheless, he disputed other submissions. He argued that, jurisdiction of a court is not inferred. In deciding the impugned ruling therefore, the learned Judge wrongly held that there were implied provisions of law that ousted his jurisdiction to try the application that was before him. He also wrongly based on paragraph 7(2) of the above cited law. Again, since the learned Judge did not address himself to the difference between the terms "suspension" and "removal" the need for seeking the interpretation by the court is necessary. He therefore, urged this court to discard the issue of jurisdiction raised by the learned State Attorney.

In his further submissions, the learned counsel for the applicants distinguished the **Tanzania Post case** (supra) cited by the learned State Attorney from the present case. The grounds for distinguishing it were that, in that case the applicants were civil servants which is not the case in the matter at hand. He further argued that, in the case at hand, the applicants were suspended and not removed. The CSA thus, does not provide for their remedy in the matter under discussion.

The learned counsel for the applicants further contended that, the respondent could not raise the issue of jurisdiction at this stage since it is

disputed by the parties and the applicants are now intending to appeal to the CAT against the impugned ruling which held that this court lacked jurisdiction. He added that, the learned State Attorney could also not raise the issue of incompetence of this application for contravening section 5(2)(d) of the AJA. This is because, the impugned ruling was final since it left no case pending in this court. The applicants thus, have two options, to wit; appealing against it or following it. Even the **Prime Catch case** (supra) supported the position that where an order has the effect of finally determining the matter, it can be challenged by appeal or revision.

To further support his above contention, the learned counsel for the applicants contended that, in law, where an application for leave to appeal to the CAT is withheld by this court, and there is no opportunity for a second bite to the CAT itself, the applicant is entitled to apply for leave to appeal to the CAT. He cemented the position by citing decisions of CAT in the cases of **Mustafa Athuman Nyoni v. Issa Athuman Nyoni (As a legal representative of the estate of the late Issa Athuman Nyoni), Civil Appeal No. 322/10 of 2022** (unreported) and **Yusuph Juma Risasi v. Anderson Julius Bicha, Civil Appeal No. 233 of 2018, CAT at Tabora** (Unreported).

The applicants' counsel further contended that, it was improper for the learned State Attorney to argue that after the suspension, the applicants were ultimately removed from the Board upon the completion of the investigation. This fact is not in the counter affidavit and was not in the applicants' affidavits. It is thus, stated from the bar which is improper. At all the material time the issue has been suspension and not removal. He

added that, the application at hand is not an illusion as contended by the learned State Attorney, but it raises serious issues fit to be considered by the CAT. He thus, insisted his prayer for leave to appeal to the CAT to be granted.

I have considered the chamber application, the affidavit supporting it, the counter affidavit, the submissions by the parties and the law. In my view, the issues related to incompetence and jurisdiction raised by the learned State Attorney for the respondents deserve to be resolved first. This is because, they have colours of a PO though in arguing them, he seemed to mix matters related to the struck-out application and the present application. Whichever the case, I agree with the learned counsel for the applicants that, though in law, such issues of incompetence or jurisdiction can be raised at any stage of the proceedings for being fundamental, the circumstances of the case at hand precluded the learned State Attorney for the respondent from raising such issues at this stage of hearing of the present application. This view is supported by the following reasons:

In the first place, since the learned Judge in deciding the struck-out application through the impugned ruling based mainly on the reason that the applicants had not exhausted the remedies under the CSA, and since the applicants were dissatisfied by that ruling and intend to test it before the CAT, the respondent could not raise such issues. This is because, as rightly put by the learned counsel for the applicants, the issues he (State Attorney) raised are related to the subject matter which is in squabble

between the parties and for which the applicants intend to draw the attention of the CAT through the intended appeal.

The learned counsel could not also raise the issues against the present application because, this is only an application for leave which is an enabler of the applicants' process of appealing to the CAT against the impugned ruling as necessitated by the law. It is also common ground that this court has the requisite jurisdiction to entertain applications for leave to appeal to the CAT. It follows thus, that, the contentions by the learned State Attorney against the struck-out application will not affect the competence of the application at hand and the jurisdiction of this court to entertain it.

Regarding the State Attorney's contention that the present application contravenes section 5(2)(d) of the AJA since the impugned ruling resulted from a preliminary objection, the applicant's counsel argued that it is also not forceful. I in fact, I agree with the learned counsel for the applicants that, upon the impugned ruling striking out the application, no case remained before this court in relation to the reliefs sought by the applicants in that application. As rightly contended by the learned counsel for the applicants, upon such ruling being pronounced, the applicant had two options, to wit; to comply with it or to challenge it through legally recognized means. They chose to challenge it by way of an appeal to the CAT. This is because, they believed that there is no any other remedy apart from judicial review, hence the present application for leave to appeal. This kind of the order is not thus, among the orders against which the law restricts appeals or revisions under section 5(2)(d) of the AJA.

Besides, the learned State Attorney could not raise a PO against the application at hand on ground that the impugned ruling was an interlocutory order or a non-appealable order by virtue of section 5(2)(d) of the AJA since this fact is disputed by the parties. In law, a PO must be based on *inter alia*, a fact pleaded and not disputed by both sides of the case; see the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E. A. 701.**

It follows thus, that, upholding the points raised by the learned State Attorney in a fashion of a PO will amount to pre-empting the hearing of the present application. This will also amount to impeding the applicants' fundamental rights of access to justice and the right to be heard. Ultimately, this court will have violated the principles of Natural Justice and will have denied the applicants' right to fair trial as far as the application at hand is concerned. The Principles of Natural Justice, the right of access to justice and fair trial are fundamental and well enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 under the umbrella of the right of fair hearing. This right is very significant for the administration of justice in both civil and criminal proceedings. The CAT described the right to fair trial as one of the cornerstones of any just society and an important aspect of the right which enables effective functioning of the administration of justice; see the case of **Kabula d/o Luhende v. Republic, Criminal Appeal No. 281 of 2014, CAT, at Tabora** (unreported). The right to fair trial cannot thus, be easily violated by any court or institution charged with judicial duties like the court I am currently presiding over.

Owing to the above reasons, I overrule the issues on incompetence and jurisdiction raised by the learned State Attorney. I will therefore, proceed to examine the present application on merits.

Regarding the merits of the application at hand, I am of the settled views that, the background of the matter at hand is not disputed. The stance of the law on leave to appeal to the CAT as highlighted by both sides is also not an issue here, and I promptly agree with them on that aspect. Again, according to the record, especially the impugned ruling, it is my conviction as I hinted earlier that, the Application No. 7 of 2020 was struck out mainly for the reason that the applicants had not exhausted the available remedies before they could resort to seeking leave to apply for judicial review. This followed the learned Judges finding in upholding the first limb of the PO that had been raised by the respondents. This step is evidenced at the last page (page 21) of the printed version of the impugned ruling. In that page, the learned Judge held thus, and I quote him for a readymade reference:

> "But, as I have pointed above regarding the first point of objection which was upheld, this application is incompetent before this court for being filed to this court without first exhausting available remedy, the same is hereby struck out with costs."

It is therefore, very apparent that, the other findings of the learned Judge were made by passing and did not form the basis of his decision in striking out the Application No. 7 of 2020 (for leave to apply for judicial review). In considering the application at hand therefore, this court will mainly focus on the above major reason on which the impugned ruling was pegged.

The major issue for determination in the present application is therefore, *whether under the prevailing circumstances this is a fit case for this court to grant leave to appeal to the CAT.* In my settled opinion, since I have found above that the impugned ruling was mainly based on the reason that the applicants had another remedy before resorting to the process of judicial review by applying for the leave to do so, then the circumstances of the case attract answering the major issue negatively. The reasons for this view are as shown below.

In the first place, the law clearly provides that, a parson who has not exhausted other legal remedies cannot resort to judicial review; see the holding by this court (Mwipopo, J.) in the case of **Julius Burchard Rweyongeza v. University of Dar Es Salaam & 2 Others, Revision No. 136 of 2020, HCT, at Dar es Salaam** (unreported) following many other decisions. Indeed, the **Julius Case** (at page 7), the **Parin Case** (supra, at page 116) decided by this court (Mapigano, J. as he then was) and the case of **Day and Night Pharmacy Ltd v. Tanzania Sewing Machine Company Limited (2001) TLR 300** (Msoffe, J. as he then was) also underscored the general rule that, where the Law provides for an extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should be exhausted before recourse is had to the judicial process. In the **Day and Night Case** (supra) this court specifically added that, where the legislature has established a special forum for dealing with a specific matter, the Civil courts will not normally entertain the matter unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum. The learned Judge

therefore, upheld the PO that had been raised and struck out the suit that was before him erroneously.

In fact, even the parties to this matter are not essentially in dispute on the position of the law just highlighted above. Their major squabble revolves around the question of whether the applicants actually have another legal remedy apart from judicial review as observed previously.

The pertinent sub-issue here is thus, *whether in the matter at hand the law provides to the applicants for other legal remedies for their grievances apart from Judicial Review.* As observed earlier, the learned Judge held this issue affirmatively in upholding the PO that had been raised by the respondents. He specifically held that, the remedy lies in paragraph 7(2) of the 3rd Schedule to the CSA.

In testing the sub-issue posed above, I am of the settled opinion that, the spark of the squabble between the parties, was constituted by the respective letters authored by the first respondent and addressed to the two applicants showing that they had been suspended from membership of the Board (and for the first applicant, also from being Chairman of the Board). The contents of the letters couched in the National Language of Kiswahili, basically showed that, there had been some suspicions against them upon the auditing which had been made, the reports of which was read before the special general meeting of the Lupembe Farmers' Cooperative Joint Enterprises Ltd (The Cooperative Society). The letters further informed the applicants that, the first respondent, under paragraph 7(2) of Third Schedule to the CSA had powers to remove them from the

membership of the Board. However, for purposes of giving them the right to be heard and give their respective defences as per paragraph 6 of the same Schedule, they had been suspended from the date of the letters (26th February, 2020) to give room for investigations and other steps.

Now, to answer the sub-issue posed above, one cannot avoid considering the contents of the letters at issue and the, law especially the CSA. In my further view, the most pertinent provisions of the law are the above mentioned paragraphs 6 and 7(1) and (2) of the Third Schedule to the CSA together with other provisions which have to be read together with them. I quote paragraph 6, 7(1) and (2) verbatim for the sake of a readymade reference:

> **"6**. (1) Where the Registrar after giving consideration to the inspection and audit report or after giving an order under section 57 is of the opinion that the Board of a registered society is not performing its duties properly he shall cause to be held a special general meeting by notice in writing and advise it as appropriate
>
> (2) Where the special general meeting resolves to suspend members of the Board, it shall-
>
> (a) elect a caretaker Board from amongst the delegates to administer the affairs of the society;
>
> (b) require the suspended members to state their objections if any in writing jointly and severally in the next general meeting.
>
> (3) Where after giving an opportunity to the Board to state its objections, if any, of its suspension in the general meeting and the latter disapproves the objections, then a new Board shall be elected to that effect by the general meeting
>
> (4) Subject to subparagraph (1), where the special general meeting resolves to disagree with the advise of the Registrar on financial malpractices the effect of which the society is rendered unable to settle its liabilities, the members shall be liable for the payment of the debts.
>
> **7.** (1) -Subject to the provisions of paragraph 6, where the Registrar is satisfied that it is in the interest of the members, he shall remove the

> Board and appoint a care taker Board which shall have the duty to manage the affairs of a registered society and to comply with the directions which the special general meeting may give and the appointed caretaker Board shall serve for the period of not exceeding one year.
>
> (2) Where the Registrar removes the Board under subparagraph (1), the member of the Board so removed may appeal to the Commission and the decision of the Commission shall be final."

Now, in the matter under consideration, the letters at issue showed clearly that the suspension was according to paragraph 6. This paragraph provides for circumstances under which a Board member can be suspended. Paragraph 6(2)(b) provides for an opportunity to a suspended member to make objections in writing to the next general meeting against the suspension. According to paragraph 6(3) where the objection is not sustained, a new Board shall be elected by the general meeting. Moreover, paragraph 7(1) gives powers to the first respondent to remove the board, but subject to the provisions of paragraph 6. Then comes paragraph 7(2) which provides for an appellate process of appeal by a removed member of the Board to the Commission against the removal made under paragraph 7(1).

In my settled opinion therefore, much as I appreciate the dissimilarity between the terms "suspension" and "removal" as highlighted by the learned counsel for the applicants, the anatomy of the above quoted provisions of the law shows that, the law makers intended to establish a special process for managing non-performing members of the Board. The process includes the following chronological steps: Firstly, an auditing or inspection is made upon being prompted by the first respondent, then if need arises, the first respondent will cause a special general meeting of a

registered society to be held, the general meeting may resolve to suspend a member of the Board, the suspended member may lodge his/her objection, if the objection is not sustained a new Board is elected, the first respondent may however, remove the suspended member, such removed member may then appeal to the commission against such removal.

Now, on the face of the letters at issue, they only informed the applicants that they had been suspended under paragraph 6 of the Third Schedule to the CSA. Indeed, the learned counsel for the applicants in some instances of his arguments tried to argue that the first respondent did not have powers to suspend the applicants, but the generality of the contents of the letters do not show that it was the first respondent himself who had suspended them. The letters clearly informed them that they had been suspended under paragraph 6. The letters also showed that, the suspension was for purposes of giving room for investigations and other steps to see if he (first respondent) could exercise his powers of removing them under paragraph 7(2).

It follows thus that, owing the above reasons, the process set by the law for dealing with non-performing members of a Board of a registered society, starts with the auditing or inspection [as per paragraph 6(1)] and ends with a removal under paragraph 7(1). The remedy for that removal certainly lies to the Commission as per paragraph 7(2) as hinted earlier. Nonetheless, the law also provides for a remedy against a suspension before the removal is effected as shown above.

Due to the above reasons, it cannot be argued that the applicants had no remedy for their suspension or the removal if it could be effect. Only that, they pre-maturely run to this court before the process explained above was completed. In fact, had the process been completed and had the first respondent removed them, their remedy could be available under paragraph 7(2) by appealing to the Commission. Nonetheless, since they intended to react against the suspension only without waiting for the ultimate result of the process, they could not argue that they had no other remedy under paragraph 7(2). Besides, they could still challenge the suspension as per the procedure shown above.

Furthermore, since it is clear that the Board was for the Cooperative Society, then disputes arising from it are manageable under the CSA and the regulations made thereunder. The Cooperatives Societies Regulations, 2015, (GN. No. 272 of 2015) hereinafter called the GN in short, for example, was made under section 141 of the CSA to provide for procedures related to *inter alia*, suspension of members of the Boards of cooperative societies and dispute resolution arising from operations of cooperative societies. Regulation 50 for instance, guides on "Election, suspension or removal of Board members." Regulation 50(1) clearly provides that, Subject to the provisions of the Act and unless otherwise directed by the Registrar, members of the Board shall be elected, suspended or removed only by a majority of the members present and voting at a general meeting.

It follows thus, that, by reading together the above cited provisions of Regulation 50(1) of the GN with paragraphs 6 and 7 of the Third

Schedule to the CSA, one cannot argued that there is no remedy for a suspension or removal of a member of the Board, or that the first respondent cannot direct for a suspension of a member of the Board though as a general rule, such suspension is performed by a majority of the members present and voting at a general meeting.

Furthermore, section 8 of the CSA lists the functions of the Commission. Section 8(2)(a)(v) guides that, the Commission's functions includes to determine disputes and complaints arising from cooperative societies. This could also constitute an alternative remedy to the applicants if they felt aggrieved by the suspension and needed to soothe themselves.

Indeed, the generality of the CSA and the GN demonstrates that, the legislative objectives were to subject all matters related to the affairs of cooperative societies like the one for which the two applicants served, to be managed or dealt with under the CSA and the GN (i.e. according to mechanisms established under such laws), unless a person exhausts such mechanisms. The squabble under discussion is, in my settled opinion, among such matters which are manageable under the Act and the GN. It is for this understanding that, even other disputes on the business and affairs of cooperative societies have to be resolved through a special procedure under the Act and the GN, the final appellate organ of which is the Minister responsible for cooperative societies; see regulations 83(1)-(18). Such disputes are not resolved through normal courts of this land. This legal position has been underlined by courts of this land in various decisions. In the case of **Daudi Gerald Kilinda v. Chama Cha Msingi Kalemela, Civil Appeal No. 5 of 2019, HCT, at Tabora** (Unreported Judgement at

page 5) for example, this court (Kihwelo, J. as he then was) offered the following useful remarks regarding this legal requirement:

> "I find it convenient to begin with **the law that governs Co-operative Societies in Tanzania and that is the Co-operative Societies Act, 2013. This law was established to govern the conduct and management of business of co-operative societies in the country** as the preamble to this law reads "An Act to provide for the establishment of the Tanzania Cooperative Development Commission; for the formation, constitution, registration and operation of cooperative development and for other matters incidental to or connected thereto."...According to Rule 83 (1) of The Cooperative Societies Regulations; 83 (1) any dispute concerning the business of cooperative society between the members of the society or persons claiming through them or between a member of or persons so claiming and the Board or any officer, or between one cooperative society and another shall be settled under the First Schedule of this Regulation. **With the above provision, it is conspicuously clear that the procedure for settlement of disputes in matters that involves the business of a cooperative society is the exclusive jurisdiction of the Registrar of Cooperative Societies and therefore ordinary courts of law are enjoined not to entertain matters of this nature unless parties have exhausted the available remedies provided under the Co-operative Societies Act...the rationale behind the requirement for the business of co-operative societies to be settled through the machinery provided by the Co-operative Societies Act and not through ordinary courts is to encourage harmony and piece within co-operative societies and ultimately let business to thrive. This longstanding requirement is meant to avoid paralyzing businesses of co-operative societies through prolonged and protracted litigation that will end up dividing co-operative societies and their members.** I am fortified in this view by the principle that disputes relating to co-operative societies should be left to those who are competent to resolve them that is the machinery provided under the law governing co-operative societies and as much as possible through amicable settlement." (Bold emphasis is added).

The requirements just highlighted above (under rule 83 of the GN) were further underlined in the case of **Viongozi Kusure Saccos Ltd v. Godwin Mosses Mbise, Civil Appeal No. 18 of 2020, HCT at Arusha** (Unreported Judgement by Mwaseba J.) following **Arusha**

Soko Kuu Saccos Ltd and Another v. Wilbard Urio, (Civil Appeal 6 of 2019) [2020] TZHC 3931 and many others; see further the case of **Babati Saccos Ltd and another v. Reginald Sanka, Land Appeal No. 67 of 2019, HCT, at Arusha** (Unreported judgment by Masara, J.).

Owing to the above reasons, I answer the sub-issue posed above affirmatively that, in the matter at hand the law provides to the applicants for other legal remedies for their grievances apart from Judicial Review.

Now, since the impugned ruling struck out the application No. 7 of 2020 for incompetence basing on the major reason that the applicants could not seek leave to apply for judicial review since they had other legal remedies which they had not exhausted, that decision goes in tandem with the law as discussed above. I therefore, find that, in relation to the present application there is neither an important issue nor serious issue nor a triable issue nor other acceptable reason which necessitates the intervention by the CAT in the intended appeal. I accordingly answer the major issue posed above negatively that, under the prevailing circumstances this is not a fit case for this court to grant leave to appeal to the CAT. I accordingly withhold the leave and dismiss the application with costs since costs follow event. It is so ordered.

JHK-UTAMWA

JUDGE

26/07/2022

26/07/2022.

CORAM; JHK. Utamwa, J.

For Applicants: Ms. Ancila Makyao, State Attorney, holding briefs for Mr. Nshala, advocate.

For Respondent; Ms. Ancila Makyao, State Attorney.

BC; Gloria, M.

Court; Ruling delivered in the presence of Ms. Ancila Makyao, learned State Attorney for all the respondents who also holds briefs for Mr. Nshala, learned advocate for both applicants, in court this 26th July, 2022.

JHK UTAMWA
JUDGE
26/07/2022.