Ndiritu v Mwalimu National Co-operative Savings and Credit Society Limited (Civil Appeal 61 of 2012) [2023] KEHC 86 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 86 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 61 OF 2012

OA SEWE, J

JANUARY 20, 2023

BETWEEN

KARURU FRANCIS NDIRITU .... APPELLANT

AND

MWALIMU NATIONAL CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED .... RESPONDENT

(Being an appeal against the Award of the Co-operative Tribunal in Mombasa CTC No. 8 of 2010 by Hon. A. Ongeri, Chairperson)

JUDGMENT

(1) This appeal was filed by Karuru Francis Ndiritu, the appellant, against the decision of the Co-operative Tribunal rendered on March 2, 2012 in Mombasa Co-operative Tribunal Case No. 8 of 2010: *Karuru Francis Ndiritu v Mwalimu National Co-operative Savings and Credit Society Limited*. The appellant had sued the defendant in that suit seeking the following orders:

(a) A declaration that the appellant, as the claimant, was the successful party in Mombasa CTC No. 1 of 2007 and was entitled to execute the award made on March 26, 2008 against the respondent.

(b) A declaration that the execution carried out against the respondent through the auctioneers was made pursuant to the award made in favour of the claimant on March 26, 2008 in Mombasa CTC No. 1 of 2007 and that the same was lawful and does not constitute harassment, a threat to the society's interest or occasion loss to the respondent.

(c) A declaration that By-law No. 16 is ultra vires, unlawful, unjustifiable and contrary to the *Cooperative Societies Act*, 1997, the respondent's by-laws and or the spirit of the Co-operative movement.

(d) A declaration that the suspension of the claimant from the respondent's membership under By-law No. 16 is unlawful, unjustifiable, *ultra vires* and contrary to the *Co-operative Societies Act*, the respondent's By-laws and or the spirit of the cooperative movement.

(e) A declaration that the respondent's decision to suspend the claimant was contrary to the rules of natural justice, vindictive, revengeful and tainted with malice.

(f) A declaration that the claimant is entitled to enjoy all the rights envisioned by Section 21 of the *Cooperative Societies Act* , 1997 as a member of the respondent including the right to apply for and receive a loan subject to fulfilling conditions that are applicable to all members.

(g) General damages.

(h) Aggravated as well as exemplary damages.

(i) The costs of the proceedings and interest thereon.

(j) Any other or further relief that the Tribunal may deem fit, just and expedient to grant.

(2) The claim was resisted by the respondent vide a Statement of Defence dated June 13, 2011, filed on its behalf by the law firm of Madzayo Mrima & Company Advocates. While conceding that the appellant at one time stood suspended as per the respondent's By-Laws, it denied that the action was under-handed. The respondent averred that the appellant had been acting contrary to the best interests of the Sacco and was accordingly treated in line with the Sacco's By-Laws. With regard to the appellant's loan application, the respondent averred the same was taken through the normal loan approval procedure and found wanting in several aspects. It was therefore the assertion of the respondent that the declarations sought in paragraph 16 of the appellant's Claim could not issue as the same were not legally grounded; hence its prayer that the appellant's Claim be dismissed with costs.

(3) Upon hearing the parties, the Tribunal found that the respondent was justified in suspending the appellant; that by the time the suit was filed, the suspension had already lapsed; and that the appellant was therefore not entitled to the remedies prayed for before the Tribunal. The Tribunal also found that, since the appellant was still a member of the respondent, he was at liberty to continue enjoying his rights as a member, since the suspension had already lapsed. In the result, the appellant's claim was dismissed with an order that each party bears own costs of the suit.

(4) Being dissatisfied with the decision of the Tribunal, the appellant filed this appeal in the year 2012. He thereafter filed an Amended Memorandum of Appeal on December 11, 2013, contending that the Tribunal:

(a) Erred in law and fact by not finding By-Law 16 *ultra vires*.

(b) Erred in law and fact by finding that a member suspended under By-Law 16 could appeal to the Annual Delegates Meeting.

(c) Erred in law and fact by not recognizing that the claimant was never found guilty as per By-Law 16.1.

(d) Erred in law and fact in not recognizing that By-Law 16.1 does not indicate who should find a member guilty.

(e) Erred in law and fact by not finding By-Law 81 *ultra vires*.

(f) Erred in fact and law by failing to recognize that By-Law 81 is aimed at removing doubt from the operation of Cap 490, Section 76.

(g) Erred in law and fact by not realizing that it is the respondent who should have referred the transgression/dispute to the board or the Annual Delegates Meeting as per By-Law No. 81 or to the Tribunal on or about the dates of December 14, 2009 and March 10, 2010.

(h) Erred in law and fact by failing to recognize that By-Law No. 81 does not override Cap 490, Section 76(1) and 76(2).

(i) Erred in law and fact by finding that By-Law 81 is a mandatory port of call for those seeking justice in the cooperative sector.

(j) Erred in law and fact in failing to recognize that a dispute between a member and an organ of the cooperative is assumed to be a dispute with the whole cooperative and cannot be referred to other organs of the same cooperative.

(k) Erred in law and fact by failing to recognize that contention between a member and an organ of the cooperative is not a dispute.

(l) Erred in law and fact by finding that the appellant was not justified in sending auctioneers to the respondent's office to execute the warrant in Mombasa CTC No. 1 of 2007.

(m) Erred in law and fact by finding that the appellant should have appealed to the Annual Delegates Meeting a body not recognized by Cap 490 Section 27(1), Section 28(1), (2) and (3).

(n) Erred in law and fact by failing to recognize that By-Laws made and or passed by Annual Delegates Meeting are illegal.

(o) Erred in law and fact by finding that a member suspended under By-Law 16 could appeal to the Annual Delegates Meeting.

(p) Erred in law and fact by allowing retrospective application of By-Laws.

(q) Erred in fact by failing to distinguish between [i] the denial to appellant of a fully guaranteed loan by the respondent on or before 23rd December 2009, [ii] the suspension of the appellant on 10th March 2010, and the issues raised in Mombasa CTC No. 1 of 2007.

(r) Erred in fact by not recognizing that the claimant last sent auctioneers to the respondent's premises on December 16, 2008 and was not suspended until March 10, 2011, and the transgression, if any, was therefore a remote transgression.

(s) Erred in law and in fact by not recognizing the member's rights were not delimited by the letter of suspension.

(t) Erred in law and fact by not noting that the effective date of suspension was not indicated in the letter and the expiry of the suspension as per By-Law 16.1 cannot be determined.

(u) Erred in fact by finding that there was a disciplinary case.

(v) Erred in law and in fact by not matching the quantum of punishment of the appellant by the respondent and the transgression if any.

(w) Erred in law and fact by allowing the respondent to fly under the radar of Cap 490 Section 76(1).

(x) Erred in fact and law by failing to recognize the matter of whether the respondent refunded the stolen money or not was res judicata on 23rd December 2009 and subsequent days.

(y) Erred in law and fact by not recognizing Cap 490 Section 27(1), 28(5) and By-Law 57 does not confer on Mr. Ojall, the author of the letter suspending the appellant, any executive authority to suspend a member or in any way unilaterally limit the enjoyment of the rights of a member.

(z) Erred in law and fact by not finding the respondent's suspension of the appellant to be in conflict with By-Law 5.

(aa) Erred in law and fact by not finding that the failure of the respondent to give the appellant a hearing prior to the purported suspension was against By-Law 5(b).

(bb) Erred in law and fact by not finding that the failure of the respondent to give the respondent a hearing prior to the purported suspension was against natural justice.

(cc) Erred in law and fact by not finding that the failure of the respondent to table charges against the appellant prior to the purported suspension was against natural justice.

(dd) Erred in fact and law by not finding that the respondent acting as judge, jury and executioner was against natural justice.

(ee) Erred in law and fact by not awarding costs after the respondent lost in the preliminary objection on 25th October 2001.

(ff) Erred in law by allowing the respondent to be represented by Mr. Kinyanjui of the law firm of Madzayo Mrima & Company Advocates who was indicated in the Law Society of Kenya Website on 8th February 2012 with a status of "inactive" and ABA status of "unpaid".

(gg) Erred in law and fact in that, having conceded to Cap 21, *Civil Procedure Act*, received exhibits and presentations that were in conflict with the same.

(hh) Erred in law and fact by allowing the respondent to be represented by a person without reference in regard to Cap 490 Section 28(1), 3(b), (5).

(ii) Erred in law and fact by allowing the respondent to fly under the radar of Cap 490 Section 79(4).

(jj) Erred in law and fact by addressing itself to Mombasa CTC No. 1 of 2007 in the absence of the proceedings of the same.

(kk) Erred in law and fact by entertaining evidentiary documents of unknown source.

(ll) Erred in fact by finding that auctioneers can harass.

(mm) Erred in law and fact by finding any technicalities in Mombasa CTC No. 1 of 2007.

(nn) Erred in law and fact by criminalizing technicalities.

(oo) Erred in fact by not demonstrating how the disbursement of a fully insured loan could occasion a loss to the cooperative.

(pp) Erred both in law and in fact by failing to consider the weight of the evidence and or the submissions and or the authorities referred to by the appellant.

(qq) Erred in law and fact by failing to award the appellant costs, general damages and exemplary damages after the appellant proved to the required standards the deliberate denial of a primary right in a savings cooperative, a loan, and the suspension in blatant disregard of the law, by-laws and rules of natural justice.

(rr) Erred both in law and in fact by not finding that the appellant proved to the required standard that he was entitled to the remedies he was seeking against the respondent.

(5) Accordingly, in this appeal, the appellant prayed for orders that:

(a) The Award made on March 2, 2012 dismissing his claim with costs be set aside in toto.

(b) The Court be pleased to substitute that part of the Award with an order allowing the appellant's claim as prayed for before the Tribunal.

(c) The Court be pleased to assess damages in favour of the applicant from the evidence adduced and submissions filed before the Tribunal.

(d) The costs of the appeal and of Mombasa CTC No. 8 of 2011 be borne by the respondent in any event.

(e) Any other or further relief that the Court may deem fit, just and expedient to grant.

(6) The appeal was heard ex parte after counsel for the respondent failed to attend court in spite of due service of hearing notice. In addition to his oral submissions on April 28, 2022, the appellant also filed detailed written submissions on November 29, 2021, on which he relied. He argued each of his 47 Grounds of Appeal separately and ultimately urged the Court to allow the appeal and grant the orders sought by him.

(7) This being a first appeal, it is the duty of the Court to review the evidence adduced before the Tribunal and satisfy itself that the decision was well-founded. As was pointed out in *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

(8) With the foregoing in mind, I have perused and considered the record of the proceedings held before the Tribunal. The record shows that the appellant's testimony was received on October 25, 2011. He explained that he was a member of the respondent society; and that he had never been subjected to any disciplinary proceedings prior to his suspension by the respondent. He joined the Society in 1989 and had, over the years taken 7 loans which he repaid without any hitch. He further told the Tribunal that in December 2009, he put in another loan application for Kshs. 800,000/= in the prescribed form with a view of purchasing a piece of land. His expectation was that the application would be processed and approved within 14 days; but this was not to be. Instead he received an "SMS" message through his mobile phone that the loan could not be disbursed because he had a pending disciplinary case; an allegation which was later confirmed by Mr. Ojall, the Chief Executive Officer of the respondent.

(9) The appellant told the Tribunal that he was later to learn that the mistake he did was in taking the respondent to Tribunal and sending auctioneers to execute the decree of the court. He confirmed that he had instituted Mombasa CTC No. 1 of 2007 against the Tribunal and that he had been awarded Kshs. 17,490/=. He added that, because the respondent was reluctant to pay the decretal amount, he instructed his lawyer to write a demand letter; which was done vide the letter dated March 1, 2010. Then on March 10, 2010, he received a letter from the respondent, under the hand of Mr. Ojall, stating

that he had been suspended under By-Law 16 of the respondent's By-Laws; and therefore that he would not be eligible to apply for any loan. He complained that he was denied a hearing before the decision to suspend him was made; hence his suit before the Tribunal.

10. The evidence of the appellant before the Tribunal further indicated that, in the meantime, he served the decree issued in Mombasa CTC No. 1 of 2007 on the respondent and, since no payment was forthcoming, he send auctioneers to recover the decretal amount. That thereafter the auctioneers filed a Proclamation on March 26, 2008 amidst contention by the respondent that the sum had already been paid. As at the time of his testimony, the matter was pending before the Tribunal. He denied having been paid Kshs. 17,490/= before filing Mombasa CTC No. 1 of 2007.

11 On behalf of the respondent, evidence was called from Boniface Muthama Muhindi (RW1), who was the acting General Manager of the respondent at the time. He confirmed that a loan application was made by the appellant in December 2009 for Kshs. 800,000/=. He added that a decision was taken by the respondent that the application be declined pending the conclusion of disciplinary proceedings against the appellant. Mr. Muhindi likewise confirmed that, while he was aware of the suspension of the appellant, he did not participate in it.

12 Regarding the sum of Kshs. 17,490/=, Mr. Muhindi explained that there were erroneous deductions through the payroll from the appellant whose TAC No. 272914 was wrongly reflected in place of Paul Gakuru Maina who had a loan and who had requested that the loan deductions be increased to Kshs. 10,000/= from Kshs. 4,170/= vide TAC No. 272940. Hence, it was the testimony of Mr. Muhindi before the Tribunal that the sum of Kshs. 17,490/= that was wrongly deducted from the appellant was repaid to his salary bank account at the Standard Chartered Bank, Mombasa, through EFT Ref. N0206981 and a composite cheque involving other transaction was thereafter sent to the bank which included the subject amount. The pertinent documents were produced before the Tribunal as Exhibits for the respondent to demonstrate that the refund had been made by the time Mombasa CTC No. 1 of 2007 was filed.

13 In the light of the foregoing summary of evidence, it is manifest that the genesis of the dispute between the parties to this appeal is the unwarranted deductions from the appellant's salary of Kshs. 17,490/= at the instance of the respondent, ostensibly for loan repayment. The respondent, through RW1, conceded that the deductions were indeed made, but asserted that the same was done by mistake out of confusion of the TAC Numbers of the appellant and one Paul Gakuru Maina. Thus, the respondent endeavoured to demonstrate that the said sums were refunded to the appellant's salary account with the Standard Bank, Mombasa. The mishap therefore degenerated into several suits before the Tribunal, namely Mombasa CTC No. 4 of 2004, Mombasa CTC No. 1 of 2007 and Mombasa CTC No. 8 of 2010.

14 There is no dispute that Mombasa CTC No. 1 of 2007, by which the appellant claimed the aforementioned sum of Kshs. 17,490/= was determined in favour of the appellant. A copy of the Award appears at page 134 of the Record of Appeal and it confirms that, in addition to prayers for exemplary/punitive damages and general damages, the appellant prayed for Kshs. 17,490/= together with interest and costs. The Tribunal's decision was that:

    (a) There was no evidence to support the claim for exemplary/punitive or general damages and the same was therefore dismissed;

    (b) The claim for refund of Kshs. 17,490/= was supported by uncontroverted evidence of salary slips. Accordingly, judgment was entered for the appellant against the respondent in the sum of Kshs. 14,490/= as prayed together with costs and interest thereon at 12% per annum from the date of filing the suit till payment in full. The appellant was also awarded travelling expenses

for five days at the rate of Kshs. 400/= per day totaling to Kshs. 2,000/=, payable by the respondent.

15 It was thus, on the basis of the foregoing that the appellant filed Mombasa CTC No. 8 of 2010, seeking declaratory orders as well as general, exemplary and punitive damages on account of his suspension and the rejection of his loan application. Granted the outcome of his suit before the Tribunal, the Court must now make a decision as to the merits or otherwise of the appellant's appeal. In this regard, I have given careful thought to the Grounds of Appeal and, in my view, the issues arising therefrom can safely be collapsed into the following:

(a) Whether the appellant's suspension by the respondent vide the letter dated March 10, 2010 was justified;

(b) Whether By-Law 81 is ultra vires Section 76 of the *Cooperative Societies Act*;

(c) Whether the Tribunal received exhibits unprocedurally;

(d) Whether the Tribunal erred in not making a proper analysis of and giving due weight to the evidence presented before it; and,

(e) Whether representation of the respondent by Mr. Kinyanjui of M/s Madzayo, Mrima & Co. Advocates was proper.

(a) On the appellant's suspensionand whether By-Law 81 is ultra vires Section 76 of the Cooperative Societies Act;

(16) The issues around the appellant's suspension were adverted to in Grounds 1,2, 3, 4, 17, 18, 19, 20, 22, 26, 27, 28, 29, 30 and 42 of the appellant's Grounds of Appeal. The suspension was effected *vide* the letter dated March 10, 2010, under the hand of J.O. Ojall, the Chief Executive Officer of the respondent. He thereby informed the appellant thus:

> " ...The society has considered its relationship with you as a member and found that the relationship is no longer in the interest of the society.
>
> It has therefore been decided that your membership be suspended under By-law number 16.
>
> Your repeated harassment of the society through auctioneers is considered to be a threat to the society's interest and may occasion a loss to the society.
>
> You have a right to appeal to next Annual Delegates Meeting against this decision..."

17 In this regard, By-Law No. 16.1 of the respondent's applicable By-Laws, 2009 states:

> " The Board may suspend a member who engages in such offences like:
>
> a. Falsifying documents
>
> b. Engaging in businesses which are in conflict with the society interest
>
> c. Impersonation
>
> d. Willfully fails to comply or refuses to comply with policies, procedures or Contracts

Any member found guilty of any of these or similar offences shall be liable to suspension from the society for a period not exceeding 12 months or liable to a fine not exceeding Kshs 50,000 or both such suspension and fine."

(18) On the basis of the evidence presented before the Tribunal, it emerges that by the time the appellant filed Mombasa CTC No. 1 of 2007, he had been paid the sum claimed therein. The payment was communicated *vide* a letter appearing at page 141 of the Record of Appeal, by which the respondent informed the appellant that the money had been paid directly to his bank, Stanchart, at Treasury Square, Mombasa. Additionally, the respondent exhibited before the Tribunal a set of documents confirming that the appellant's refund was processed and paid through Cheque No. 206981 for Kshs. 572,279.50, which was paid on 12th October 2003. The documents appear on pages 187 to 190 of the appellant's Record of Appeal.

19. Indeed, *vide* the letter dated January 28, 2004, exhibited at page 185 of the appellant's Record of Appeal, the appellant's Advocates, M/s Kibara & Company Advocates, acknowledged thus on his behalf:

> " ...Our client above stated has now informed us that you have stopped your illegal deductions on his account. However, we note that you have made an effort to refund to our client the sum of Kshs. 17,490 (Kenya Shillings Seventeen Thousand Four Hundred and Ninety Only).
>
> Our client now instructs us to demand from you which we hereby do the immediate payment of the full refund on interest as above stated with immediate effect. We are further instructed to demand Kshs. 200,000.00 (Kenya Shillings Two Hundred Thousand Only the same being damages that would be awarded by the co-operative tribunal upon the institution of proceedings against you in any event..."

20. In the premises, the Tribunal cannot be faulted for coming to the conclusion that:

> " ...the Claimant who was aware of the payment knew that he won the suit on a technicality and yet he continued with the execution even after his costs of the suit and travelling expenses and the Auctioneers charges were paid and he was presented with evidence of the payment.
>
> We find that in the circumstances, the respondent was justified in suspending the Claimant from the society..."

21. It is also noteworthy that in the suspension letter dated March 10, 2010, the appellant was informed that he had a right to appeal the decision to the Annual Delegates Meeting. Indeed, By-Law 81 of the respondent states:

> " Any dispute arising out of the By-Laws or concerning the business of the Society which cannot be settled by the Board or the Annual Delegates Meeting shall be referred to the Cooperative Tribunal established under the Act."

22. The appellant did not deem it fit to comply with the express provisions of the above mentioned By-Law before seeking the intervention of the Tribunal vide Mombasa CTC No. 8 of 2010. Needless to say that it is a cardinal principle that where there is a clear procedure for redress, the same ought to be

pursued to conclusion before resort is had to formal legal action. Thus, in [*Speaker of National Assembly v Karume*] [1992] KLR 21 the Court of Appeal held:

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

23. Likewise, in [*Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others*] [2015] eKLR, the Court of Appeal restated its position thus:

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

24. I therefore find no basis for faulting the conclusion reached by the Tribunal with regard to the appellant's suspension. It is for the same reason that I find no merit in the appellant's arguments that By-Law 81 is ultra vires Section 76 of the *Co-operative Societies Act*, Chapter 490 of the Laws of Kenya; which arguments were hinged on Grounds Nos. 5, 6, 7, 8, 9, 23 and 35 of his Grounds of Appeal. In the same vein, I find no merit in the appellant's argument that the *Co-operative Societies Act* and the rules thereunder have no place for by-laws because nothing could be further from the truth. A perusal of the Act underscores the relevance of the societies' By-Laws right from the Section 2 thereof. In particular, Section 24 of the Act is explicit that:

> "Every co-operative society shall keep a copy of this Act and of the rules made thereunder and of its own by-laws and a list of its members (excluding details of nominees and shareholdings) at its registered office and shall keep them open for inspection by any person, free of charge, at all reasonable times during business hours."

25. Similarly, Section 13 of the Act recognizes that:

> "The By-Laws of the Co-operative Society shall, when registered bind the co-operative society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member for himself and his personal representatives to observe all the provisions of the By-Laws."

26. Section 76 of the *Co-operatives Act*, on the other hand, provides that:

(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, 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."

27. Thus, by asserting, as he did at Grounds 10, 11, 16 and 21 of his Grounds of Appeal, that the suspension was not a dispute for purposes of Section 76 of the *Co-operatives Societies Act*, the appellant missed the point. The operative words used in the section are "shall include", which invariably signals that the list is not exhaustive. According to Black's Law Dictionary, Tenth Edition, "include" is defined as "to contain as a part of something". It then goes on to state that "The participle including typically indicates a partial list."

28. Similarly, in *Dilworth v Commissioner of Stamps* [1899] AC 99, it was observed:

> "The word "include" is very generally used in the interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was merely employed for the purpose of adding to the natural significance of the words or expressions defined." (also see *Mjengo Limited v Commissioner of Domestic Tax* [2016] eKLR)

[29] In the premises, it is generally understood that"include"is employed where the expression of the stipulated meaning is incomplete and only part of the intended meaning is expressed. Thus, in this case, it is permissible to extend the definition of a "dispute"to encompass suspension. I therefore find no basis for the appellant's argument that the Tribunal erred by not finding that By-Law 81 isultra viresSection 76 of the *Cooperative Societies Act*.

(b) On whether the Tribunal received exhibits unprocedurally:

30. The appellant contended, per Grounds 33 and 38 of his Grounds of Appeal, that all documents presented before the Tribunal by Boniface Muthama need to be expunged from the record for the reason that they were from unknown source and were introduced in contravention of Sections 22 and 35 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. He went ahead and made reference to documents annexed to affidavits in support of a Motion filed in CTC No. 1 of 2007 and faulted the respondent for using the same documents in CTC No. 8 of 2010.

31. I find this argument incongruous; granted that it was the appellant who entirely based his Mombasa CTC No. 8 of 2010 on the findings of the Tribunal in CTC No. 1 of 2007. This is evident at Paragraph 13, 16 and 18 of his Statement of Claim as well as prayers (a) and (b) of his prayers in the suit. Thus,

notwithstanding that the respondent did not adduce evidence in Mombasa CTC No. 1 of 2007, it was at liberty to defend himself in the subsequent suit, CTC No. 8 of 2010 as best it could; including availing documents through its RW1, as it did. I find no merit in the appellant's argument that the lower court relied on inadmissible evidence. In any event, such an objection ought to have been taken before the Tribunal. There is no indication that it was; and therefore to ask that the evidence be expunged from the record is not only belated but ineffectual vis-a-viz the reasons for the decision of the Tribunal per the impugned Award.

(c) Whether the Tribunal erred in not making a proper analysis of and giving due weight to the evidence presented before it:

(32) In his Grounds of Appeal Nos. 40, 41, 42 and 43, the appellant faulted the Tribunal's Award on the basis that the Tribunal failed to consider the weight of the evidence or the submissions and/or authorities referred to by the appellant. He further submitted that the Award was premised on technicalities without a clear demonstration as to how the disbursement of a fully insured loan could occasion loss to the respondent. I note however that, in the Award, the Tribunal gave a balanced consideration of the evidence adduced by either side before coming to its conclusion on the basis of that analysis. The Award further shows, at page 243 of the appellant's Record of Appeal, that the Tribunal also considered the bundles of documents presented by the parties as well as their written submissions. There is therefore no merit in the argument that the Tribunal failed to make a proper analysis of the evidence presented or give due weight thereto.

(33) I nevertheless note that the Tribunal, apart from a general statement to the effect that the claimant failed to prove to the required standard that he was entitled to the remedies prayed for by him, failed to address itself to the prayer for damages and the quantum of damages it would have awarded had it found for the appellant. This obligation was restated by the Court of Appeal in *Andrew Mwori Kasaya v Kenya Bus Service* [2016] eKLR thus:

> " ...the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in *Mordekai Mwangi Nandwa v Ms. Bhogals Garage Ltd* Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
>
>> "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"
>
> This principle has religiously been followed by the courts below..."

(34) In the premises, I reiterate the expressions made in *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, that:

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established... Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable

and the appellate court needs to know the view by the Court of first instance on the issue of quantum… It therefore behooves this court to assess quantum."

(35) I note that, in his written submissions, the appellant prayed for an award of Kshs. 600,000/= in general damages and Kshs 6,000,000/= in exemplary damages. He contended that the respondent was oppressive and malicious. It must however be borne in mind that the suspension was only for one year; and that the appellant had the option of appealing the decision before the Annual Delegates Meeting but opted not to promptly do so or at all. It is also not lost on the Court that in his Advocate's letter to the respondent dated 28th January 2004 a proposal was made for general damages of Kshs. 200,000/=. In the premises, an award of Kshs. 300,000/= would have sufficed in my view.

(36) As for exemplary damages, it is imperative to bear in mind the rationale for such an award. As acknowledged by the appellant, exemplary/punitive damages are only available in cases where oppressive or arbitrary action is proved on the part of the defendant. Thus, in *Obonyo and another v Municipal Council of Kisumu* (*supra*), it was held:

> "…exemplary damages are appropriate in two classes of cases: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended…"

(37) Similarly, in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR the Court of Appeal reiterated that:

> " Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute".

(38) The appellant's claim did not fall under any of those categories, and therefore he is not entitled to exemplary damages. As to whether the Tribunal erred in not awarding him costs, the proviso to Section 27(1) of the *Civil Procedure Act* is explicit that costs follow the event; and the event herein is that the appellant's suit before the tribunal was upheld partially. Accordingly, the Tribunal ordered that each party bears own costs; which in my view was fair and just in the circumstances.

(d) Whether representation of the respondent by Mr. Kinyanjui of M/s Madzayo, Mrima & Co. Advocates was proper;

(39) Lastly, the appellant took issue with the fact that before the Tribunal, the respondent was represented by Mr. Kinyanjui of the law firm of M/s Madzayo Mrima & Company Advocates, who was then reflected as inactive/unpaid as per the information availed at the website of the Law Society of Kenya. The point was raised as per Grounds 32 and 34 of the appellant's Grounds of Appeal. This was not an issue before the lower court and therefore is not a valid point on the appeal. Indeed, the Court of

Appeal had occasion to speak to this issue in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto*, [2018] eKLR and stated that:

> .... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."

40. In the result, I find no merit in the appeal. The same is hereby dismissed with an order that each party shall bear their own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JANUARY 2023.

....

OLGA SEWE

JUDGE