



**Busolo v Butali Savings and Credit Co-operative Society Ltd (Civil Appeal  
13 of 2020) [2023] KEHC 17888 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 13 OF 2020  
PJO OTIENO, J  
MAY 30, 2023**

**BETWEEN**

**SARAH BUSOLO ..... APPELLANT**

**AND**

**BUTALI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY  
LTD ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. B. Kimemia (Chairman), Hon Terer (Deputy  
Chairman) and P. Swaya (member) in Kakamega Co-operative Tribunal Claim No. 674 of 2017)*

**JUDGMENT**

1. The appeal was fixed before the Court on 19.01.2023 for parties to show cause why it should not be dismissed for want of prosecution. Prior to that date, one Ms. Aligula Advocate for the Respondent had attended the Registry on the 15/11/2022 and fixed the matter for mention on the 8/2/2023. That attendance followed the admission of the appeal on the 13.6.2022. In the presence of both Counsel on the date fixed for notice to show cause, none of the parties to the appeal attended before the Judge and the matter was then dismissed for want of prosecution.
2. By an application dated 26.01.2023, barely seven (7) days after the dismissal, the Appellant sought that the dismissal be set aside and the appeal reinstated for hearing on the merits. The reasons advanced for failure to attend Court and show cause was that it was erroneous for the Court to fix the matter for dismissal and proceed to close the file while parties had in fact filed Submissions in compliance with the directions of 13.6.2022 and matter had been listed for mention to confirm filing of Submissions and taking of a Judgment date. It was added that on the date fixed, 19.01.2023, the Counsel had attended Court before Musyoka J. only to be told that the Court was only handling criminal cases. A later visit at the registry revealed that the matter had appeared before another Judge and file closed.



3. That application was not opposed by the Respondents despite service. It is thus deemed unopposed. The overriding principle of law on default remain that default should not be the only reason a Court declines its mandates to have the parties' dispute resolved. That principal applies more when the dispute is not contested like in this case. On the basis that the Respondent appear to agree with the Respondent's position, I would set aside the exparte orders and reinstate the appeal for hearing on the merits.
4. However, more important reason to set aside is the fact that, even in contested regular civil litigation, a suit is only liable for dismissal where it has been left unattended for a period of twelve months. In this matter the notice inviting parties to attend Court was for purposes of confirming filing of Submissions. I have perused the file and noted that by the date the file was closed, both parties, Appellant and Respondent, had filed Submissions on the 20.7.2022 and 13.9.2022 respectively. A keener registry staff ought to have captured this fact and listed the matter for purposes of taking a Judgment date. That was not done with a notice issued like no Submissions had been filed.
5. Lack of diligence in the registry is the only reason the matter was closed on alleged inaction by the parties when parties had done all they were expected to do. That is a mistake that cries out for correction. I do correct it by setting aside the orders of 19.01.2023 to allow the appeal be heard on the merits.
6. Having so set aside, and reinstated the appeal, and noting that the appeal has been argued by the Submissions by the parties, instead of asking parties to attend court for anything other than taking the Judgment of the Court, would be to employ the judicial resource in time less efficiently. I chose to employ that resource well by considering the Submissions filed and making a decision towards closure of the file before this Court.
7. By way of a plaint dated 7<sup>th</sup> December 2017, the Appellant, a member of the Respondent SACCO, sued the Respondent for the recovery of the sum of Kshs. 152,000/- (being a refund of her shares), costs and interest of the suit.
8. In a statement of defence and counter claim dated 20<sup>th</sup> January, 2018, the Respondent pleaded that it indeed owed to the Appellant and was ready to make a refund of shares, if any, if the Appellant formally resigned from the SACCO and cleared her outstanding debt of Kshs. 251,633/-. The Responded asserted that the outstanding debt arose following inspection report by the district co-operative office which apportioned liability to the officials, including the claimant who was a treasurer, for misappropriation of funds.
9. In a decision of the Tribunal dated 26<sup>th</sup> February, 2020, judgment was entered in favour of the appellant for Kshs. 152,000/- and the Respondent for Kshs. 258,615. There was then a set off with direction that the appellant pays the respondent a sum of Kshs. 106,615/- plus costs and interest.
10. Aggrieved with the decision of the Tribunal, the Appellant lodged a Memorandum of appeal dated 3<sup>rd</sup> March, 2020 premised on the following grounds: -
  - a. That the tribunal erred in the evaluation of evidence before it.
  - b. That the Honourable tribunal misdirected itself as to the applicability of section 76 of the *Co-operative Societies Act* Cap 409 of the Laws of Kenya.
  - c. That the Honourable tribunal grossly erred in arriving at the finding that the appellant herein was surcharged for the amounts shown on the counter claim.



- d. That the Honourable tribunal grossly erred in not stopping further deductions from the appellant's shares.
  - e. That the Honourable tribunal finding that other members had been surcharged for the lost funds had not been backed by any evidence.
  - f. That the Honourable tribunal grossly erred in not finding that the counter-claim herein was an afterthought as the respondents had never raised the issue prior to filing the claim herein.
  - g. That the tribunal's final orders have caused a miscarriage of justice.”
11. The Appellant thus prays that the judgment on the counter claim be set aside and that she be awarded costs for the claim and counter claim.
  12. The court directed that the appeal be canvassed by way of written Submissions and each party has filed their respective Submissions. The Appellant submits that the action of surcharging a member under section 73(1) of the *Co-operative Societies Act* is to be carried out by a commissioner. She argues that in a meeting held on 16/8/2016, a report by the Deputy Commissioner Malava Sub County was adopted in which he stated that allegations made had not proved and that he needed time to investigate. She claims that the tribunal wrongfully found that the investigation report conducted pursuant to section 60A of the *Co-operative Societies Act* concluded that it apportioned liability to the officials and surcharged them. She further argues that following the report, a meeting was convened on 28/6/2016 where the Deputy Commissioner required some of the members to take responsibility to refund some of the money advanced to them and that there was no direction to surcharge the treasurer thereafter.
  13. It was further contended that she did not receive any notice of intention to surcharge and that this violated her rights to fair administrative action in respect of which submissions she placed reliance on the case of *R v Commissioner for Co-operative Development & 3 others ex parte Elisha Otieno and 22 others* (2016) eKLR. It was then concluded by stating that despite her exit from the SACCO, the SACCO continues to make monthly deductions of Kshs. 2000/- from her account which she seeks reimbursement of.
  14. For the Respondent, it was submitted that the tribunal evaluated the evidence before it correctly in that they called two witnesses who testified that the Appellant had been removed from office due to misappropriation of funds and served with a notice to show cause why she should not be suspended but instead she wrote to the Respondent through an advocate claiming her shares and seeking to withdraw as a member.
  15. They argue that the tribunal was right in applying section 76 of the *Co-operative Societies Act* because following the adoption of the inquiry report in a meeting held on 28/6/2016, some of the members were surcharged and that the Respondent produced a summary of debts and liabilities owed to the Respondent which showed that Appellant was the only one who had not cleared her debts. They claim that that the Appellant deliberately failed to exercise her right to be heard since the notice to show cause was part of implementing the inquiry report and the resolutions passed by the meeting held on 28/6/2016. They place reliance on the case if *R v commissioner for Co-operative Development & 3 others ex parte Kennedy Masese Omwancha & 7 others* (2021) eKLR for the proposition that where one is given a chance to be heard but fails to exercise same, the duty is discharged by the person obligated to afford the right to be heard.



## Issues for Determination

16. The court has considered the grounds of appeal, the proceedings of the Tribunal and the Submissions by both the Appellant and the Respondent and discerns that the only issues arising for determination by the court is whether the surcharge in the sum of Kshs. 258,615 was proved?
17. It is the determination of this court that only that one issue stands out for determination because, the membership of the Appellant and the amount of his shares were never disputed. It was also not in dispute that acting upon the Respondent's letter dated 13.06.2017, the Appellant gave a notice of withdrawal to last a period of 60 days by the letter dated 29.06.2017. It is to this court sufficient to give notice by counsel and therefore the contention by the Respondent, in the letter dated 18.09.2017, that the letter be by the co-operator in person is a misconception flying on the face of the established position of the law that he who acts by an advocate acts by himself. The court finds that the Appellant's resignation took effect on or about the 30.08.2017 and was thus entitled to the refund of her shares as at the date the suit was filed.
18. The procedure leading to surcharging an official of a society is stipulated by section 58 of the Co-operative Societies Act, No. 12 of 1997 ("the Act") and demand that the process begins with an inquiry and/or inspection carried out by a Commissioner. Upon completion of the inquiry and determination that any person is liable for a loss to the society, section 73 vests the Commissioner with power to surcharge.
19. Following an inspection of the Respondent society's books of account by the county co-operative auditor, Kakamega County and the co-operative officer, Kakamega Central, it was their finding in a report dated May, 2016, that;
  - a. some members had not fully paid their shareholding;
  - b. due process was not adhered to in the payment of vouchers;
  - c. late remittance of statutory deductions and
  - d. members being paid allowances for meetings not attended.
20. The commissioners then recommended, among other things, that double allowance paid on 09/08/2015 should be accounted for and the committee to use by-law No. 46 to run the society.
21. In exercise of its mandate under section 58(3) of the Act, the Commissioners presented the inquiry report in a meeting of the Board of the Respondent held on 28<sup>th</sup> June, 2016. In the said meeting, the Commissioner directed a surcharge on the following items in relation to the appellant; - a) committee education of a sum of Kshs. 180,000 to be shared among 12 board members including the appellant which each paying Kshs. 15,000/-; b) Co-op annual meeting of Kshs. 10,000/- each member of the board was subjected to pay a sum of Kshs. 833/-; c) ASK show totaling to Kshs. 12,000/- to be shared among 12 officials and the appellant repaying as sum of Kshs. 1000/-. This brings the total surcharged amount as against the Appellant and each of the board members to a total of Kshs. 16,833/-.
22. The law bestows only upon the Commissioner the power to order surcharge. The trial court in entering judgment on the counterclaim took the view and concluded that the sum of surcharge was as in the inspection report. That was erroneous as there must be a determination by the Commissioner. There was no evidence that the Appellant was herself surcharged the sum of Kshs 251,633 by the Commissioner. It is therefore the finding of the Court that only Kshs 16,833 was proved to have been surcharged and that is the sum that could have been due for recovery by the Respondent on the counter claim.



23. Accordingly, for the reasons set out above, this appeal succeeds and the courts deems the appropriate orders to serve the final ends of justice to be as follows: -
- a. The decision by the tribunal is hereby set aside.
  - b. The respondent is ordered to refund the appellant the sum of Kshs. 152,000/- less the proved surcharge of Kshs 16,833/-being a refund of her share contribution as at the date of filling the suit together with all subsequent sums deducted by the employer and remitted to the respondent subsequent to filling of the suit.
  - c. The employee shall cease making monthly deductions from the appellant's account henceforth unless becomes a member of the society.
  - d. The appellant is awarded costs at trial with half costs of this appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF MAY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Mr. Iddi for the Appellant

Ms. Aligula for the Respondent

Court Assistant: Polycap

