



**Runka Services Co-operative Sacco Limited v Mbaya (Commercial Civil Case E646 of 2021)
[2022] KEHC 123 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E646 OF 2021
DAS MAJANJA, J
FEBRUARY 18, 2022**

BETWEEN

RUNKA SERVICES CO-OPERATIVE SACCO LIMITED PLAINTIFF

AND

LAWRENCE KATHURIMA MBAYA DEFENDANT

RULING

1. When I delivered the ruling on 31st February 2022 dismissing the Plaintiff's application for injunction, I informed the parties that I doubted whether this court had jurisdiction to entertain this case as the cause of the action between the Plaintiff and Defendant was between an employer and employee and also between a Co-operative Society and its member. I therefore requested the parties to address me on the issue whether the matter was subject to the jurisdiction of the Employment and Labour Relations Court ("the ELRC") or the Co-operative Tribunal ("the Tribunal").
2. The brief facts emerging from the Plaintiff and depositions on record are that at the time material to this suit, the Defendant was a member of and an employee of the Plaintiff ("the Co-operative"). The Co-operative, in its Plaintiff dated 31st May 2021, claims that on diverse dates between January 2016 and December 2020, while its employee and member, he obtained through fraud and conversion for his benefit KES. 22,618,611.00 belonging to it causing it to suffer loss and damage which it now claims. The Co-operative further states the Plaintiff was employed in 2005 as an accountant and joined it as a member in 2006 where he holds shares and savings worth KES. 344,410.00.
3. The Co-operative's case is that in his position as an accountant, he misappropriated KES. 22,618,611.00 which was discovered when an audit was conducted for the years 2016 to 2019. In due course, the Defendant was summoned by the Co-operative's Management Committee to explain the discrepancies in the audit whereupon he admitted the discrepancies and prepared a letter authorizing the Co-operative to recover the amount from his savings and the balance be recovered from his salary.



He was also charged with the offence of stealing by servant contrary to section 281 of the *Penal Code* (Chapter 63 of the Laws of Kenya) and fraudulent accounting by officer contrary to section 328(b)(ii) of the Penal Code in Milimani Criminal Case No. E331 of 2021. In this case, the Co-operative seeks to recover the amount alleged to have been misappropriated by the Defendant by tracing his properties allegedly acquired by the misappropriated funds.

4. Counsel for the Plaintiff submitted that this court has jurisdiction to entertain as the Co-operative's cause of action is premised on fraud as it seeks to recover money lost through fraudulent dealing. She argued that the case is not about monies earned from employer employee relationship hence the matter cannot be dealt with by the ELRC and should remain in the High Court.
5. Counsel for the Defendant contended that since the Plaintiff is a Co-operative Society and the Defendant is still member, then the Tribunal established under section 76 of the *Co-operative Societies Act* has jurisdiction. He added that since an appeal from the Tribunal is to the High Court under section 81 of the Co-operative Societies Act, then by dint of Article 165(3) of the *Constitution*, the High Court still has jurisdiction and as it the court with unlimited original jurisdiction. He therefore urged the court to refer the matter to the Tribunal.
6. The issue of jurisdiction is a preliminary issue which ought to be determined in the first instance in accordance with well-known dicta expressed by Nyarangi JA., in *Owners of the Motor Vessel Lilian SS v Caltex Oil (Kenya) Ltd [1989] KLR 1*:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

7. The jurisdiction and powers of Co-operative Tribunal are derived from section 76 of the Cooperative Societies Act which reads as follows:

71

- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include—
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand



due from a co-operative society, whether such debt or demand is admitted or not;

- (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

8. A literal and ordinary reading of the aforesaid section is that where the parties to a dispute are current or past members of a co-operative society, or members of a cooperative society and the society, or between two co-operative societies and the subject matter of the dispute is the business of a co-operative society, then the dispute shall be referred to the Tribunal. By use of the word “include”, section 76(2) proceeds to give a non-exhaustive of the nature of disputes contemplated.

9. From the facts I have outlined, this case does not deal with any issue of and concerning membership of the Co-operative by the Defendant. The alleged misappropriation was in the course of his employment as an accountant. I therefore find and hold that the Tribunal does not have jurisdiction in this matter as the alleged misappropriation of the Co-operative’s money was a result of Defendant’s employment and not qua member which was merely an incidental relationship in that regard.

10. Turning to the issue of employment, Article 162(2) of the Constitution empowers Parliament to:

162

- (2) establish Courts with the status of the High Court to hear and determine disputes relating to -
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).

11. The legislation contemplated and duly enacted is the Employment and Labour Relations Court Act which at section 12(1) provides for the jurisdiction of the ELRC in the following terms:

12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers’ organisation and a trade union organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers’ organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer’s organisation or a federation and a member thereof;



- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.
[Emphasis mine]

12. The dispute in this matter arises from and relates to the relationship between employer and employee. The employer accuses the employee of stealing in the course of employment hence this is a dispute falling squarely within section 12(1)(a) of the *Employment and Labour Relations Act* and is a dispute, “relating to or arising out of employment between an employer and an employee”. I therefore find and hold that this is a dispute that falls for determination by the ELRC. This finding is also buttressed by the fact that the Defendant was charged with the offence of stealing by servant.
13. Having come to the conclusion that the subject of this suit falls within the jurisdiction of the ELRC, it means that the High Court lacks jurisdiction to entertain this claim. The question then is whether the matter should be transferred to the appropriate court. There is dicta in several cases from the Court of Appeal, among them, *Kenya Medical Research Institute vs. Davy Kiprotich Koech NRB CA Civil Appeal No. 207 of 2013 [2018] eKLR* stating the court, in such instances, may order transfer of the suit to the appropriate court. However, and more recently the Court of Appeal in *Phoenix of EA Assurance Company Limited v S. M. Thiga t/a Newspaper Service NRB CA Civil Appeal No. 244 of 2010 [2019] eKLR* and *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel NRB CA Civil Appeal No. 13 of 2016 [2016] eKLR* has taken the position that a suit filed in a court without jurisdiction is an incompetent suit and cannot be disposed of in any other way other than to strike it out.
14. In conclusion and for the reasons I have explained, I find and hold that this court lacks jurisdiction to entertain this claim. The suit is accordingly struck out. The Defendant is awarded costs amounting to KES. 30,000.00 exclusive of disbursements which shall be certified by the Deputy Registrar.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Mwikali instructed by Mugo Githinji and Company Advocates for the Plaintiff.

Mr Senteu instructed by Senteu and Ndung'u Advocates for the Defendant.

