



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 87 OF 2019

MWALIMU NATIONAL SACCO LIMITED.....1ST APPELLANT

JOSEPH M. GIKONYO T/AGARAM INVESTMENT.....2ND APPELLANT

VERSUS

ABIGAEL KERUBO MORAA.....RESPONDENT

(Being an Appeal from the Ruling and Order of Hon S.N Makila Senior Principle Magistrate

delivered on 21st June, 2019 in the Chief Magistrates Court

at Kisii Civil Case No. 214 of 2019)

JUDGEMENT

1. The respondent who is the plaintiff before the lower court sought injunctive orders against the sale of Land Parcel Title No Nyaribari Chache/B/B/Boburia/14903 through public auction and a declaration that the purported sale by Public Auction of the said land was unprocedural, null and void.
2. A brief background to the dispute is that the respondent was advanced a loan facility of Kshs 1,600,000/- by the 1st appellant and the respondent offered her parcel of land registration No. Nyaribari Chache/B/B/Boburia/14903 as collateral. The respondent advanced that the 1st appellant's right to statutory power of sell had not arisen as it had not served her with requisite statutory notices.
3. Before the matter could be heard the applicants raised a preliminary objection on grounds that the court did not have jurisdiction and that the suit offends provisions of **Section 76 (1) (b) of the Co-operatives Societies Act, Cap 490, Laws of Kenya** (*'the Act'*).
4. The trial court after hearing the rival submissions on the preliminary objection held that the dispute before it was of a commercial nature and that it had jurisdiction to hear and determine the matter.
5. It is this ruling that precipitated this instant appeal on the following grounds;
 1. *THAT the learned Magistrate erred in law failing to allow the Preliminary Objection raised by the Appellants.*
 2. *THAT the Learned Magistrate erred in law and in fact failing to find that the Co-operatives tribunal has exclusive jurisdiction to hear and determine dispute, between a co-operative society and a member of the Co-operative Society.*
 3. *THAT the Learned Trial Magistrate erred in law and in fact in otherwise failing to exercise her discretion in the proper manner resulting to injustice to the Appellant.*
6. The only issue for determination is in regard to whether the appropriate forum for the resolution of dispute is the Co-operative Societies Tribunal.
7. The appellant in its submissions have argued that where statute has provided a remedy for a party, the court must exercise restraint and give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. They cited the cases of **Speaker of National Assembly v Njenga Karume [2008] 1KLR 425** and **Charles Keragita Arwenya v Nyakoe Farmers Co-operative**

Society Ltd [2016] eKLR.

8. The respondents submitted that it is not automatic that any dispute between a member and a Co-operative Society must be referred to the tribunal, but rather the dispute must concern the business of the society. She argued that the dispute raised before the trial court was commercial in nature as she challenged the exercise of the appellant's statutory power of sale to sell the respondents land in respect to a loan facility advanced to her. In addressing the dispute, the Land Act and the Land Registration Act have to be analyzed to determine if the required statutory notices were duly served. She advanced that such disputes fall within the jurisdiction of the Environment and Land Court and subordinate courts duly gazetted to hear and determine matters relating to land. The respondent cited the case of **Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & Another [2018] eKLR; Bernerd Mugo and Others v Kagaari South Farmers Co-operative Society and 4 Others [2015] eKLR; Biringo Farmers Co-operative Society Ltd v Abel Moranga Ongwancho & 4 Others [2016] Eklr and Kiamumbi Multi-purpose Co-operative Society Ltd v James Mburu Kamau & 4Others [2018] eKLR** to support her position.

9. The jurisdiction of the Co-operative Tribunal is provided for under **S 76** of the **Co-operative Societies Act**. That section provides;

Section 76(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.”**

10. From the proceedings, the respondent does not dispute being a member of the 1st appellant. She does not dispute that she obtained a financial facility from the 1st appellant by virtue of her membership and that she offered security in form of the suit property.

It is upon failing to settle the indebtedness that the 1st appellant moved to exercise the right of redemption through the 2nd appellant. The respondent's response was to file suit in the subordinate suit.

11. I have applied my mind to the facts and the Law which ought to have guided the preliminary objection. It is admitted by the appellant that she is a member of the 1st appellant and she is indebted to it. The issue for determination in the preliminary objection raised before the trial court was whether the trial court had jurisdiction to determine the dispute in light of the provisions of **S 76(1)** and **(2)** of the **Co-operative Societies Act**.

12. At the onset, it is necessary to consider whether the preliminary objection fell under what in Law is recognized as a preliminary objection on a point of Law.

13. In **Oraro vs Mbaja [2005] I KLR 141**, the court considered what constitutes a preliminary objection and held as follows;

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”

13. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.”

14. The facts as admitted in this matter are that the respondent is a member of the 1st appellant and was indebted to it. Therefore the preliminary objection before the trial court was not blurred with factual details liable to be contested and to be proved through evidence. The live issue before the court was the interpretation of **S 76(1) & (2)** of the **Co-operative Societies Act**.

15. A plain reading of Section 76(1) and (2) clearly shows that the dispute herein is between the respondent (a member) against the 1st

appellant (a Co-operative Society (S 76(1)(b)) and the dispute is a claim by a Co-operative Society for a debt demand due from a member (S 76 (2)(a)).

16. In Republic v Cooperative Tribunal & 2 Others Ex Parte Jackson Wekesa Abala [2019] eKLR the court held that;

“25. A literal and ordinary interpretation of the 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. Section 76(2) proceeds to give examples of such disputes and is not exhaustive in this respect. In the present application it is not in dispute that the Applicant and Interested Parties are members of the Law Society of Kenya SACCO, which is a co-operative society. It is also not in dispute that the Interested Parties guaranteed a loan which was advanced to the Applicant by the Law Society of Kenya Sacco.

26. The specific relief sought by the Interested Parties in their claim before the Respondent in Co-operative Tribunal Case No 149 of 2018 was a refund by the Applicant of Kshs 400,000/= and Kshs 150,000/= to be paid to their respective Law Society of Kenya SACCO Accounts. Their dispute thus concerned the refund by the Applicant of monies they paid to settle his loan obligations with the Law Society of Kenya SACCO. It is thus my finding that the Respondent was properly seized of the claim filed before it by the Interested Parties in Co-operative Tribunal Case No 149 of 2018, as it involved the business of refund of a loan payment to the Law Society of Kenya SACCO by the Interested Parties on behalf of the Applicant, who are both members of the said SACCO.”

17. From the foregoing, the trial court clearly fell into error in its holding that it had jurisdiction to entertain the dispute.

18. The appeal herein is wholly successful. I allow the same and make the following orders;

1. The appeal is allowed.

2. The order of the subordinate court dated 21st June 2019 is set aside and substituted thereof with an order allowing the preliminary objection dated 3rd May 2019.

3. The appellants shall have costs at the subordinate court and on this appeal.

Dated, Signed and Delivered at Kisii this 28th day of April, 2021.

A. K. NDUNG’U

JUDGE