



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 19 OF 2020

MWALIMU NATIONAL SACCO LIMITED.....APPELLANT

VERSUS

POLYCARP ABERI NYAIRO.....RESPONDENT

(An Appeal from a Ruling delivered by Hon. S. Makila on the 17th January 2020

in CMCC Kisii Civil Case No. 630 of 2019)

JUDGMENT

1. This appeal is in respect of a ruling delivered by Hon. S. Makila dated the 17th January 2020. The background of this appeal is as follows; the appellant was sued by the respondent in CMCC 630 of 2019 seeking an order of permanent injunction to restrain the appellant or its agents of savants from offering for sale, arranging, public auction, disposing, advertising for sale and or selling the property L.R. No. Central Kitutu/ Mwamosioma/ 3301 Kisii Municipality as proclaimed in the redemption notice dated 6th June 2019.

2. At the hearing of the Notice of Motion the appellant raised a preliminary objection challenging the court's jurisdiction to hear and determine the matter. In a Ruling dated the 17/1/2020 the trial magistrate held as follows;

“In as much as I agree with the respondent that the business of loaning money to the applicant falls under the jurisdiction of the Co-operative Societies Tribunal I notice that the instant case involves the applicant's interest in the land.

I agree with the applicant's submissions that Section 9 of the Magistrate Court's Act vest this Court with the jurisdiction to hear the instant application and suit.

I find that section 76(1) of the Co-operative Societies Act no. 12 of 2015 is thus not applicable in this case. I will dismiss the notice of preliminary objection dated 13.8.2019.

3. In a memorandum of appeal dated the 20/2/2020 the appellant raises 4 grounds of appeal as follows;

i. *That the Learned Magistrate misdirected herself as to the principles for the grant of an injunction and thus improperly exercised her discretion by dismissing the appellant's preliminary objection.*

ii. *That the Learned Magistrate erred in law and in fact in failing to find that the Co-operative tribunal has exclusive jurisdiction to hear and determine dispute, between a co-operative society and a member of the Co-operative Society.*

iii. *That the Learned Trial Magistrate erred in law and in fact in otherwise failing to exercise her discretion in the proper manner in resulting to injustice to the Appellant.*

The appellant seeks that the appeal be allowed and the Ruling and Order of the Subordinate Court be set aside and be substituted with an order allowing the preliminary objection dated 3rd May 2019.

4. As an appellant court I have the duty of review the proceedings and findings of the trial court and draw my conclusion. At the hearing of this appeal I directed that the appeal be canvassed by way of written submission. The preliminary objection was canvassed by way of written submissions in the lower court.

SUBMISSIONS

5. I have considered the written submissions filed by the parties. The appellant submits as follows; that the ruling be set aside and an order be issued allowing the preliminary objection. That from the pleadings it is clear that the respondent is a member of the appellant society. The appellant obtained a facility from the appellant by virtue of his membership and issued a sufficient security the suit property. That having failed to pay up the loan at the stipulated time the appellant moved to exercise its right of redemption. That the respondent filed the suit in the subordinate court. That the dispute clearly falls within the ambit of section 76 (1) (a) of the Cooperative Societies Act (“**the Act**”). That the provisions of section 76 (1) & (2) are clear and that the respondent need to seek justice in the right forum. The appellant referred to two cases in support of its case namely, **Charles Kerugita Arwenya vs Nyakoe Farmers Co-operative Ltd [2016] eKLR** and **Speaker of National assembly vs Njenga Karume [2008] 1KLR 425**.

6. The respondent maintains that the trial court did not err in its finding. It was submitted that the claim does not fall within the description of business of the society and that the suit challenges the legality of the decision of the society alleged to have infringed the rights of the respondent as the sale is premised on fraudulent and inaccurate report. That the matter is outside of the ambit of section 76(1) and (2) of the Act. That a claim of negligence and a breach of statutory rights cannot be closely related to the business of the Society. That it has not been established that the Society’s by-laws and rules envisage such activity to be part of the business of the society. It was further submitted that under section 9 (a) (iv) & (v) of the Magistrate’s Court Act No. 26 of 2015 a Magistrate’s court has jurisdiction to hear and determine claims relating to valuations and public , private and community land and contracts, choses in action or other instruments granting and enforceable interests in land an environment and land generally. The respondent relied on various cases on the issues raised namely; *Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1*, *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, *Toratio Nyanga & 4 Others vs Lietego FCS Limited (2011) eKLR* and *Republic vs Matheka Kithome & 4 Others (2011) eKLR*.

ANALYSIS AND DETERMINATION

7. The main issue for determination is whether the trial magistrate erred in failing to find that the Cooperative Tribunal has exclusive jurisdiction to determine disputes between a Co-operative Society and its members

8. The appellant is aggrieved by the trial court ruling that section 76 (1) of the Cooperative Societies Act was not applicable in the case. In the case of *Owners of Motor Vessel “Lillian S’ vs. Caltex Oil Kenya Limited [1989] KLR Nyarangi JA* stated that jurisdiction is everything and without it a court has no power to make one more step.

9. Section 76 (1) and (2) of provides as follows;

Disputes

(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 plaint filed in CMCC No. 630 of 2019 dated 6th August 2019, the plaintiff/ respondent states that he was a member and shareholder of the defendant. It is not in dispute that he is a member of the defendant society. At paragraphs 4 he states that in the year 2016 the plaintiff entered into a loan facility arrangement with the defendant and was offered a loan on the strength of a property LR No. Central Kitutu/ Mwamosioma/3301 as security. From the said averment the respondent admitted he was a member of the defendant society and that he took a loan and offered the appellant parcel no. 3301 as security.

11. The main issue in dispute is the valuation done by the appellant after the respondent defaulted in paying the loan. He complains in paragraph 9 of the plaint that Highland Valuers Limited undervalued the property and at paragraph 10 he claims that the report diminishes the value property. Granting loans to its members is the business of the defendant/appellant. Section 76 (1) (b) provides that *any dispute concerning the business of a cooperative society between members, past members or deceased members and the society , its committee or any officer of the society shall be referred to the tribunal*. A dispute is defined at section 76 (2) to include, *a claim by a cooperative society for any debt or demand due to it from a member of a past member, or from the nominee or personal representative of deceased member whether such debt or demand is admitted or not*.

12. From the plaint the dispute is between the respondent who is a member of the appellant/ defendant over a loan facility granted to him.

The plaintiff moved to court when the defendant wanted to realise the security he offered. He challenged the valuation that had been done by the appellant. I find that the trial court erred in holding that the case involved the applicant interest in land. The proper forum for the dispute is the cooperative tribunal. I find that there is merit in the appeal and I set aside the ruling and order of the subordinate court dated the 17th January 2020. The preliminary objection dated 13th August 2019 is allowed. The subordinate court lacked the jurisdiction to hear the dispute. The respondent's suit in CMCC No. 630 of 2019 offends the provisions of Section 76 (1) (b) and 76 (2) of the Co-operative Act, Cap 490, Laws of Kenya. The appellant is awarded costs of the appeal.

Dated, Signed and Delivered at KISII on the 29th day of October 2021.

R. E. OUGO

JUDGE

In the presence:

Mr. Ochieng For the Appellant

Mr. Mose Nyambega For the Respondent

Ms Rael Court Assistant