



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 154 OF 2018

ABEID MWAMBURIAPPELLANT

VERSUS

SOKORO SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the ruling on the preliminary objection by the

Honourable W. Wahome C.M. in the Chief Magistrate's Court

at Molo CMCCC No. 319 of 2017)

JUDGMENT

THE BACKGROUND

1. This is an appeal from the ruling on preliminary objection delivered by Honourable W. Wahome delivered on 25th September 2018. The respondent had sued the appellant who had been employed by the respondent as the Chief Executive Officer from the year 2012 until 2016. Through plaint dated 7th September 2017, the respondent sought a refund of Kshs. 1,654,274.03/= being monies unaccounted for by the appellant when he was in employment, interests and costs of the suit.
2. In response, the appellant filed his defence denying the averments in the plaint.
3. The appellant filed a notice of preliminary objection dated 8th July 2018, challenging the jurisdiction of the court to determine the dispute on the ground that it is under the preserve of the Co-operative Tribunal, and the commissioner for co-operative society has the powers to surcharge officers of the co-operative society who have misappropriated funds.
4. In opposing the preliminary objection, the respondent submitted that the court is clothed with jurisdiction to determine the suit as the same has not been curtailed by Section 76 of the Co-operative Societies Act.
5. The court delivered a ruling on 25th September 2018 dismissing the preliminary objection and held that the court has the jurisdiction as issues raised are above the ambit of the tribunal.
6. Aggrieved by the decision of the **Chief Magistrate Hon. S. Wahome**, the appellant filed the current appeal raising the following grounds-
 - a. *The learned trial magistrate erred in law and fact in failing to appreciate the appellant is an officer of the respondent under the provisions of the Co-operatives Society Act (No. 12 of 1997) as amended by Act No. 2 of 2004 and should be treated as such.*
 - b. *The learned trial magistrate erred in law and fact by failing to take cognizance of the fact that the respondent is a Co-operative Society registered and operates within the provisions of the co-operative societies Act, rules, and registered By-laws*
 - c. *The learned trial magistrate erred in law and fact in failing to find that the suit relating to misappropriation of funds or failure to account the funds of co-operative society by its officers is adequately addressed by section 73 of the co-operative*

societies Act which is the applicable law.

d. The learned magistrate erred in law and in fact in failing to find that the dispute between the appellant and the Respondent is a Cooperative dispute under the provision of the Co-operative Society Act and hence the preserve of the Co-operative Tribunal established by the Co-operative Societies Act.

e. The learned trial magistrate erred both in law and in fact by failing to determine the issues of jurisdiction raised and the enabling provisions of law and hence went out of his way by arrogating to himself a jurisdiction he does not have in law.

f. The learned trial magistrate erred in law and fact by evading to address all issues raised in the preliminary objection thereby casually dismissing it.

g. The learned trial magistrate erred in law and fact by going against the law and judicial authorities relied on by the Appellant and thereby arrived at an absurd determination.

h. The learned trial magistrate erred in law and fact by failing to find that the Commissioner of Co-operatives has a crucial to play in on a case touching on funds of a Co-operatives Society and its officers which function is stipulated in the Co-operative Societies Act inter alia, he has powers to Surcharge the Officers of a Co-operative Society and the officers surcharged by the Commissioner can only appeal to the Co-Operative Tribunal.

i. The learned trial magistrate erred in law and in fact by addressing matters not raised in the Preliminary Objection and proceeded to provide an opinion on the matter.

j. The learned trial magistrate erred in law and fact by failing to appreciate the provisions of law governing the operations of a Co-operative Society.

k. The learned trial magistrate erred in law and fact by failing to adequately consider the substance submissions filed by the appellant and proceeded to make a finding outside the grounds of Preliminary Objection.

l. The establishment of the Co-operative Tribunal under the Co-operative Societies Act is sanctioned by the Constitution of Kenya, 2010, and its functions cannot be taken by another court.

m. The learned trial magistrate erred in law and fact by failure to make a determination on issues raised in the Preliminary Objection thereby denied the appellant his constitutional right to a fair hearing.

n. The learned trial magistrate erred in law and fact by applying the provisions of the Co-operative Act selectively and the entire ruling was perverse and lopsided.

7. On 13th May 2021, directions were taken to have the appeal proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

8. The appellant submitted that issues raised in the preliminary objection were not addressed in the Ruling; that trial magistrate failed to address the specific issues raised. Appellant submitted that the appellant being an employee of the respondent was also an officer of the respondent as per section 76 (1) (b), and thus the dispute should have been referred to the tribunal as the wording in the section is couched in mandatory terms; that the respondent was required to invoke section 73 (1) and 73 (2) rather than filing the current suit and cited the case of **Wakenya Pamoja Sacco Society Ltd vs Stephen Ogamba, D. Musinga J** with the approval of the Court of Appeal in the case of **Speaker of the National Assembly –Vs The Hon. James Njenga Karume civil case of Application No 92 of 1992** where the court observed as follows:-

“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.”

9. The appellant submitted that the dispute should have been submitted to the commissioner of the co-operative society and a party aggrieved by the decision of the commission is supposed to appeal at the tribunal as per section 74 (1); that the trial court interfered with the duty of the specialized tribunal which is protected by the constitution and urged this court to set aside the ruling of the trial magistrate and dismiss the matter in the lower court.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that the Co-operative Societies Act define the parties and the nature of the dispute to be referred to the tribunal, and it does not include the officers or employees. The respondent further submitted that the appellant was not a member of the respondent and section 76 (2) does not therefore apply to him; that Section 76 applies to members, past members, persons claiming through members, past members deceased members.

11. The respondent further submitted that the appellant was not a member but an employee and the appellant admitted the dishonesty and loss of funds in writing and offered to pay by installments of Kshs. 100,000/= but defaulted payment after the first installment; thus, the dispute is not a real dispute as the appellant did not dispute the amounts. The respondent cited **Mombasa Republic Versus Matheka**

Kithome and 4 Others Misc. Civil. Appl. No 664 Of 2010 where Edward M. Muruthi, J. stated as follows:-

“In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service, or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws, and rules. Such dispute must be referred to the tribunal which under section 77 of the Act is required to be composed of a majority 4 of 7 members of persons with experience in cooperative law and cooperative management and practice. See Gatonye Coffee Guard’s vs Gitau (1970) E. A. 361 R. VS. Comm of Coop Development Exp Kabuthi & Org. EA 168.

12. The respondent submitted that for disputes between members and the cooperative society or among members or between societies, which are outside the area delineated above, the ordinary court system must be used; that a member who misappropriates society’s funds cannot avoid the criminal prosecution which may be preferred against him; a member who willfully destroys society’s property or commits torts against the society or its officers or members must be taken through the court process, and so also the society when it fails to pay salaries (if any) to its members as employees or takes disciplinary action against its members or officers. In such cases, the disputes are outside the restricted purview of the provisions of **section 76 of the Act.**

13. The respondent further cited the case of **Lukenya Ranching V. Kavoloto 1970 E.A. 414 and Wakiro V Comm. of Bugisu Coop 1968 EA 523** where the court stated as follows:-

“I find that the discipline of a member by a cooperative society for any reason including the performance of the member's duties is outside the purview of section 76 of the Act. The dispute arising therefrom is not one “concerning the business of a cooperative society” as cooperative societies do not have as their business the quasi-judicial determination of discipline claims. When the cooperative society constitutes itself as disciplining mechanism it moves out of its ordinary business contemplated under section 76 of the Act and it becomes the proper subject of the constitutional supervisory jurisdiction of the High Court under Article 165(6) of the Constitution.”

14. The respondent further submitted that Section 81 of the Co-operative Societies Act states that, the High Court of Kenya has appellate jurisdiction from a decision by the tribunal and the High Court's decision is final. It would be wrong for the same Court - the High Court - to have both original and appellate jurisdiction in the same matter without there being any reference in the act to the Court of Appeal. The respondent urged this court to dismiss this appeal with costs to the Respondent and the matter be referred back to the trial court.

ANALYSIS AND DETERMINATION.

15. I have perused and considered the record of appeal together with submissions herein and find the issue for consideration is whether the trial magistrate has jurisdiction to determine the dispute between parties herein.

16. Section 76 the Co-operative Society Act provide for the settlement of disputes in respect to Co-operative society as set out hereunder:-

Section 76. 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 of 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 license or any other due, from the Authority.

17. From the foregoing, it is quite clear that **section 76 (1)(b) of the Cooperative Societies Act** deals with issues that concern the business of cooperative society with a member, past member, deceased, its committee, or any officers of the society.

18. The Act also defines persons named above as hereunder:-

“member” includes a person or a co-operative society joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws;

An officer is also described as:

“officer” includes a chairman, vice-chairman, secretary, treasurer, committee member, employee or any other person empowered under any rules made under this Act, or by-laws of a co-operative society, to give directions in regard to the business of the society;

19. The question, therefore, would be whether the appellant who was an employee fall within the ambit as an officer of the respondent? The answer is in the affirmative. It is not disputed that the appellant was employed in the capacity of a finance officer and was therefore an employee of the respondent. The dispute herein is between the cooperative and its employee and therefore fall within the ambit of **section 76(1)(b) of the co-operative societies Act**, and the magistrate court does not therefore have jurisdiction to deal.

20. FINAL ORDERS

- 1) Appeal is allowed.**
- 2) The Preliminary Objection raised before the trial court is upheld.**
- 3) The magistrates court has no jurisdiction to deal with the dispute herein.**
- 4) The dispute to be filed before Cooperative Societies Tribunal.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 21ST DAY OF OCTOBER, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Getange for Appellant

Ms. Cherono for Respondent