



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 292 OF 2016

ROBERT GATHIGANI NJAGI.....APPELLANT

VERSUS

JOHN MUTUAL MANDA..... RESPONDENT

(Being an appeal from the Ruling delivered on 5th May, 2016 by Hon. Mrs. M. Chesang (Resident Magistrate) at Chief Magistrate Court's Milimani Commercial Courts in CMCC No. 7564 of 2014)

JUDGMENT

1. Vide the amended plaint dated 23rd March, 2018, the Plaintiff, (Respondent) file suit in the lower court for a refund of Ksh.410,027.37 together with the interest of Ksh.131,343.93 at the rate of 12% per month from 14th April, 2012 up to the date of filing suit or in the alternative that the interest be paid at the sum of Ksh. 410,027.37 at commercial bank rates from 14th April, 2012 up to 18th December, 2014 up to the date of filing suit. The claim is stated to have arisen when the Plaintiff and the Defendant (Appellant) were members of Mhasibu Co-operative Society Ltd and the Defendant defaulted in the repayment of a loan stated to have been guaranteed by the Plaintiff.

2. The claim was denied as per the statement of the Amended Defence filed on 7th April, 2015.

3. The Defendant filed a Preliminary Objection to the suit on the ground that the court lacked jurisdiction to hear and determine the case.

4. The Plaintiff filed the following grounds of opposition to the Preliminary Objection:

“1. The Notice of Preliminary Objection dated 19th December, 2014 is incompetent and is prejudicial to the Plaintiff as it does not clearly and unambiguously state the reasons why the court lacks jurisdiction to hear and determine the suit herein.

2. The application is mischievous, has no merits, is baseless, frivolous and an abuse of the court process.

3. The Preliminary Objection does not meet the legal threshold of a Preliminary Objection as known in law and/or as is as well established in the celebrated case of Mukisa Biscuits vs. West End Distributors (1969) EA at page 696 and Kenneth Maina Karite vs. Jane Njeri :

Bankruptcy Cause No. 12 of 2007.

4. In the Defence dated 19th December, 2014 at paragraph 4 the Defendant has denied the Plaintiff was a member of Mhasibu Sacco Society limited and this is an issue that can only be dealt with during a full hearing of the suit but not through a Preliminary Objection.

5. The Plaintiff was a guarantor of the Defendant and the issue before the court do not involve the management of the affairs of Mhasibu Sacco society Limited but the issues are between a borrower (Defendant and his guarantor (the Plaintiff) and the enforcement of their respective rights and duties as per the guarantee signed before Mhasibu Sacco Society Limited granted the Defendant a loan.

6. The issues raised in the suit herein and the circumstances of this suit do not fall within the powers granted to the Co-operative Tribunal by Section 76 of the Co-operative Societies Act (Chapter 490 laws of Kenya)."

5. In a ruling delivered on 5th May 2016, the trial magistrate dismissed the Preliminary Objection on the following grounds:

"1.The issue of whether or not either of the litigants were members of Msahibu Sacco Society Limited is a matter of fact, to be determined after a full hearing.

2. The preliminary Objection therefore having raised issues of law as well as issues of fact, does not meet the threshold set out in Re: Mukisa Biscuits vs West End Distributors."

6. The Appellant was aggrieved by the said ruling and appealed to this court on the following grounds:

"1. The presiding magistrate erred in law in finding that the court has jurisdiction to hear and determine the dispute herein by dismissing the Preliminary Objection dated 19th December, 2014.

2. The presiding magistrate erred in law and in fact by ignoring the fact that the Cooperative Tribunal is the one clothed with jurisdiction to hear and determine this dispute.

3. The presiding magistrate misdirected herself in law and in fact by completely disregarding the submissions and authorities tendered by the Appellant."

7. The Appeal was canvassed by way of written submissions which I have considered alongside the authorities relied on by the parties.

8. Section 76 (1) and (2) of the Co-operative Act No. 12 of 1997 provides as follows:

"(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 debtor 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 cooperative 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.”

9. It is pleaded in paragraph No. 3 of the Amended plaint that before 14th April, 2012, both the Plaintiff and the Defendant were members of Mhasibu Sacco Society Ltd (hereinafter Sacco) where the loan in question was advanced to the Defendant and guaranteed by the Plaintiff amongst others. The Defendant admitted being a member of the Sacco.

10. The question that arises is whether in the face of the above pleadings the Preliminary Objection raised was sustainable.

11. As stated in the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696:**

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The plaint clearly reflects that the Plaintiff’s case is based on a Sacco loan at a time when both the Plaintiff and the Defendant have pleaded to have been members of the Sacco. The Defendant was sued as the one advanced the loan wherein the Plaintiff is reflected as one of the guarantors. The Plaintiff further pleaded that upon default in the repayment of the loan, the sum of Ksh.410,027.37 was deducted from his Sacco Account. It is therefore evident that the dispute herein involves a Sacco loan and in my view falls within the business of the society and therefore falls within the ambit of Section 76 of the Sacco Societies Act.

13. With the foregoing, I hold that the dispute falls within the jurisdiction of the Co-operative Tribunal. Consequently, the Preliminary Objection ought to have been upheld. The Appeal is hereby allowed with costs. The suit before the lower is struck out with costs.

Dated, signed and delivered at Nairobi this 23rd day of Jan., 2020

B.THURANIRA JADEN

JUDGE