



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 581 OF 2011

PAUL GICHUHI GICHUKI.....APPELLANT

VERSUS

KAMARA FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the Ruling delivered on 13th September, 2011

by the Co-operative Tribunal at Nairobi, Tribunal Case No. 35 of 2006)

JUDGMENT

1. Vide a statement of claim dated 23rd March, 2006, the Respondent, Kamara Farmers Co-operative Society Limited (hereinafter the Claimant Society) filed a claim before the Co-operative Tribunal, Nairobi, claiming Ksh.3,480,000/= with interest at 12% interest from 22nd February, 2000 until payment in full. The said amount of money was claimed to have been part of Ksh.9,736,077.90 lost by the Claimant Society. The loss of the sum of Ksh.3,480,000/= was attributed to the Appellant, Paul Gichuhi Gichuki who was at the material time appointed by the Commissioner of Co-operative Societies as a Liquidator, Kiera Farmers Co-operative Society and an agent of the Claimant Society.

2. The amount claimed from the Appellant was stated to be the sum that an Inquiry Team appointed by the Registrar, Co-operative Development, recommended that the Appellant be surcharged with in accordance with the Co-operative Societies Act.

3. The Appellant denied the claim as per the Statement of the Defence herein dated 9th May, 2006. The Appellant admitted that he was a Liquidator of Kiera Farmers Co-operative Society Limited but denied that he was an agent of the Claimant Society. The Appellant denied having been a party to any proceedings of the Inquiry Team and termed any orders made by the said Inquiry Team as illegal. The jurisdiction of the Co-operative Tribunal was denied.

4. The Respondent filed a reply to the Defence, reiterated the contents of its claim and joined issues with the Appellant.

5. The Appellant subsequently filed the Preliminary Objection dated 30th August, 2011 against the claim on the following grounds:

“(a) The Honourable Co-operative Tribunal has no jurisdiction to hear and determine the suit herein or the application by the Claimant.

(b) The suit as it is, is a total abuse of the process of the Tribunal.

(c) The claim offends both procedural law and substantive law particularly the Co-operative Societies Act (No.12 of 1997) as amended by Act No. 2 of 2004 and the Co-operative Societies Rules 2004.

(d) The inquiry report is *ultra vires* the terms of reference given by the Registrar (Commissioner) of Co-operative Societies.”

6. The Preliminary Objection was opposed on the following grounds:

“1. That the Respondent’s Preliminary Objection is unmerited.

2. That the Respondent’s Preliminary Objection is an afterthought and an outright abuse of the court process.

3. That the Respondent’s Preliminary Objection frivolous, vexatious and abuse of the court process.

4. That the Preliminary Objection as framed is defective and not specific.

5. That the Preliminary Objection offends Article 159 of the Constitution.

6. That the Preliminary Objection does not meet the standard required and called for under the decided case law.

7. That the law is well settled as to who is amenable to surcharge, the Respondent being one of them and therefore, the Claimant’s suit is merited.

8. That the allegation that the inquiry is *ultra vires* before this Honourable Tribunal is baseless and unsustainable because such grounds can only be raised under Judicial Review proceedings which has not been utilized by the Respondent if at all he felt aggrieved.

9. That the Respondent did not exercise his right of appeal as per the Co-operative Societies Act.”

7. The Preliminary Objection was heard by the Co-operative Tribunal and dismissed. That is what triggered the Appeal herein.

8. The Appeal was canvassed by way of written submissions and counsel for the parties were given the opportunity to highlight the submissions.

9. The Tribunal in dismissing the Preliminary Objection in its ruling, *inter alia*, stated:

“we have carefully considered the submissions and rival arguments vis-à-vis the position of the law. Our considered view is that on jurisdiction, the law is clear: a liquidator is appointed under Section 65 of the Co-operative Societies Act and his powers are statutorily governed under Section 66 of the aforesaid Act. Further, those powers are to be exercised “subject to the guidance and control of the commissioner and to any limitations imposed by the commissioner”. Section 66 (1) (b) provides that “the liquidator shall, subject to this Act have the powers to institute and defend suits and other legal proceedings by, and on behalf of, the society on his own name or office, and appear before the Tribunal as a litigant in person on behalf of the society”. The current claim arose pursuant to the liquidator carrying out his duties need not consent in writing to be bound by the decisions of the Tribunal. On that account alone the preliminary objection fails.

At his stage of the proceedings it might be prejudicial to discuss exhaustively our deliberations since that might pre-empt the arguments in the main. In the circumstances, we find that the preliminary objection is without legal basis and therefore order that it be struck out with costs. Parties may now take dates for the main suit”.

10. Mr. Getange for the Appellant submitted, *inter alia*, that Section 76 of the Co-operative Societies Act lists the persons who are subject to proceedings in the Co-operative Tribunal. That a Liquidator is not one of them and therefore is not subject to the jurisdiction of the Tribunal. He submitted that the Appellant was appointed as a Liquidator of a society whose certificate had been cancelled by the Commissioner and was not therefore an officer of a society. He further submitted that the Tribunal had no jurisdiction to determine a claim for surcharge ordered by the Commission. That the Tribunal should therefore have found that it had no jurisdiction and ought to have struck out the claim.

11. Mr. Muriuki for the Respondent submitted that the Liquidator is appointed under Section 65 and is subject to the Tribunal under Section 66(a) as he is an officer. He submitted that the Appellant was appointed as Liquidator by the Commissioner of Co-operative Societies who is also the one who ordered the surcharge.

12. After considering the grounds of Appeal, and the submissions, we have identified the question of jurisdiction as the central issue in this Appeal.

13. The subject of the Appeal is a Preliminary Objection. 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.”

14. The Court of Appeal held as follows in the case of the **Owners of Motor Vessel "Lillian s" v Caltex Oil Kenya Ltd [1989] KLR 1:**

“Jurisdiction is everything. Without it, a court has not 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.”

15. Section 76 (1) and (2) of the Co-operative Act No. 12 of 1997 gives the Co-operative Tribunal powers to hear disputes concerning the business of a Co-operative Society. The said provisions stipulate 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; ...”

16. What is the “business” of a society for purposes of Section 2 & 76 of the Co-operative Societies Act? This was answered by the Court of Appeal in the case of **Gatanga Coffee Growers v Gitau (1970) E.A. 361** and **Murata Farmers Saaco Society Ltd v Co-operative Bank of Kenya Ltd [2001] eKLR:**

“...business of the society is not confined to the internal management of the society but covers every activity of the society within the ambits of its by-laws and rules.”

17. A perusal of the pleadings herein reflects that the Claimant Society describes itself as a Co-operative society registered under the Co-operative Act. The claim is for a sum of money stated to have been lost as a result of the negligence or failure by the Appellant as a Liquidator and agent of the Claimant Society. It was claimed that the Applicant together with others failed to exercise due care and diligence in handling the business of the Claimant Society. In our view, a Liquidator of a Co-operative Society is an officer of that society.

18. Section 2 of the Co-operative Act No.2 of 1997 defines an Officer as follows:

“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. A Liquidator of a Co-operative Society is appointed under Section 65 of the Co-operative Societies Act and all the property of a society whose registration has been cancelled vests with the Liquidator.

20. Under Section 66 the liquidator’s powers are to institute and defend suits on behalf of the society; determine contributions made by members; investigate claims; call meetings of members and creditors; selling the property of the society; carry the business of the society; determine expenses of the liquidation process; distribute assets of the society and to keep books, documents and asset of the society amongst other duties.

21. It is pleaded in paragraph No. 2 of the Statement of Claim that the Appellant is a former Liquidator of Kiera Farmers Co-operative Society Ltd and an agent of the Claimant Society. In our view, the definition of an officer under the Co-operative Societies Act includes any person empowered under the Act or the by-laws of a Co-operative Society to give directions in regard to the business of the society. The Appellant admitted in the Statement of Defence that he was a liquidator for Kiera Co-operative Society Ltd.

22. Section 73 of the Co-operative Societies Act gives power to the Registrar of Co-operative Societies to surcharge past or present officers of a Co-operative Society in relation to misapplication, retention, liability and accountability for money or property of a society.

23. Section 75 thereof provides for any such money by way of a civil debt or any other mode of recovery. The said section provides as follows:

“Any moneys (including interest) ordered by an order made under section 73, to be repaid or contributed to a co-operative society, shall without prejudice to any other mode of recovery, be a civil debt recoverable summarily.”

24. With the foregoing, we hold that the dispute herein concerns the business of a Co-operative Society, is stated to be against a Liquidator and agent of a society and involves a surcharge. The dispute in our view falls squarely within the ambit of the disputes envisaged under the provision of Section 76 of the Co-operative Societies Act.

25. In the upshot, we find no merits in the Appeal. Consequently, the appeal is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 21st day of Feb., 2020

B.THURANIRA JADEN

JUDGE

S. N. RIECH

JUDGE