



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 208 OF 2017

VIPINGO SACCO SOCIETY LTD.....APPELLANT

VERSUS

MOHAMED A. SHEIKHDINI & 7 OTHERS.....RESPONDENTS

(Being an appeal from the Judgment and Decree of Honourable Co-operative Tribunal delivered on 11th September, 2017 by the Honourable Chairman in Mombasa Co-operative Tribunal Case No. 338 of 2017 Sheikh Mohamed & 7 Others –versus- Vipingo Society Limited)

RULING

1. The Respondents, sued the Appellant vide a statement of claim vide Mombasa Cooperative Tribunal Case No. 338 of 2017, SHEIKH MOHAMED & 7 OTHERS –VERSUS- VIPINGO SACCO SOCIETY LIMITED, in their capacity as members and shareholders of posho mill claiming that the Appellant has refused to pay them dividends for the years 2012, 2013, 2014, and 2015 amounting to Kshs.553,125.00.
2. The Respondent also prays for judgment against the Appellant due to the mismanagement of the posho mill and as shareholders they should be given mandate to manage and own their own business without interference of the Appellants. They also pray that they be paid their dividends totaling Kshs553,125.00/=.
3. The Appellant did not enter appearance and neither did they file a defence despite having been served with the statement of claim, replying affidavit and summons. And on 11th September, 2017, the chairman of the Tribunal entered an interlocutory judgment in the sum of Kshs553,123.00 against the Appellant under the believe that the appellant had failed to take steps to defend the claim.
4. The Appellants were dissatisfied with the interlocutory judgment that had been entered against them on 11th September, 2017, whereby the Cooperative Tribunal sitting at Mombasa has issued a decree to be executed. It will be noted that the dispute had been partially determined in respect of the liquidated claim and the remaining dispute set down for formal proof.
5. Aggrieved by this development, the Appellant has filed an appeal against the Respondent with regard to the said decree, and simultaneously filed an application vide a Notice of Motion (Application) dated 3rd October, 2017, seeking for;

(a) Spent;

(b) stay of execution of the Honourable Tribunal's entire judgment and decree dated 11th September, 2017 whereby the Appellant was ordered to pay the Respondent the decretal amount of Kshs562,531/- and costs of Kshs16,840/- pending the hearing and determination of the application and appeal;

(c) the judgment delivered by the Honourable Chairman on 11th September, 2017 and the decree therein be set aside and for the trial to commence de novo;

(d) leave to be granted to the Appellant to defend itself in MOMBASA COOPERATIVE TRIBUNAL CASE NO. 338 OF 2017, SHEIKH MOHAMED & 7 OTHERS –VERSUS- VIPINGO SACCO SOCIETY LIMITED;

(e) the annexed draft defence and draft memorandum of appeal be deemed as duly filed;

(f) costs of the application be provided for.

6. The application is grounded on a raft of grounds but the main one being that service was not effected upon the Appellants, and therefore the judgment should be set aside as the defence by the Appellants is good, strong with triable issues.

7. The application is opposed on the ground that the Respondent has set out in the Replying affidavit whereby 13 grounds have been raised. The emphasis is set out at paragraphs 8, 9 and 10 of the Replying affidavit where service of the claim, verifying document and summons upon the Appellant on 30th May, 2017 is admitted at paragraph 5 and at paragraph 4, the admission of judgment on 11th September, 2017.

8. The other important point is that in the pleadings herein, the merits of the judgment entered against the Appellant have not been challenged and that the application ought to have been filed in the Cooperative Tribunal in the first instance as provided for under Rule 6 of the Cooperative Tribunal (Practice & Procedure Rules, 2019). It is on these facts that the Respondent seeks to have the court dismiss the entire application and appeal, and allow execution to proceed.

9. I have considered the application herein in terms of the provisions of Section 81 of the Cooperative act, No. 12 of 1997. The Section gives its court jurisdiction to hear appeals from the Tribunal, that;

(1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) Upon the hearing of an appeal under this section, the High Court may—

(a) confirm, set aside or vary the order in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(3) The decision of the High Court on any appeal shall be final.

10. And any virtue of Section 81(3) of the said Act, the decision of this court is final. The right for a party to be heard is fundamental and guaranteed by the provisions of Article 50(1) (2) (a) to (q) of the Constitution of Kenya.

11. I have considered the nature of dispute in the instant case and find it is one that calls for the court to invoke the discretion granted by section 81(2) (b) which provides as follows;

“Upon hearing an appeal under the Section, the High Court may;-

“remit the proceedings to the Tribunal with such instructions from further consideration, report, proceedings or evidence as the court may deem fit to give.”

12. Accordingly, I remit these proceedings to the Tribunal for it to decide on the disputed matters in this case.

It is therefore ordered:-

(a) that the orders made by Honourable Lady Justice Njoki Mwangi on 12th October, 2017 that there be a stay of judgement and decree dated 11th September, 2017 whereby the Appellant was ordered to pay to the Respondent the decretal amount of Kshs562,531/= and costs of Kshs16,840/= pending the hearing and determination of the claim of the Tribunal are hereby confirmed;

(b) This file to be remitted to the Cooperatives Tribunal for consolidation with CTC No. 338 of 2017, Mombasa;

(c) The trial to commence de novo;

(d) The Appellants are granted leave to defend themselves before the Cooperative Tribunal and the annexed draft defence be deemed as duly filed;

(e) The parties be at liberty to file supplementary documents within 30 days from today;

(f) Mention before the Tribunal for directions;

(g) The Appellant to pay costs of the Notice of Motion dated 3rd October, 2017 and the same is hereby complied at Kshs20,000/=.

Ruling delivered, dated and signed this 28th day of March, 2019

D. CHEPKWONY

JUDGE.

IN THE PRESENCE OF:

Mr. Kalimbo, counsel for the Applicant.

Respondent in person.

Court assistant; Beja.