



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 178 OF 2018

MUKUYUNI FARMERS CO-OPERATIVE SOCIETY.....APPELLANT

VERSUS

JACKSON N. NGULI.....1ST RESPONDENT

JOSHUA MUTETI KALULU.....2ND RESPONDENT

ONESMUS M. MUTUA.....3RD RESPONDENT

BONIFACE W. NDAMBUKI.....4TH RESPONDENT

J U D G M E N T

The Appellant herein, Mukuyuni Farmers Co-operative Society was the claimant in the Co-operative Tribunal Case Number 320/2017 in which it sued the Respondents herein, Jackson N. Nguli, Joshua Muteti Kalulu, Onesmus M. Mutua and Boniface W. Ndambuki for an order compelling them to produce before the Tribunal the financial Records of the Claimant/Appellant for the years 2011/2012 and 2012/2013 as particularized in the statement of claim dated the 5th day of April, 2017 and filed on the even date. The Appellant also sought for the costs of the suit.

The claim was based on the allegation that, the Respondents who had served the Appellant in their respective capacities until the 10th day of October, 2014, had while leaving office, carted away the Appellant's Financial Records for the year 2011/2012 and 2012/2013 which action had made it impossible for the independent auditor to finalize its audit report as at the time of filing the claim, which action was unlawful, illegal and immoral and has hardened the smooth sailing operations of the Appellant.

The Appellant claimed that the said financial records which were still in possession of the Respondents are crucial to finalize the audit report by the Appellant's independent auditor and therefore, there is need for the court to compel the Respondents to produce those financial records.

The claim was denied by the Respondents who filed their memorandum of Reply on 31st May, 2017. They admitted that they served diligently as officials of the Appellant until the 13th June, 2014 and after the new officials were elected, they handed over the control of all Appellant's properties and documents to the claimant's new officials. They denied the Appellant's allegation that they carted away to their homes, the official records of the Appellant.

Further to the foregoing, they contended that at all material times, the Appellant's documents and books of accounts were and are still kept in the Appellant's offices with the secretary manager who is the custodian. They averred that they have never been custodians of the Appellant's documents and therefore, they are strangers to the claim being made against them by the Appellant and as such, the suit raises no cause of action against them.

The matter proceeded for hearing with Stephen Muia Wambua testifying as PW1. At the material time, he was the chairman of the Appellant. It was his evidence that the respondents were former members of the Board, who were in office for about 10 years until October, 2014 when they resigned when members in the AGM resolved that they needed to investigate their operations after members found that they had kept some books with financial records. He stated that they only handled over financial records for the year 2013/2014 but not for 2011, 2012, 2013 and 2014, which made it difficult for the Auditors to audit the Appellant's financial report.

In cross examination, he stated that he replaced the Respondents on 13th June, 2014, after he took office and that there was a handing over process after election which took place on 21st June, 2014 except the 3rd Respondent who handed over on 29th October, 2014. He further

stated that the records handed over were for the year 2014 and they were serialized. That during the handing over, the 3rd Respondent brought documents in a paper bag. It was his evidence that there was a time the Appellant did not have a secretary manager and during this period, the Respondents kept the documents.

Jones Matheka is a professional Auditor who testified as CW2. He testified that his firm J. N. Matheka were auditors of the Appellant and in the year 2013 they did a report for them for the period April 2013 to March, 2014. That in the process of the audit, they found there was a discrepancy and therefore, they were unable to conduct full audit because documents for the year 2011, 2012 and 2013 were not made available as the Appellant could not supply them with the said documents.

The Respondents called one witness Jackson Nzuki Ngala who testified as RW1(the first Respondent). He testified on his own behalf and that of the other Respondents. He denied the allegations made by the Appellant against them. His evidence was that the Appellant's documents were kept in the society's office by the secretary manager. He wondered why only four Respondents were sued yet they were all nine in total. He denied the allegations that he took a stamp home. He stated that they handed everything when they left office on 10th October, 2014.

In cross examination, it was his evidence that he was the chairman of the applicant from 2011 – 2013 but at the time they were asked to step down on 10th October, 2014 he was the vice chairman. He stated that the handover process took time but during the handover meeting, no minutes were taken.

Parties filed their submissions in support of their respective cases and in its judgment delivered on the 3rd April, 2018, the members of the Tribunal found that the Appellant had failed to Prove its claim to the required standard and declined to grant the orders sought which is essence meant dismissal of the Appellants claim.

The said judgment is the subject of the appeal herein, which was filed by the Appellant (Claimant) in which it has listed 14 grounds of Appeal in its memorandum of appeal dated the 12th day of April 2018 and filed on the 13th day of April, 2018.

When the Appeal came up for hearing parties agreed to canvass the same by way of written submissions.

The court has carefully considered the submissions and the grounds of appeal. The court has also re-evaluated the evidence adduced before the Tribunal as expected of the Appellate Court.

In its submissions, the Appellant set out two issues for determination as follows:

1. Whether the Honourable Tribunal erred in law and in fact in finding that the Respondents did not have a fiduciary duty to produce the documents for an independent audit report and whether the duty was breached if at all.
2. Whether the Appellant's prayers ought to be granted.

On the first issue, the Appellant submitted that the tribunal misinterpreted the law by failing to find that the Respondents had a fiduciary obligation towards the Appellant and that they were in breach of that obligation. They submitted that the tribunal erred in finding that the Appellant ought to have filed a complaint with the Commissioner of Co-operative Societies as per Section 58 of the Co-operative Society Act. They argued that the claim before the Tribunal was not for misappropriation of the society's funds but it was with regard to documents that were carted away by the Respondents which would have formed the complaint to the Commissioner as the Commissioner could not have dealt with the complaint without the auditor's report. They relied on the case of *Ajay Shah vs. Deposit Protection fund Board & Others (Criminal Appeal No. 158/2013)* where the court of appeal held;

“.....to describe directors as trustees seems today to be neither strictly correct nor invariably helpful (see City Equitable Fire Insurance Co. (19250 Ch 407 per Romer J. at page 426.

In truth, directors are agents of the Company rather than trustees of it or its property, but as agents, ***they stand in a fiduciary relationship to their principal, the Company***. The duty of good faith which this Fiduciary Relationship imposes are virtually identical with those imposed on trustees and to this extent, the description “***trustee***” still has validity.

The duties of directors can conveniently be discussed under two heads;

1. Fiduciary duties of loyalty and good faith (analogous to the duties of “***trustees***” strict sensu and;
2. Duties of care and skill (see ***Fiduciary Relationships***” (1962) C. L. J 69 AND 91963) C. L. J 119, and “***The Directors as trustees***” (1967) C. L. J. 83)

On the part of the Respondent, it was submitted that the Appellant did not adduce any evidence in support of the claim that the Respondents carted away its documents on 10/10/2014 when they stepped down. That the only evidence that they are relying on was the allegation that a rubber stamp was taken by the 1st Respondent to his home though the person who allegedly took the stamp to the Respondent's homestead was never called to testify. They argued that parties are bound by their pleadings and the Appellant did not plead the issue of the rubber stamp.

They further submitted that though the auditor stated that he could not finalize the audit report due to lack of Financial Records, he did not

specify the financial records that were missing and that the secretary manager whose duty was to keep the Appellants documents was never called to testify to substantiate the claims by the Appellant.

On the issue of whether the Respondents owed the Appellant a duty of care, the Respondents contended that although they did, the same was never breached. They also urged that the Respondents left office in the year 2014 and the allegations of missing documents was only raised in the year 2016, a delay of two years which delay was not explained by the Appellant. They averred that the Appellant has not explained under whose authority the alleged investigations were done. They cited Section 58 of the Co-operative Societies Act to the effect that the commissioner ought to have authorized such investigation and appoint an independent person to do such investigation and, therefore, according to them, the investigations that gave rise to the claim were a nullity. They have asked the court to dismiss the appeal.

The court has considered the appeal and the submissions by the parties. On whether the Respondents owed the Appellant a fiduciary duty, both parties are in agreement that they did. The Respondents in their submissions admitted as much and therefore, that is not an issue for consideration in the appeal. The only issue in this regard is whether that duty was breached.

In the statement of claim filed before the Tribunal the Appellant/Claimant sought for orders to compel the Respondents to produce before the tribunal, financial records of the Claimant/Appellant for the financial years 2011/2012 and 2012/2013 as set out therein. The Respondents in their memorandum of reply denied being in possession of the same.

The Respondents who are former Board Members of the Appellant had served in their respective capacities until the 10th October, 2014, when members in a Special General Meeting passed a resolution that they should vacate office immediately due to inconsistencies in financial records during their tenure. New officials were duly constituted.

CW2, Jones Matheka was appointed to carry out the audit for the period between 2011/2012 and 2012/2013 but in his evidence he stated that he could not conduct the audit because the financial records for those years were not availed to him. It should be noted that the need to audit the accounts for the years 2011/2012 and those of 2012/2013 was prompted by discrepancies that were noted during the audit of 2013/2014 which highlighted serious discrepancies that called for the need for similar investigation to be carried out for the years 2011/2012 and 2012/2013. This is borne out in the affidavit of the Chairman of the Appellant (Stephen Wambua) in his affidavit filed in court on 16th October, 2017.

In the report by the auditor dated 30th November, 2015 and which was for the year ended 2014, he was categorical that the Appellant lacked many crucial documents which would have been relied upon to shed more light on the utilization of the Society's funds for the period 2011/2012, 2012/2013 and 2013/2014. The auditor further noted that the documents for the year 2011/2012 and 2012/2013 were missing completely. He recommended to the Board in office then, to pursue the former Board Members to avail the same to enable him finalize with the audit. This, therefore, means that the said audit was never finalized contrary to what the Respondents have submitted that the said financial records had been subjected to audit and the report adopted by the members.

It is the Respondent's case that they handed over the control of all the Appellant's properties and documents to the Appellant's new officials. They also averred that the Appellant's documents and books of accounts were and still are kept in the Appellants offices with the secretary manager being the custodian and thus they have never been the custodians of the Appellant's documents.

The evidence on record reveals that there were two handovers that took place. The first was attended by both new and old officials of the Appellant. According to the minutes taken on the said date, the handover involved the property of the Appellant. The new members of the committee were shown the boundaries of the society's land and the property that was in the apartment and chemical stores among others but no documents were handed over on the said date.

The other handover by the treasurer took place on the 29/10/2014 during an executive committee meeting. The evidence available being that he could not hand over immediately as he needed time to prepare the books of accounts. The minutes taken on that day shows that he handed over the following documents;

1. Two cheque books; one for members Account with ten (10) leafs and the other for Operation Account with 18 leafs.
2. Another cheque book for Family Bank with 18 leafs.
3. Payment vouchers which were 6 books and 5 of them were filled up.

The Respondents contended that upon handing over they signed an inventory which they stated was in possession of the Appellant arguing that if they had not handed over, the Appellant could not have continued operating without them.

At the same time, the Respondents have argued that the documents were in the custody of the secretary manager. In response to this, the Chairman of the Appellant in his affidavit filed in court on 10/10/2017 deponed that there was a period during which the Appellant did not have a secretary manager from February, 2014 to 13/05/2014 and he suspected the Respondents could have carried away the documents during that period. He referred to a letter dated 13/05/2014 in which one Shadrack M. Ndegwa was appointed in that capacity. This evidence was corroborated by the 3rd Respondent in his replying affidavit filed on 11/05/2017 where he stated that at some point, the secretary manager stepped aside and another one had to be employed. In this regard the court has perused the by-laws for the Appellant amended in the year 2014. The court is able to confirm that among the duties of the secretary manager are to maintain and custody of society's books of accounts, assets, registers, certificate, society seal, cheque books and other accountable documents.

Though this is the case, given the evidence that there were times that the Appellant did not have a secretary manager, one cannot rule out the fact that during such times, the Respondents being Board Members could access the documents. This is not farfetched considering the

minutes of the meeting held on 10/10/2014 in which it was minuted that one Musyoka Ndunda had picked the society's official rubber stamp and taken it to the 1st Respondent's home. It is on record that the first Respondent did not deny that fact and he even apologized stating that he did not have an ill motive in doing so.

Further, there is evidence that in the year 2014, the 3rd Respondent took payment vouchers to the incoming treasurer from his house which he had put in a paper bag. The said vouchers were for 2014/2015 financial year.

This court cannot rule out the fact that the Appellant's documents could have landed in the hands of the Respondents.

Their memorandum of reply was also contradictory in that, at paragraph 5 they stated that they handed over the documents while at paragraph 6 they denied having been in possession of any documents belonging to the Appellant as the documents were in the custody of the secretary manager. The three limbs of the defences cannot go together unless they are pleaded on *a without prejudice* which was not the case herein.

Though the Respondents contended that there was bad blood between them and the Chairman which could have led to the filing of the claim, it is my considered view that this was just a mere allegation that was not proven.

As to the contention that the Respondents handed over all the documents, this court is not persuaded by that argument. To the contrary, the Appellant produced sufficient evidence of the documents that were handed over to them by the Respondents. It was worth noting that several letters were exchanged between the Appellant and the Respondents requesting for the documents. I did not see any from the Respondents stating when, if at all, the claimed documents were handed over. That argument by the Respondents is dismissed.

Finally, the Respondents contend that the investigations carried out by the Appellant were annuity as the same was done in contravention of Section 58 of the Co-operative Societies Act. The court has perused that provision vis-a-vis the claim filed by the Appellant and the reliefs sought therein. The section provides that the Commissioner of Insurance may hold an inquiry or direct any person authorized by him in writing to hold an inquiry into by-laws, working and financial conditions of any Co-operative Society. It is instructive to note that the word used there is "*may*". My understanding of the Section is that such an inquiry can only be held for members of a sitting committee and not former members. This can be inferred from Section 58(4) on the action that the commissioner may take after the inquiry. In our case, the Respondents had already left office and were no longer members of the Appellants committee.

Without prejudice to the aforesaid, looking at the orders sought by the Appellant in its claim, it was an order directing the Respondents to produce the documents stated in the claim which they required for purposes of auditing. I would therefore not agree with the Respondents contention that the process of asking for the documents would be equated to an inquiry under Section 58 of the Cooperative Societies Act. The members of the Tribunal took the same view with that of the Respondents with regard to Section 58 which view, as pointed out herein above was erroneous.

In the end, I find that the Appellant's proved their case on a balance of probability and the learned members of the Tribunal erred in dismissing its claim. The appeal has merits and the same is allowed with costs to the Appellant.

Dated, Signed and Delivered at NAIROBI this 27TH Day of JUNE 2019.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

.....For the Respondent