



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 61 OF 2012

KARURU FRANCIS NDERITUAPPELLANT

VERSUS

MWALIMU NATIONAL COOPERATIVE SAVINGS

CREDIT SOCIETY LIMITED.....RESPONDENT

R U L I N G

1. The Appellant/Applicant filed an appeal against the award/judgment of the Honourable Chairperson of the Co-operative Tribunal, M/S A. N. Ongeri, delivered on 2nd March, 2012 in Cooperative Tribunal Case No 8 of 2010 at Mombasa. KARURU FRANCIS NDERITU VRS MWALIMU NATIONAL COOPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED.

2. The Appellant who was the claimant in the case before the Tribunal filed a statement of claim dated 5th May, 2011, stating that he was a member of the Respondent, Sacco and had applied for a normal loan from the said Respondent on a or about 14.12.2009 and expected to receive the same within 14 days. He stated that despite follow up and reminders through all the provided for mechanisms he was denied the loan and was eventually suspended on the grounds that he had harassed the respondent society through auctioneers and caused them embarrassment. The appellant found the decision unlawful, unjustifiable and ultravires the cooperative societies Act and the Respondent's By - Laws.

3. In response, the Respondent filed a statement of defence dated 13th June, 2011 in which they denied the appellant's claim while stating that the loan application had to go through settled procedure and that his suspension was justified as it was done within the by -Laws. After the hearing the Cooperative Tribunal held as follows;

“ In a nutshell, the claimant has failed to prove to the required standard that he is entitled to the remedies he is seeking against the Respondent. We dismiss the claimant's case at this stage. Finally, on the issue as to who pays the costs of this suit, we find that since the claimant is still a member of the Respondent and for that reason we order each party bears its own costs of the suit”.

4. Aggrieved by this decision, the claimant /Appellant filed an appeal in which he has cited 45 amended grounds of appeal challenging the said decision of the Tribunal.

5. Before the appeal could be heard, parties attempted an out of court settlement which collapsed. And on 7th December, 2015 the appellant filed a notice of Technical Objection based on Order 9 Rules (1) and (2) of the Civil Procedure Rules, and sections 12 and 26 (1) and (3) (a) and (b) of the Cooperative Society Act, where he claims to have raised serious issues on equality before the law.

6. In the Notice of Technical Objection dated 2nd December, 2015 the appellant /applicant seeks for orders that;

(a)The law firm of Madzayo Mrima and Jadi advocates is not properly before the court in its representation of the respondent

(b) The law firm of Madzayo Mrima and Jadi Advocates does not conform with the Civil Procedure Rules, 2010, Order 9, rule 1 and 2.

(c) The law firm of Mdzao Mrima and Jadi Advocates does not conform with the Cooperative Societies Act, Section 12 and Section 28 (1) and (3) (a) and (b).

(d) The Honourable court has witnessed a legal transgression in by the law firm of Madzayo Mrima an Jadi Advocates

(e) The law firm of Madzayo Mima and Jadi Advocates pays a fine of Ksh 2,000,000/= for all the transgressions.

(f) The law firm regularizes its representation of the respondents in conformity with the laws of the Republic of Kenya

The application is based on the provision of order 9 (1) and (2) of the Civil Procedure Rules, and sections 12 and 28(1) and (2) of the Cooperative Societies Act.

7. On 30th April, 2011, the parties proceeded with the hearing the said Notice of Technical Objection filed by the Appellant/Applicant on 7th December, 2015.

8. According to the Applicant /Appellant in his oral submissions to court; the prayers are as outlined in the said objection. He also added that his prayers are based on the sections of the law he has cited in the application in support thereof. He further stated that Mr. Kinyanjui, counsel for the respondent was representing a cooperative body which cannot come and stand in court so that he wants the Executive Officer to come instead together with a seal or present Mr Kinyanjui as their appointed agent and or advocate.

9. In response, Mr. Kinyanjui submitted that all along Respondent has been represented by the same firm of advocates and that it is rather too late for the Appellant to demand for the Chief Executive Officer of the Respondent to attend court, at the appeal level. He stated that the recognized agent for the respondent in this case, is the advocate, who has been on record all through. He urged the court to go through the record and will note that this is not an issue that was raised at the stage of trial. He then urged the court to estoppe the Appellant/Applicant from urging that line of argument and allow for the appeal to go on.

10. The appellant insisted that there is nothing on record to show that the firm of M/s Madzayo, Mrima Jadi & Co. Advocates have been properly appointed by the Respondent to act for them.

11. In considering the Notice of technical application, the grounds on which it is premised, submissions by the applicant and Mr Kinyanjui for the Respondent, I find that the rule of natural justice provide for the right for a party, whether person or corporate body, to be represented by an advocate of their own choice.

12. Of the provision cited by the Applicant. I find that none them advance his notion for representation of a party by an advocate. They are as follows;

1. Civil Procedure Rules, 2010 Order 9, Rule 1 which states;

1. Applications, appearances or acts in person, by recognized agent or by advocate (Order 9, rule 1.)

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party is such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf;

2. Civil Procedure Rules, 2010 Order 9 Rule 2 which states;

2 Recognized agents (Order 9, Rule 2.)

The recognized agents of parties by whom such appearance applications and acts may be made or done are-

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

3. Co-operative Societies Act, Section 12

12. Co-operative Societies to be body corporate Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

4. Co-operative Societies Act, Section 28 (1) and (3) (a) and (b).

28. Membership and powers of the committee

(1) Every co-operative society shall have a committee consisting of not less than five and not more than nine members.

(3) The committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-law of the co-operative society, direct the affairs of the co-operative society with power to-

(a) enter into contracts;

(b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative

society;

These provisions speak for themselves and do not support the applicant's prayer.

13. Furthermore, I have gone through the record and established that the firm of M/s Madzayo, Mrima and company Advocates have always represented the Respondent and at no time has the issue of their not being properly on record been raised or objected to.

14. In the circumstances, I find that the technical objection application lacks merit and dismiss the same with costs

It is so ordered.

Ruling delivered, dated and signed this 3rd day of August, 2019.

LADY JUSTICE D. O. CHEPKWONY