



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 444 OF 2017**

**JAMES GACHOKI.....APPELLANT**

**VERSUS**

**BARAGWI FARMERS CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

**(Being an appeal from the Ruling/Award of the Tribunal delivered on the 2<sup>nd</sup> August 2017 in Tribunal Case No 40 of 2003 at the Cooperative Tribunal Nairobi)**

**JUDGMENT**

**INTRODUCTION**

1. In its decision delivered on 2<sup>nd</sup> August 2017, the Co-operative Tribunal (hereinafter referred to as “Tribunal”) held that the Appellant adduced no defence before it to persuade it to overturn the findings of the Registrar of Co-operatives and the Minister in Charge of Co-operatives. It further contended that it did not have facilities to go behind the enquiry process and that the finding to the effect that the Appellant as a Chairman was found culpable, stood.
2. It therefore found the claim for the sum of Kshs 2,710,000/= to have been merited and upheld the same. It further directed that interest would accrue at the rate of twenty (20%) per cent from the date of hearing to the date of judgment and thereafter, interest would be charged at court rates until payment in full.
3. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 21<sup>st</sup> July 2018 on 13<sup>th</sup> August 2018. He relied on eight (8) grounds of appeal.
4. His Written Submissions were dated 20<sup>th</sup> March 2019 and filed on 30<sup>th</sup> March 2019 while those of the Respondent were dated 3<sup>rd</sup> May 2019 and filed on 6<sup>th</sup> May 2019.
5. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE APPELLANT’S CASE**

6. The Appellant submitted that the Registrar of Co-operatives Societies commended surcharging based on heresay reports. He contended that he was not the custodian of the Respondent’s assets and documents and that he was not in the office at the material time, new officials having been in place.
7. He was emphatic that the recommendations were discriminatory as cases against the other Committee members were withdrawn contrary to Article 27 of the Constitution of Kenya that provides that each and every person is equal before the law.
8. He further submitted that the Tribunal violated the rules of natural justice because although a hearing was conducted, Section 75(1) (sic) was cited and applied without any evidence by the respective witnesses being considered. He pointed at the Tribunal’s assertions that stated:-

**“As a tribunal we did not have any facilities as evidence (sic) to go behind the enquiry process. The Respondent as the Chairman was found culpable. That finding stands.”**

9. He relied on the case of **Mary Wanjiku Gachigi vs Ruth Muthoni Kamau Civil Appeal No 172 of 2000** (eKLR citation not given) where it was held that it was the duty of every trial judge or magistrate to analyse and consider the evidence that has been placed before it and to also take note of the demeanour of witnesses.

10. He also placed reliance on the case of **Francis Gichobi & Another vs Baragwi Farmers Co-operative Society Ltd [2015] eKLR** where Mativo J held that when evidentiary facts are in dispute, a full trial is necessary. He reiterated that although trial was conducted, the evidence of the witnesses was not considered.

11. He argued that the Tribunal relied on Section 75(1) of the Co-operative Societies Act and failed to appreciate the provisions of Article 156 (sic) of the Constitution of Kenya and determined the matter on a technicality which led to the dismissal of his Defence thus occasioning him miscarriage of justice.

12. It was his further submission that the Tribunal failed to apply Section 7 of the Sixth Schedule to the Constitution of Kenya which demands that it “ought to have construed with alterations, adaptations, qualifications and expectations to the said Section 75 into conformity with the new Constitution thereby arriving at a wrong decision.”(sic)

13. He added that the Tribunal grossly misapplied the law on the right to fair hearing by failing to consider the oral evidence on record and urged this court to allow his Appeal.

14. He placed reliance on the case of **Peter vs Sundays Post Ltd [1958] EA 424** where it was held that:-

***“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”***

#### **THE RESPONDENT’S CASE**

15. On its part, the Respondent submitted that the Inquiry Report was lawfully and legally conducted and the surcharge orders issued were validly done so (sic). It pointed out that the matter proceeded properly before the Minister and Tribunal and that if the Appellant was dissatisfied with the surcharge order, he ought to have moved the court by way of a Judicial Review.

16. It was emphatic that its application for summary judgment against the Appellant was dismissed and the matter proceeded to full hearing at the Tribunal and the Appellant’s defence dismissal was not a technicality.

17. It was its submission that the Appellant was accorded fair hearing as per Article 47 and 50 of the Constitution of Kenya by being given adequate notice and time to appear before the Tribunal to defend himself.

18. It placed reliance on the case of **Geoffrey Kinuu Maingi & 4 Others vs Nthimbiri Farmer’s Co-operative Society [2015] eKLR** where Serгон J dismissed an appeal where the 1<sup>st</sup> appellant therein was found to have been liable for the respondent’s fines amounting to KShs 1,709,868.90.

19. It therefore argued that in view of the foregoing, the decision of the Tribunal was not malicious and did not breach the Appellant’s fundamental right.

20. It therefore urged this court to allow it to proceed against the Appellant herein so that it could enjoy the fruits of its judgment and bring the litigation which had gone on for eighteen (18) years, to an end.

#### **LEGAL ANALYSIS**

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

22. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

***“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”***

23. Having considered the parties respective submissions, it appeared to this court that the issues that were placed before it were really:-

#### **1. Whether the Tribunal violated the rules of natural justice.**

## 2. Whether the Tribunal arrived at a wrong conclusion warranting the interference of this court?

24. A perusal of the proceedings shows that the Respondent's case proceeded on 22<sup>nd</sup> May 2013 when the Appellant's advocate told the Tribunal that he was ready to proceed with one (1) witness. His case also proceeded on 2<sup>nd</sup> June 2015 when his advocate informed the Tribunal that he was ready to proceed with the hearing. Both the Appellant and the Respondent relied on their respective documents in support of their cases.

25. The Appellant proceeded with the hearing only when he and his advocate were ready. He referred to documentary evidence and tendered his evidence in chief. He was cross-examined and re-examined. His advocate also cross-examined the Respondent's witnesses. There cannot be said to have been violation of the rules of natural justice by the Tribunal. The Appellant was given full opportunity to present his evidence for determination. His argument that the rules of natural justice were violated fell by the wayside.

26. Turning to the merits of the Appeal, this court noted that Section 73 of the Co-operatives Act Cap 490 (Laws of Kenya) stipulates as follows:-

**(1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—**

**(a) has misapplied or retained or become liable or accountable for any money or property of the society; or**

**(b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.**

**(2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.**

**(3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.**

27. Section 75 of the Co-operative Act states that:-

**(1) Subject to section 74, an order made pursuant to section 73 for any**

**moneys to be repaid or contributed to a co-operative society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.**

**(2) Without prejudice to the powers by the Committee of a society to take action for recovery of the sum surcharged under section 73, the Commissioner may, on behalf of the society, institute such action.**

28. In the Report from Page 71 to 110, the Assistant Commissioner and District Co-operative Auditor recommended that the Respondent keep proper records and put in proper systems of running the affairs of the Society.

29. The Surcharge order was issued after the findings and recommendations of the Inquiry Report were unanimously adopted by the Respondent's members in a resolution made at a Special General Meeting that was held on 17<sup>th</sup> January 2002.

30. In the Surcharge order dated 2<sup>nd</sup> October 2002, the Appellant was informed of the provisions of Sections 73, 74 and 75 of the Co-operatives Act. During trial, he indicated that he was not aware of the appeal having been dismissed.

31. It appeared to this court that the Respondent's claim was filed pursuant to Section 75 of the Co-operative Tribunal and was for recovery of the surcharge of Kshs 2,710,000/=, as a civil debt.

32. This court looked at the Appellant's Statement of Defence that was filed on 21<sup>st</sup> February 2003 and found the same to have contained mere denials. He did not seem to have countered the allegation of misappropriation of the sum of Kshs. 2,170,000/=. He did not substantiate his submission that the Tribunal did not consider the evidence of the witnesses. He did not also elaborate on the relevance of Section 7 of the Sixth Schedule of the Constitution of Kenya.

33. This court noted his assertions that he did not have custody of the Respondent's assets and documents. The fact that he did not appeal against the decision of the Minister greatly weakened his case. The Tribunal found no additional evidence to make it overturn his decision. This court did not also see any merit in the Appellant's case because he seemed to place the burden of proof on the Respondent to prove that he was not liable for the surcharge.

34. He was under a responsibility to rebut and/or controvert the Respondent's case. He failed to do so and in the circumstances, he failed to persuade this court to interfere with the decision of the Tribunal and proceed in any of the ways that have been set out in Section 81(2) of the

Co-operative Societies Act.

35. The said Section 81(2) of the Co-operative Societies Act states that:-

**(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.**

**DISPOSITION**

36. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 21<sup>st</sup> July 2018 and filed on 13<sup>th</sup> August 2018 was not merited and the same is hereby dismissed. In view of the imbalance in the financial ability, it is hereby directed that each party will bear its own costs of this Appeal.

37. It is so ordered

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of December 2019**

**J. KAMAU**

**JUDGE**