



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 1 of 2018**

**POLYCARP OCHOLA.....APPELLANT**

**VERSUS**

**LYDIA AKINYI OWITI.....1ST RESPONDENT**

**KLEF DEVELOPMENT ASSOCIATION.....2ND RESPONDENT**

**(Being an Appeal from the Ruling and Orders in Kisumu CMCC No. 466 of 2017 delivered by Hon. O.Odawo (RM) on 11th December, 2017)**

**JUDGMENT**

1. **POLYCARP OCHOLA** (*hereinafter referred to as appellant*) sued **LYDIA AKINYI OWITI and KLEF DEVELOPMENT ASSOCIATION** (*hereinafter referred to as respondents*) in the lower court seeking declaratory and injunctive orders as pleaded in the plaint filed on 8th September, 2017.
2. By a Notice of Motion dated 12.10.17 and filed on 13.10.17, respondents sought orders that ACCOUNT NOS. [Particulars Withheld], [Particulars Withheld] and [Particulars Withheld] held at STANBIC BANK KISUMU BRANCH that hold members' monthly share contributions and investment money be frozen, pending the hearing of the suit.
3. In opposing the notice of motion, plaintiff on 23rd October, 2017 filed grounds of opposition in which he stated that the orders sought related to accounts held by KLEF SACCO (*hereinafter referred to as the Sacco*) which is not a party to this suit.
4. In a ruling delivered on **11th December, 2017**, the trial court found that the application was merited and granted it thereby freezing STANBIC BANK KISUMU BRANCH ACCOUNT NOS. [Particulars Withheld], [Particulars Withheld] and [Particulars Withheld].
5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 24.10.17 filed the Memorandum of Appeal dated 19.10.17 which sets out 5 grounds of appeal which I have summarized into 4 grounds that:-

- 1) *The Learned trial Magistrate totally misapprehended the facts and the law in issue and arrived at a skewed decision, finding and ruling*
- 2) *The trial magistrate had no jurisdiction to entertain, try and decide on issues exclusively reserved for the Co-operative Tribunal*
- 3) *The Learned trial Magistrate totally misapprehended the threshold in the Giella vs Cassman Brown case*
- 4) *The Learned trial Magistrate decided on matters touching on KLEF SACCO which is not a party to the suit*

**SUBMISSIONS BY THE PARTIES**

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

**Appellant's submissions**

7. Appellant holds the view under Section 76 of the Co-operative Societies Act Cap 490 Laws of Kenya (*hereinafter referred to as the Act*); the court had no jurisdiction to issue an order relating to Account No. [Particulars Withheld] which belongs to the Sacco which is not a party to this suit. In support thereof, appellant placed reliance on:

i. *Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR* where the court held that 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

ii. *Universal Traders Sacco v Margaret Mwikali Mbithi [2015] eKLR* where the court held that the lower court had no jurisdiction on matters under Section 76 of the Act

### **Respondent's submissions**

8. Respondent holds the view that 2nd respondent is an association and not a co-operative and is therefore not subject to the provisions of the Co-operative Societies Act. It was further submitted that the frozen accounts belong to the 2nd respondent and not the Sacco as alleged by the appellant. In support thereof, respondents relied on:

1. *Republic –Vs- Chief Magistrate's Court Ex-parte Edward Kibet Kimetto, [2013] eKLR* that a litigant must prove membership of a co-operative society.

2. *Richard M. Mwambura & 8 Others v Chief Magistrate Mombasa & Another [2002] eKLR* where a suit involving members and no-members of a Society was ruled not one envisaged in Section 76(1) of the Act

3. *Martin Njuhigu & 11 others v Sacco Societies Regulatory Authority & another [2016] eKLR* where the court held that the Tribunal has powers only on disputes that concern the business of the society

### **Analysis and Determination**

9. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR* and *Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123*. It then behooves this court to summarize the evidence that was tendered before the trial court.

10. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of court's jurisdiction.

### **Jurisdiction**

11. As was held in the case of *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1*:

*".....Jurisdiction is everything. Without it, a Court has no 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

12. There is no doubt that while 1st respondent is a member of a society, 2nd respondent is an association and is not subject to Section 76 of the Act. The matter that was before the court is not one envisaged under the provisions of Section 76 of the Act and I therefore find that the court had jurisdiction to deal with the issues raised in the Notice of Motion dated 12.10.17.

13. The foregoing notwithstanding, the record shows that the respondents sought orders to freeze account No. [Particulars Withheld], which according to the documents in support of the Notice of Motion dated 12.10.17, belongs to the Sacco. Appellant claims that it is Account No. [Particulars Withheld], which belongs to the Sacco but attached no documents in support thereof. I am therefore constrained to find that it is account No. [Particulars Withheld] that belongs to the Sacco. I am therefore in agreement with the appellant that the Learned trial Magistrate erred in deciding on matters touching on KLEF SACCO which is not a party to this suit.

### **Disposition**

14. As a result, the appeal partially succeeds and the order freezing account No. [Particulars Withheld], that belongs to the KLEF SACCO is hereby lifted. Each party shall bear its own costs of this appeal.

**DATED AND DELIVERED THIS 24th DAY OF May 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**For Appellant - Keniario Holding Brief for Onsongo**

