



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 625 OF 2009**

**D.M.K. WAROE & 9 OTHERS.....APPELLANTS**

**- V E R S U S -**

**PETER KARIUKI MUGO & 10 OTHERS .....RESPONDENTS**

*(Being an appeal from the award and decree of the Co-operative Tribunal at Nairobi CTC No. 157 of 2006 delivered and issued on 6<sup>th</sup> November, 2009)*

**JUDGEMENT**

1. This appeal arises out of the claim filed by the respondents in the Cooperative Tribunal vide a statement of claim dated 17<sup>th</sup> May 2006 which the appellants defended by filing their defence dated 30.5.2006. In the statement of claim the respondents complained that they were unprocedurally expelled without due notice. They prayed for the following orders against the appellants:

- a. A permanent injunction do issue against the defendants restraining them from expelling the plaintiffs as members of the society.*
- b. A permanent injunction restraining the defendants, their agents, or any other party to conduct elections in the various branches represented by the plaintiffs in the society.*
- c. A permanent injunction restraining the defendants from dissolving the other ministries branch*
- d. An order do issue that the defendants pay the 3<sup>rd</sup> and 8<sup>th</sup> plaintiffs their allowances which they were illegally denied*
- e. The court declares and independent audit from a reputable international audit firm to ascertain the extend of loss.*
- f. The defendants be declared unfit to hold office on their own admission as liability*
- g. Costs of this suit and interest thereon.*
- h. Any other or alternative relief this honourable court may deem fit to grant.*

2) The claim was eventually heard after this court issued orders vide Nairobi H.C.C.C no. 722 of 2007 directing the 1<sup>st</sup> respondent to hear and determine the dispute before it on priority basis. The respondents were awarded judgement as against the appellants. The appellants being aggrieved by the award of the

Cooperative Tribunal made on 6<sup>th</sup> November 2009, preferred this appeal. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submission.

3) I have re-evaluated the case that was before the Cooperative Tribunal. I have also taken into consideration the rival written submissions and the authorities cited by learned counsels. It would appear what triggered this dispute are reports widely covered by the print media on some alleged financial mismanagement and irregularities in Afya Savings and Credit Cooperative Society Ltd. It is said that the alarming reports prompted the respondents to requisition for a special delegates meeting to consider those concerns. The central management committee declined the requisition. In due course the respondents were invited to the 26<sup>th</sup> Annual Delegates Meeting of Afya Savings and Credit Cooperative Society Ltd scheduled for 29.4.2006 at K.I.C.C. On arrival at the venue on the aforesaid date, it is said that the respondents' names were called and were thereafter physically ejected from the venue. It is submitted that in the absence and without due notice a resolution to expel them from the membership of the society and as delegates was passed, an act which the respondents claim was unlawful, null and void. The appellants denied the allegations of financial mismanagement but averred that the respondents were unlawfully expelled from the society for conduct that is prejudicial to the interests of the society in accordance with the Bylaws of the society.

4) Though the appellant put forward 16 grounds of appeal, those grounds may be summarised to 5 grounds.

5) First, whether the respondent's claim was immature and incompetent before the cooperative tribunal. It is the submission of the appellants that the respondents should have first appealed against the decision of the central management committee or the general meetings to the next Board or representatives meeting instead of rushing to the High Court and the Cooperative Tribunal. The appellants cited the provisions of Bylaws no. 18 and 19 of the society. It is said that the respondents filed their claims before this court and the Cooperative Tribunal before exhausting the mandatory internal appeal procedures. The appellants further pointed out that it was wrong for the cooperative tribunal to allow the claimants to produce and make reference to another set of By-laws that were allegedly registered by the commissioner for Cooperative Development on 19.2.2007 yet the claim was filed on 17.5.2006. The new set of rules amended the previous Bylaws so that the society's power to 'expel' was substituted with the power to 'suspend'. The appellants argued that it was wrong for the tribunal to hold that the society's By-law did not provide for expulsion yet that was a provision which the previous By-law provided for but was taken away by amendment which was not in existence at the material time. The appellants were of the firm view that there was a calculated move aimed at assisting the respondents to win the case. The respondents are of the view that their claim was mature and competently before the cooperative tribunal since the purported expulsion was unprocedural and against the society's By laws. It is not in dispute that there was an internal appeal mechanism which the respondents by passed and straight away approached the High Court and the Cooperative Tribunal instead. The question which should be answered is whether the side-stepping of that stage is fatal? In my humble view, it is not fatal. However it is always desirable to exhaust the available internal dispute resolution mechanisms before proceeding to the next available avenue. The failure to do so is not fatal since the law does not expressly state so and in any no prejudice would be suffered. It has been argued that the Cooperative Tribunal erred when it relied on a By law which was introduced after the claim had been filed. The appellants are of the view that the new By law could not operate retrospectively. With respect, I agree with the submissions of the appellants. The new By law which was introduced, actually amended the previous By law by substituting the word '**expel**' with the word '**suspend**'. In this dispute, the critical question to be answered is whether or not the appellants were given an opportunity to be heard or not. Hence, whether the tribunal applied the previous or new By law does not matter. It is apparent from recorded evidence that the respondents were not heard before they were expelled. In short, I find the respondents' claim was properly before the courts and the Cooperative Tribunal.

6) Secondly, it is argued by the appellants that the Cooperative Tribunal did not have jurisdiction to entertain the respondent's claim while there was a pending suit before the High Court whose existence was never disclosed to the Cooperative Tribunal. The respondents are of the view that they filed Judicial

Review proceedings before the High Court to address questions of process which culminated to this court issuing an order directing the Cooperative Tribunal to proceed to hear and determine the matter before it on priority basis. A reading of By law 97 of the society, expressly states that in the event that the central management committee or general meeting or the board of representatives cannot settle a dispute, the matter shall be referred to the Cooperative Tribunal. In my humble view and the basis of the above, I am convinced that the Cooperative Tribunal had jurisdiction to entertain the respondent's claim.

7) Thirdly, whether the claim was bad for misjoinder of the 1<sup>st</sup> to 9<sup>th</sup> appellants with the 10<sup>th</sup> appellant. The appellants are of the argument that under Section 12 of the Cooperative Societies Act Cap 490 Laws of Kenya, upon registration, a cooperative society becomes a body corporate capable of suing and being sued in its own name. It was argued that the joinder of the 1<sup>st</sup> – 9<sup>th</sup> appellants in the suit as officials of the society's central management without accusing them of any wrong doing ought not to have been allowed by the Cooperative Tribunal. The respondents are of the contrary view that the 1<sup>st</sup> -9<sup>th</sup> appellants were sued in their capacities as officials of the society together with the society. A reading of the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010, will reveal that a suit cannot be defeated for misjoinder of parties. In this matter, the parties who should not have been sued are actually jointly sued with the corporate entity. For the above reasons the misjoinder is not fatal.

8) Fourthly, whether the deputy chairman had jurisdiction to preside over the hearing the dispute? It is the submission of the appellants that the deputy chairman of the Cooperative Tribunal, Mr. A. J. Kariuki was biased against the appellants from the beginning. The appellants argued that they raised several objections against his sitting but she refused to recuse himself. The appellants presented court documents showing they had challenged his appointment at the deputy chairman of the Cooperative Tribunal. The respondents contested the appellant's arguments by submitting that the deputy chairman was lawfully gazetted vide Kenya Gazete no. 151 of 2008 published on 18.1.2008. The respondents also argued that there was no tangible evidence to show that the deputy chairman was biased.

9) I have considered the material placed before this court on the question as to whether or not the deputy chairman should have been disqualified himself. I think what matters here is not about the past disputes and suits filed against the deputy chairman but the question as to whether there was evidence laid before the court to show that the deputy chairman was interested in this dispute and its outcome. I have not found such evidence. I therefore find no merit in this ground.

10) Finally, it is argued that the case before the tribunal had been overtaken by events since the term of the elected representatives namely 2<sup>nd</sup> – 9<sup>th</sup> appellants had lapsed. It is said that the tribunal erred when it made adverse orders affecting persons newly elected and without giving them a chance of being heard. The respondent had no opportunity to respond to this ground because they had not been served with the appellants submissions. I think the argument cannot stand because, the court or tribunal was dealing with decisions made by officials of the society on behalf of the society. The mere change of officials cannot in itself make the suit fail.

11) In the end I find no merit in the appeal. The same is dismissed in its entirety with costs to the respondents.

Dated, Signed and Delivered in open court this 27<sup>th</sup> day of January, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent