



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 382 OF 2014

JULIUS ONGERI MOSEAPPELLANT

VERSUS

ASILI SACCO SOCIETY LIMITED.....RESPONDENT

(Appeal from the ruling/order/decision of the Co-operatives Tribunal at Nairobi in case No. 260 of 2013).

JUDGMENT

The Appellant was the Claimant before the Co-operative Tribunal where he had filed a Statement of Claim dated 3rd June, 2013 challenging the decision of the Respondent Society suspending him on the grounds that the suspension was illegal and unlawful. The Respondent filed its Statement of Defence dated 25th June, 2013 and on 15th October, 2013, the Respondents filed a Notice of Preliminary Objection of even date on the grounds that ;

- (a) The Honourable Tribunal has no Jurisdiction to hear and determine the claimant's Suit ; and that
- (b) The Claim by the Claimant is an abuse of the registered by-laws of the Respondent and the process of this Honourable Court

The Objection was opposed by the Appellant and the same was canvassed by way of written submissions culminating to a ruling which was delivered on 31st July, 2014 striking out the claimant's claim with costs.

The Appellant being aggrieved by the decision of the Tribunal filed this Appeal on the grounds that:-,

- i.** The Learned Tribunal bench erred in law and in fact in striking out and/or dismissing the Appellant's suit on the basis of the Respondent's Preliminary Objection dated 15th October, 2013 when they knew or ought to have known that the said objection was not a preliminary objection based on law, but was an objection on facts which could only be determined after a full hearing.
- ii.** The Learned Tribunal bench erred in law and fact in dismissing the Appellant's suit when there was overwhelming evidence and grounds that the dispute herein was one, which under the law should be determined by the Co-operatives Tribunal.
- iii.** The Learned Tribunal bench erred in law and fact in dismissing the Appellant's claim for want of jurisdiction, when they knew or ought to have known that the Co-operative Societies Act, (Cap 490) Laws of Kenya, conferred the Tribunal with jurisdiction to determine the claims between

members, former members and the Co-operative societies, and hence arrived at a wrong decision when there was overwhelming evidence and grounds that the dispute herein was one, which under the law should be determined by the Co-operatives Tribunal.

iv. The Learned Tribunal bench erred in law and fact in that it did not consider the evidence and submissions advanced in favour of the Appellant and hence arrived at a wrong conclusion.

The duty of this Court is to re-evaluate the evidence tendered before the Tribunal as was stated in the cases of **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424.**

Looking at the grounds of Appeal, the issues for determination by this Court will be whether the Learned Tribunal erred in dismissing the Appellants claim on the basis of the Preliminary Objection dated 15th October, 2013.

The Respondent filed its submissions dated 5th November, 2013 in support of the preliminary objection. In the submissions, the Respondent referred to section 20 of Asili Sacco Society Ltd by-laws as the basis of the Preliminary Objection. This section is titled “**Suspension and Expulsion Procedure**” and states that;

a) *Upon formal and written proof that a member has committed a violation punishable by expulsion, the Board shall serve a thirty (30) days written notice to the member stating the reason(s) for the proposed expulsion and requiring him/her to file a defence.*

b) *Upon the expiry of 30 days and taking into consideration the member’s defence, if any, the board shall initiate the administrative inquiry and make a decision on its findings within 15 days. The Board may ;-*

i. Suspend the member pending expulsion by the General Meeting or

ii. Impose any other punishment as may be in this by law or as may be directed by the general meeting from time to time.

c) *A member who is expelled from the Sacco society shall have the right to appeal to the tribunal.*

The Respondent further submitted that the Cooperative Act gives the members in a general meeting a free hand to decide their matters on merit without interference from outside. He referred to section 29 (1) of the Act which states that , “ **The supreme authority of a cooperative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters**”

The Appellant filed his submissions dated 4th February, 2014 and argued that the objection raised was not on a point of law but rather a matter of fact that cannot be determined as points of law. The Claimant relied on several cases to illustrate what constitutes a preliminary objection on a point of law, among them is the case of **Oraro Vs. Mbajja (2005) eKLR** where the Court stated that, “ A preliminary objection is a point of law which must not be blurred with factual details liable to be contested , and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection , and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication , is not, as a matter of legal principles, a true preliminary objection which the Court should allow to proceed.”

The Appellant further submitted that the allegations that he has not fully exhausted the machinery before filing the Suit can only be verified in a full trial. Further, to illustrate that the Tribunal has jurisdiction, the Claimant referred to section 76 (1) (a) of the Co-operative Societies Act which provides that, “*If any dispute concerning the business of a Co-operative Society arises;-*

a. Among members, past members and persons claiming through members, past members and deceased members- it SHALL be referred to the Tribunal ”

The Appeal was canvassed by way of written submissions which I have considered. In the Appellant's written submissions dated 15th March, 2017, the Appellant submits that he questioned the said suspension by a letter dated 13th April, 2010 where he stated that the Secretary did not indicate his misconduct in the suspension letter.

My re-evaluation of the evidence on record reveals that there is a discrepancy between the Appellants application of section 20 of the Respondent's by-laws on one side and the application of the same section by the Respondent and the Tribunal in its ruling on the other side. On page 4 of ruling the Tribunal stated that “...after his suspension, the Claimant was required to follow the procedure laid down in by-law 20 by filing his defence within the time stipulated in that by law. There is no evidence that the Claimant filed any defence.” A proper reading of the paragraph will reveal that even without the suspended member filing a defence, the Board can proceed and make its decision. Section 20 (b) reads that , “Upon the expiry of 30 days and taking into consideration the member's defence if any, the Board shall initiate the administrative inquiry and make a decision on its findings within 15 days.” The wording is “**member's defence if any**”. In essence, a member after receipt of the notice should file a defence and the Board will consider the defence in making its decision. The introduction of the word “**if any** “ should be interpreted to mean that if there is no Defence filed, then the Board can still proceed and make its decision. It is not a mandatory requirement that a suspended member must file a Defence.

It has been argued by the Respondent and the Tribunal has noted in its ruling that the Claimant ought to have approached the Tribunal only after his expulsion has been effected and therefore the Suit was premature. I will draw the attention of the parties herein to paragraph 4 of the statement of claim. The Appellant's claim is based on unlawful and illegal suspension. Section 20 of the Respondent's by-laws under which the Appellant was suspended clearly stipulates what ought to be the contents of the notice in section 20 (a) in that “Upon formal and written proof that a member has committed a violation punishable by expulsion, the Board shall serve a thirty (30) days written notice to the member stating the reason(s) for the proposed expulsion and requiring him/her to file a defence.” I have read the suspension notice dated 31st March, 2010 and I find that the reasons for the suspension were not stated therein.

Further, the by-law provides that a decision will be made by the Board upon expiry of 30 days' notice and within 15 days after the expiration of the Notice. The notice in question was issued on 31st March, 2010 and the Statement of Claim to the tribunal was filed on 3rd June, 2013 which is more than three years down the line. The said decision ought to have been communicated 45 days from the date of the notice which was not the case.

A preliminary objection has the effect of dismissing a suit before it is heard on its merits and for that decision to be made, a Court of Law has to be satisfied that the same is purely on a point of law which cannot be controverted.

The ingredients of a preliminary objection are well established in the celebrated authority of *Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696* as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

It is my finding from the evidence on record that the issues of law raised by Respondent do not come out clearly to support a preliminary objection. These would require further investigation of facts and therefore do not stand out as adoptable points of preliminary objection.

The upshot of this is that I allow the Appeal and set aside the decision of the Co-operative Tribunal made on 31st July, 2014.

Due to the nature of the matter, I make no orders as costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of **September, 2017**.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

.....For the Respondent