



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERUGOYA

CIVIL APPEAL NO. 31 OF 2014

BINGWA SACCO SOCIETY LTD.....APPELLANT

- VERSUS -

QUICKLINE AUCTIONEERS.....1<sup>ST</sup> DEFENDANT

JOSEPH GITHARA MUCHIRA.....2<sup>ND</sup> RESPONDENT

*(An appeal from the conviction and sentence of the Principal Magistrate's*

*Court (D. Nyaboke) at Wanguru, Civil Case No. 107 of 2012*

*delivered on 12<sup>th</sup> May, 2014)*

**JUDGMENT**

1. The appellant **Bingwa Sacco Society Limited** filed this appeal challenging the ruling of the trial magistrate in Wanguru Resident Magistrate's Court Civil Case No. 107 of 2012 which was delivered on 12<sup>th</sup> March, 2014. The Appellant who was the 1<sup>st</sup> defendant in the suit had raised a preliminary objection dated 10<sup>th</sup> March, 2014 contending that the trial magistrate lacked jurisdiction to hear and determine the suit by virtue of **Section 76** of the **Co-operative Societies Act No. 12 of 1997** as amended in 2004 and under **Section 67(3)** of the **Sacco Societies Act No. 14 of 2008**. That the plaint did not disclose a cause of action against the 1<sup>st</sup> defendant.

2. The appeal is based on the following grounds:

***1. The learned magistrate erred in law in finding that the Court had jurisdiction to hear and determine the suit before her since the second respondent was a member of the appellant.***

***2. That the learned magistrate erred in law in failing to find that the Co-operatives tribunal has exclusive jurisdiction to hear and determine disputes between a co-operative society and a member of the co-operative society.***

***3. That the trial magistrate erred in law in failing to allow the preliminary objection raised by the appellant.***

3. Based on these grounds the appellant prays that the appeal be allowed, the order of the trial magistrate be set aside and be substituted with an order allowing the preliminary objection with costs. That costs of

the appeal be provided for.

4. This appeal was opposed by the 2<sup>nd</sup> respondent Joseph Githara Muchira who filed submissions dated 13<sup>th</sup> December, 2016.

5. I have considered the appeal. The issue for determination is whether the trial magistrate erred in holding that she had jurisdiction to hear and determine the suit.

6. It is submitted by the Appellant that it is not in dispute that the Appellant Bingwa Sacco Society Limited is a Savings and Credit Co-operative Society registered under the **Societies Act** and **Sacco Societies Act**. At page 98 of the record of appeal the Appellant annexed a certificate of registration showing that Bingwa Savings and Credit Co-operative Society was on 9<sup>th</sup> July, 1984 registered in the register of Co-operative Societies under the provisions of the **Co-operative Societies Act**.

7. In his submission, the 2<sup>nd</sup> Respondent submits that the Appellant is a savings and credit Co-operative Society registered as such under the Societies Act. It is my view that this issue is not in dispute. The Appellant is a savings and credit society registered under the provisions of the **Co-operative Societies Act**.

8. The trial Court found that the 2<sup>nd</sup> respondent was a member of the appellant for the reasons that:-

(a) In paragraph 6 and 7 of his plaint the 2<sup>nd</sup> respondent stated that he had shares worth Ksh.20,000/- with the appellant.

(b) He also stated in his written statement filed together with the plaint that he had shares worth Ksh.20,000/-.

(c) The application and members forms availed to Court showed that he was a member.

9. The 2<sup>nd</sup> Respondent confirms this finding by the trial court and is satisfied with the finding as he does not raise it as an issue. I am of the view that based on the pleadings by the 2<sup>nd</sup> Respondent and the witness statement that he had shares with the Appellant, the trial magistrate was right to hold that the 2<sup>nd</sup> respondent was a member of the Appellant.

10. The trial magistrate found that she had jurisdiction to entertain the suit as the claim by the 2<sup>nd</sup> Respondent was return of his attached goods and damages. In so doing the learned magistrate relied on paragraph eleven of the plaint where the respondent stated that the 1<sup>st</sup> Respondent went to his house and removed goods worth more than the amount of loan balance..... The trial magistrate erred in relying on that paragraph in isolation of other paragraphs. It was clear from the pleadings that what was at stake in the dispute was a loan advanced by the Society to the 2<sup>nd</sup> Respondent. She would then consider whether the Court had jurisdiction.

11. From the ruling the learned trial magistrate was alive to the fact that she lacked jurisdiction to entertain any dispute between the society and a member concerning the business of a co-operative society. Jurisdiction has been stated to be everything and without it a Court must down its tools.

12. The learned trial magistrate was saying that the claim was against the auctioneer who had attached the property of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent had sued the auctioneer and the Appellant. The dispute was a loan which was advanced to the 2<sup>nd</sup> Respondent by the Appellant which he failed to repay. The auctioneer was an agent of the Appellant to attach the 2<sup>nd</sup> Respondent's properties to recover the loan. The activity of lending loans to a member is a business of savings and credit society. Any dispute arising from the loan is a business of the society. **Section 76(1)** of the **Co-operative Societies Act No. 12 of 1997** provides:

**1. 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; or**
- (b) Between members, past members or deceased members, and the society, its Committee or any officer of the society, or**
- (c) Between the society and any other co-operative society, it shall be referred to the Tribunal.**

**2. A dispute for the purpose of this section shall include:-**

- (a) A claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or**
- (b) A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;**
- (c) A claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the authority.**

**Section 67(3) of the Sacco Societies Act on the other hand provides:**

***“All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.”***

13. It was submitted by the 2<sup>nd</sup> Respondent that as a matter of practice a court of law lacks jurisdiction to entertain a claim between a co-operative and its members unless it is an appeal from the decision of the Co-operative Tribunal which goes to the High Court. A Court of law cannot confer jurisdiction upon itself where that jurisdiction has been ousted by Statute. In **Gatanga Coffee Growers -V- Gitau (1970) E.A. 361** it was stated:

***“.....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 and rules”.***

In the case the High Court interpreted the meaning of the business of the society in the Co-operative Societies Act. The Court refused to adopt a restricted interpretation and cited the Uganda case of **Wakiso & Another -V- Committee of Bugisu Co-operative Union at 527** where Russel J. considering the expression Business of the Society in the **Co-operative Societies Act** which provision is similar to our **Section 76** cited above to arrive at the holding. **Section 4** defines the Business of the society as that which has the object of promoting the welfare and economic interest of its members.

14. It is admitted by the 2<sup>nd</sup> Respondent that it is part of the business of the society to lend money. It is admitted that the claim was on his property that had been attached to recover the loan arrears. I do not agree that this was outside the scope of the business of the society. The case of **Gatanga Coffee Growers (Supra)**, the business covers every activity of the society. It is the society which follows a member who is in arrears of loan repayment. It instructs its agents (Auctioneers) to recover the loan. It is the business of the society to ensure the members repay loan and in the event of default initiate a process to recover it. A society's business is to lend and ensure repayment and recovery. The 2<sup>nd</sup> Respondent submits that the suit originated from the loan but that was not the dispute filed before the Court and hence the Court has jurisdiction. This is not the position as the loan was central in the dispute before the Court and formed the cause of action. Without the loan there was no dispute. I am of the view that the suit touched on the business of the society and the Court lacked jurisdiction to entertain it. In the case of **Ernest Muiruri Njoroge & 28 Others -V- Kabiru Karanda & 4 Others C.A.Nairobi C.A. No. 144/1997**. The Court of Appeal upheld a decision of the Court which had found that the dispute between

members of the society with the officers of the said society over allotment of plots to the members must have concerned the business of that society. That the appellants cannot therefore be entitled to shed their status as members of their society in connection with those plots so as to deny the society the protection conferred upon it by **Section 80** of the **Act** in relation to the determination of such dispute. The learned trial magistrate has found that the 2<sup>nd</sup> respondent was a member of the appellant and that there was a dispute concerning the business of the society, ought to have found that she lacked jurisdiction and immediately down her tools. In a persuasive decision **Murata Farmers Sacco Society Ltd. -V- Co-operative Bank of Kenya**, the Court held that ‘*inter alia*’, “the business of the society within the meaning of Section 76 of the Co-operative Societies Act covers every activity of the Society within the ambits of its by-laws rules and includes the business of banking and provision of financial services. That the **Co-operative Societies Act, Section 76**, applied to the suit and ought not to have been filed in the High Court in the first instance. It further stated:

***“It is imperative to note that decisions of the Co-operatives Tribunal are appealable to the High Court which is the court of final resort on that category. Matters in which the court has jurisdiction other than those included in the Act may be heard in the High Court and follow the laid down process for appeal. The need to seek justice in the right forum cannot therefore be overemphasized. The provisions of Section 76 (1) and (2) are very clear.....”***

In **Universal Traders Sacco v Margaret Mwikali Mbithi [2015] eKLR** in a similar case where the Appellant instructed its agents, Kand Auctioneers, to proclaim the Respondent’s business items with respect to a loan it had advanced the Respondent, the court stated:

***“Therefore, it is evident that the dispute revolves around the business of the Appellant in terms of a claim for repayment of a debt or demand due to it. Further it is admitted by the Respondent in her Amended Complaint and that the 2<sup>nd</sup> Defendant was acting in the capacity of agent and/or servant of the Appellant, and is therefore within the rubric and category of persons who can be described as officers of a co-operative society under section 76 (1) (b) of the Co-operative Societies Act. I accordingly find that the dispute in the trial Court was one which fell squarely under Section 76 of the Cooperative Societies Act, and the trial Court, ought to have deferred to the jurisdiction of the said Tribunal.”***

15. The dispute between the appellant and the 2<sup>nd</sup> respondent arose from its business of advancing loans to its members. The 2<sup>nd</sup> respondent ought not to have leaned on the contention that the dispute was between him and the 1<sup>st</sup> respondent to avoid taking the dispute to the tribunal and yet he had joined the Appellant as a party in the suit. The notification of sale at page 40 of the record shows that the creditor was the Appellant. It was an error for the learned trial magistrate to hold that the dispute was between the 2<sup>nd</sup> Respondent and the auctioneer and yet the Appellant was joined as a party. There are binding authorities from the Court of Appeal like the case of **Ernest Muiruri Njoroge & 28 Others (Supra)**. If Court was in doubt, the proper cause of action would have to let the dispute be resolved by the Tribunal. I am of the view that the dispute involved the business of the society and the Court lacks jurisdiction to entertain it. The Magistrates Courts should not burden themselves with disputes which are prescribed for tribunal. The tribunals should be allowed to handle disputes which they are best placed to handle. The businesses of the Co-operative societies are wide and the intention of the legislature is that these disputes be handled by tribunals established under the Act. The Constitution has recognized the role of these tribunals(s). **Article 159(1)** of the **Constitution** which deals with Judicial mandate provides:

***“Judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution.”***

In this case, it was confirmed that 2<sup>nd</sup> Respondent is a member of the Appellant. The loan application form clearly indicates that the 2<sup>nd</sup> Respondent whose Membership No. is 45292 has a share value with the Appellant of Kshs.3,000/= . In his statement, the 2<sup>nd</sup> Respondent confirmed that he had bought shares worth Kshs.20,000/=.

16. The point for determination is whether the 1<sup>st</sup> Respondent was acting as an agent of the Appellant when it proclaimed the goods belonging to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent did not enter appearance and confirm whether or not they were instructed by the Appellant and the copy of the proclamation is not visible. However, both the Appellant and the 2<sup>nd</sup> Respondent confirm that the 2<sup>nd</sup> Respondent took a loan with the Appellant. The only difference is on the amount since the 2<sup>nd</sup> Respondent alleges to have repaid part of the loan which is denied by the Appellant. The Appellant stated that it was a term of the agreement that in case of default, they had authority to use any means at its disposal to recover any defaulted loan which seems to be the case herein. In my view, this falls under **Section 76(2) (a)** of the **Co-operative Societies Act** which states:

***“A dispute for the purpose of this section shall include – a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not.”***

Therefore the trial court had no jurisdiction to deal with the matter and the orders of the trial court should be set aside and the suit should be dismissed.

17. The Appellant took issue with the plaint. It is submitted that the plaint does not disclose a cause of action. It is submitted that the prayers in the plaint were ambiguous as the plaintiff did not set out the particulars of the goods she wanted returned to her. That the complaint against the Appellant is not clear. He has not specified the grievance that he had against the Appellant. That indeed the trial magistrate stated that there was no evidence that the Applicant instructed the 2<sup>nd</sup> defendant. It is for this reason the learned trial magistrate held that the matter did not involve the business of the society since there was no connection with the Appellant. That the trial magistrate ought to have struck out the plaint for not disclosing a cause of action against the Appellant.

18. In response the 2<sup>nd</sup> Respondent submits that the issue of cause of action is not raised in the grounds of appeal. That **Order 42 rule 4** of the **Civil Procedure Rules** is clear that grounds not listed on the Memorandum of Appeal and no leave sought and granted to argue them must be struck out. That the learned trial magistrate cited Article 159 of the constitution, **Section 1A** and **1B** of the **Civil Procedure Act** and provisions of amendment which were sound.

19. I have considered the submissions. The Appellant did not raise the ground that the plaint did not disclose any cause of action.

20. The Appellant raised three grounds in the Memorandum of Appeal. The issue of the plaint was among. The Appellant could not rely on the ground without leave of the Court. It would be prejudicial to the Respondent for the Appellant to introduce a new ground in the submission when it was not raised in the Memorandum of Appeal. This denies the Respondent the opportunity to properly address the issue. This ground is rejected.

### **In Conclusion:**

For the reasons I have stated, I find that the appeal has merits. I order that the orders of the sub-ordinate court shall be set aside. The preliminary objection before the trial magistrate had merits as the Court had no jurisdiction to entertain the suit. The order dismissing the preliminary objection is substituted with an order allowing it with costs. The suit shall be struck out with costs for want of jurisdiction. The costs of the appeal are awarded to the Applicant.

***Dated and delivered at Kerugoya this 17<sup>th</sup> day of November, 2017.***

**L. W. GITARI**

**JUDGE**

Read out in open Court, in the presence of M/S Kiragu, for Appellant, Mr. Maina Holding brief for Mr. Munene for the 2<sup>nd</sup> Respondent; no appearance for 1<sup>st</sup> Respondent, court assistant Naomi Murage this 17<sup>th</sup> day of November, 2017.

L. W. GITARI

JUDGE

17.11.2017