



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

**CIVIL APPEAL NO. 164 OF 2009**

**TOBIAS OGWEN RACHUONYO.....APPELLANT**

**VERSUS**

**FRANCIS OMONDI JAPASO**

**FRED OCHIENG**

**JACKO OGEDA (as office bearers of**

**TUSHIRIKIANE INVESTMENT**

**COOPERATIVE SOCIETY).....RESPONDENTS**

***(An Appeal arising out of the Ruling and Order of E.N. Maina SPM delivered on 6<sup>th</sup> March 2009 in Nairobi Chief Magistrate's Court Civil Case No. 5600 of 2008)***

**JUDGMENT**

The Appellant moved court through a Memorandum of Appeal dated 9<sup>th</sup> March 2009 which appeal is against the ruling and order of the learned trial Magistrate E.N. Maina delivered on 6<sup>th</sup> March 2009. The grounds of appeal are as follows:

1. The learned trial magistrate erred in law and in fact in striking out the suit on grounds that the court did not have jurisdiction to deal with the matter.
2. The learned trial magistrate erred in law in holding that it is the Co-operative Tribunal that has proper jurisdiction to hear and determine the matter.
3. The learned trial magistrate erred in law and in fact by failing to appreciate and uphold the submissions made by the appellant's counsel.
4. The learned trial magistrate erred in law and in fact by upholding the preliminary objection against its jurisdiction when all evidence on record did not show that the appellant was a member of the respondent co-operative society.

The Appellant prays for orders that the said ruling be set aside and the replacement of those orders with the appropriate order with costs to him.

The brief facts of the lower court case are that the Appellant filed suit in the lower court vide a plaint

dated 8<sup>th</sup> September 2008. Therein he stated that he entered into an agreement with the Respondents in their capacity as office bearers of Tushirikiane Investments Co-operative Society Limited (the society). He invested an amount of money totaling to Kshs. 1,612,251/- through investment agreements where he was supposed to periodically obtain profit from them. However, that the Respondents never paid profits as agreed nor did they refund the initial principal. Instead they issued cheques that were dishonoured upon presentation to the paying bank. He sought orders of refund of the sum plus interest and costs.

The Respondents filed defence and denied all the averments in the Plaint while also contending that the suit as filed was in breach of the provisions of the Co-operative Societies Act. In a reply to defence, the Appellant joined issue with the Respondents upon their defence. The Respondents also filed a notice of preliminary objection citing the lack of jurisdiction of the lower court to deal with the suit. The Appellant opposed the preliminary objection on the ground that he was not a member of the Co-operative Society under whose name the Respondents had been sued in the suit before the trial Court.

The learned trial magistrate in her ruling upheld the preliminary objection on the ground that Section 76(1)(b) of the Co-operatives Societies Act covers the business of the society with past members of the society. It is this ruling that is the subject of this appeal.

The Appellant filed written submissions. The Appellant relied on Section 76 of the Co-operative Societies on the disputes to be referred to the Cooperative Tribunal and the definition of such disputes.

The issue for determination in this appeal is whether the lower court had jurisdiction to hear and determine the Appellant's suit. The applicable law as regards the jurisdiction being challenged is Section 3(2) of the Magistrate's Courts Act, which provides that the Resident Magistrate's Court shall have jurisdiction throughout Kenya and Sections 76 and 77 of the Cooperative Societies Act (Cap 490 Laws of Kenya).

The jurisdiction of the Cooperatives Tribunal is granted by Section 76 of the Cooperative Societies Act which provides as follows -

**76.(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.**

The said Tribunal is set up under Section 77 of the Co-operative Societies Act.

The point for determination in this appeal therefore is whether the dispute between the parties is a dispute concerning the business of a cooperative society, which should be referred to the Cooperatives Tribunal as provided for under section 76 of the Cooperatives Societies Act. From the pleadings, it is evident that the relationship between the Appellant and the Respondent is disputed as the Appellant regards himself as an investor and not a member of the Society while the Respondents aver that he indeed was a member of the Society.

In Nairobi JR Case No. 187 of 2011 Republic –VS- Chief Magistrate’s Court Ex-parte Edward Kibet Kimetto, [2013] eKLR it was stated –

**“In essence the Tribunal deals with disputes amongst members of cooperative societies; disputes between members and co-operative societies; and disputes amongst co-operative societies. For a dispute to merit the attention of the Tribunal a litigant must prove membership of a co-operative society.”**

In this case, the Respondents did not prove that the Appellant was a member of the Society. But is this a dispute concerning the business of the Co-operatives Society in the context of Section 76 (1) and (2)?

Section 4 defines the business of the society as that which has the object of promoting the welfare and economic interest of its members. The court has had occasion to define the ‘business of the Society’ in the case of GATANGA COFFEE GROWERS VS GITAU [1970] EA 361 thus -

***“...business of the society is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by-laws and rules.”***

While the dispute revolved around the business of the Society in terms of a claim for repayment of a debt or demand due from it, and the respondents are 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, it was not proved by the party that sought to rely on it that the Appellant was a member of the society.

The Appellant’s appeal herein is consequently allowed for the foregoing reasons, and the ruling of the lower court is hereby set aside. The suit shall continue to be heard by the Lower Court on its merits. The appellant shall have the costs of this appeal.

**Dated and delivered at Nairobi this 12<sup>th</sup> Day of October, 2016.**

**A.MBOGHOLI MSAGHA**

**JUDGE**