



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 199 OF 2009**

**1. GODFREY KINUU MAINGI**  
**2. JUSTUS MURUNGI**  
**3. JOSEPH NTURIBI MWITHIMBU**  
**4. HARUN MBURUNGU**  
**5. ANDREW GIKUNDA.....APPELLANTS**

**VERSUS**

**NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT**

*(Appeal from the ruling/award of the Co-operative Tribunal Cases No. 230 of 2006 consolidated with 231,232,233,244 all of 2006 dated 2<sup>nd</sup> April, 2009)*

**JUDGMENT**

1. The Respondent filed the claim before the tribunal against the 1<sup>st</sup> Appellant seeking KShs. 1,709,868.90/=-, interest on the said sum at 14% interest p.a. from 26th November, 2003 till payment in full together with costs of the claim. The Respondent's claim was as follows. At all material times between 15th April, 1999 to 26th November, 2003 the 1<sup>st</sup> Appellant was elected the management Committee chairman of the Respondent. During his term, the 1st Appellant so badly managed the affairs of the Respondent contrary to the express Provisions of Section 27(6) of the Co-operative Societies Act No. 12/97 in that he caused the Respondent to incur financial losses. The members of the Respondent raised complaints with the managements, the District Co-operative Officer, Meru Central District and the Registrar of Co-operatives over the said mismanagement. The registrar of the Co-operatives in exercise of his powers under Section 58 of the Co-operative Societies Act appointed Mr. Hesbon Kiura and Mr. L.K. Metha on 23<sup>rd</sup> June, 2003 to inquire into the by-laws, working and financial conditions of the claimant being C.S/8913. The two carried out a thorough inquiry as assigned in a special general meeting convened by the 1<sup>st</sup> Appellant on 26<sup>th</sup> November, 2003. The inquiry report was read and adopted. It was alleged that the 1st Appellant's management of the Respondent was found to be seriously wanting and in contravention of the Co-operative Societies Act No. 12 of 1997 and the rules made there under and the by-laws of the Respondent. The particulars of mismanaged were as follows:-

a) Society did not maintain a cash journal

- b) Society had no payment vouchers
- c) Cheque drawing cash never reconciled with vouchers
- d) No records of payers or purpose of payment
- e) Cash collected never banked intact
- f) No physical checking of physical cash despite him being knowledgeable
- g) No committee minutes to show money received and how spent
- h) No maintenance of a cash float (petty cash)
- i) No maintenance of ledger statements or creditors ledger
- j) Accounts not maintained as required by the Co-operative Societies Laws.
- k) No budget drawn or maintained or economic reports prepared
- l) No membership register maintained not even of the 1st Appellant
- m) No proper minutes book, accountable documents, register, fixed assets register, cheque control register and coffee sales register maintained.

2. It was alleged that due to the mismanagement the 1st Respondent became accountable for the Respondent's funds to the tune of KShs. 1,709,868.90/=. The 1st Appellant jointly with former committee members moved to court by way of judicial review vide Nairobi High Court Miscellaneous Application No. 633 of 2004 challenging and seeking to quash the 1st Appellant's decision and adoption of the inquiry team's report which application was struck out on 8th July, 2005. It was averred that during pendency of the suit, there was stay of the surcharge recommendation in the inquiry team's report which stay orders were lifted upon the dismissal of Miscellaneous Application No. 633 of 2004. It was stated that on 11th August, 2005, the Commissioner for Co-operative Development issued the 1st Appellant a fourteen days notice of intention to surcharge him requiring a notice to show cause why the amount of KShs. 1,709,868.90 should not be recovered from him by way of surcharge which notice was forwarded vide a letter dated 16th August, 2005. That the Commissioner for Co-operative gave due consideration to the 1st Appellant's response to the show cause and not being satisfied gave him a span of thirty (30) days within which to pay the KShs. 1,709,868.90/= and notified him of his right of appeal. It was stated that the 1st Appellant instead of paying the said sum filed Co-operatives Tribunal Claim No. 90 of 2006 seeking injunctive orders against the surcharge orders which application was struck out.

3. To the claim, the 1st Appellant filed a defence in which he denied the Respondent's claim. He contended that Mr. Hesbon Kiura and L.K. Metha were hired with specific instructions and pre-determined report and conclusions for the purpose of maliciously removing him and all other members of the management committee of the Respondent's office. He denied that the Miscellaneous Application No. 633 of 2004 was dismissed on a technicality and maintained that the inquiry report was illegal and fraudulent. The 1st Appellant also denied having received a notice of surcharge as alleged.

4. Subsequently, the Respondent filed an application dated 29<sup>th</sup> May, 2008 seeking leave to amend its statement of defence. In opposition thereto the 1st Appellant filed grounds of opposition dated 11th June, 2008 on the following grounds:-

***i.that the tribunal lacks jurisdiction to enter judgment to enforce summarily a surcharge order made by an inquiry team appointed under section 58 of the Co-operative Societies Act.***

***ii.that the purported surcharge orders sought to be enforced are based on the inquiry made by***

*H.M. Kiura and L.K. Metha under section 58 of the Co-operative Societies Act, and not on an inquiry made separately and independently by the Commissioner for Co-operative Development under section 73 of the Co-operative Societies Act.*

*iii. that under section 73 of the Co-operative Societies Act, the function of the Commissioner for Co-operative Development to inquire is judicial or quasi-judicial and no power to delegate the same to other officers has been given by the said section to the Commissioner for the Co-operative.*

*iv. that the purported notices to surcharge the 1st appellant and purported surcharge orders are expressly stated to be based on the adopted findings and recommendations of the inquiry report instituted under section 58 of the Act, and because the inquiry report found the 1st Appellant liable on grounds which are within the Respondents knowledge and details attached herewith.*

*v. that this tribunal lacks jurisdiction to enforce summarily a purported surcharge order which has been made in contravention of the rules of natural justice and the requirements of a fair trial under section 77(9) of the Constitution, through the Commissioner's failure to supply to the persons intended to be surcharged details or particulars of the Respondent's Commissioner's claims.*

*vi. That the tribunal lacks jurisdiction to enforce a surcharge order made by the Commissioner for Co-operative Development, a member of the Executive branch of the government, in that he is not qualified to do so as he is not independent, within the meaning of section 77(9) of the Constitution.*

5. The tribunal heard the application together with the preliminary objection and entered summary judgment against the 1st Appellant. In their award, the tribunal held the view that the nature of the Respondent's notice of motion dated 29th May, 2008 sought summary judgment against the 1st Appellant. On the basis of the 1st Appellant's failure to appeal against the orders for surcharge as required under Section 73 of the Co-operative Societies Act. It is on that basis that the tribunal held that the 1st Appellant could not be heard to say that the Commissioner did not give him an opportunity to challenge the surcharge yet instead of appealing he lodged judicial review vide Nairobi High Court Miscellaneous Application No. 633 of 2004.

6. The 1st Appellant felt aggrieved by that decision and lodged this appeal on the following grounds:-

*i. The learnt tribunal erred in not holding that the rules of natural justice to day require that where a statute vests judicial power in an authority or an officer, like the Commissioner for co-operative development as under section 73 of the co-operative societies Act, it requires that authority or officer to fashion a procedure which ensures that the person to be surcharged is given an opportunity to defend himself before he is surcharged and in exercise of its jurisdiction under section 75 of the co-operative societies Act, the tribunal has a duty to inquire as to whether in making a surcharge rules of natural justice were adhered to.*

*ii. the learned tribunal erred in not holding that under section 73 of the co-operative societies Act, the commissioner for co-operative development exercises a judicial function and is obliged to apply rules of natural justice when undertaking an inquiry.*

*iii. the learned tribunal erred in not holding that under section 58 of the co-operatives societies Act, the registrar for co-operative development exercises an administrative function and is not obliged to apply the rules of natural justice in undertaking the inquiry under the said section.*

*iv. the learned tribunal mistook the nature and the functions of the inquiries undertaken under section 58 and 73 of the co-operative societies Act respectively.*

*v. The learned tribunal erred in holding that the approval by members of a co-operative society,*

*of a report and recommendations contained in a report compiled under section 58 of the co-operative societies Act can excuse contravention of rules of natural justice in an inquiry undertaken under section 73 of the co-operative societies Act.*

*vi. The learned tribunal ignored the fact that fair hearing standards under section 77(9) of the constitution apply to the Commissioner for Co-operative development when exercising his power under section 73 of the Co-operative Societies Act.*

*vii. the learned tribunal ignored the fact that the notice of intention to surcharge the appellants dated 11th November, 2005 was a nullity and consequently no valid surcharge order come from the same.*

*viii. the learned tribunal erred in not holding that section 73,74 and75 of the Co-operative Societies Act are ultra-vires, section 77(9) of the Constitution for permitting a surcharge order made in violation of the rules of natural justice.*

*ix. the learned tribunal ignored the doctrine of the supremacy of the Constitution over the co-operative Societies Act as embodied in Section 3 of the Constitution.*

*x. The learned tribunal erred in not holding that the notice of the Commissioner for the Co-operative development dated 11th August, 2005 offended/breached the rules of natural justice in that it did not indicate to the appellants the cases which they had to meet.*

*xi. the learned tribunal erred in entering judgment in the circumstances of the case before it.*

*xii. the learned tribunal erred in not holding that the appellant's defence raised triable issues and consequently, summary judgment was not available to the respondent under section 75 of the Co-operative Societies Act.*

*xiii. the learned tribunal erred in following its decision in its ruling in tribunal miscellaneous Case No. 13 of 2007, in which it had held that the appellants had no defence because he did not lodge an appeal under Section 74 of the Co-operative Societies Act, within thirty days.*

*xiv. the learned tribunal contravened the appellant's right under Section 77 (9) of the Constitution to a fair hearing in that:-*

*a) the learned tribunal declined to entertain the appellant's defence in view if its ruling in tribunal Miscellaneous Case No. 13 of 2007.*

*b) the learned tribunal declined to hear the appellant's defence which he could have put before the Commissioner of Co-operative Development under Section 73 of the Co-operative Societies Act, if rules of natural justice had been followed;*

*c)the co-operative tribunal treated as barred by res judicata the appellant's defence because of its ruling in Tribunal Miscellaneous Case No. 13 of 2007.*

7. Parties filed written submissions to this appeal. The Appellant's gravamen is that he was not accorded fair hearing. He argued that the Co-operative Societies Act did not clearly set out rules of procedure to be followed but that where there are no rules to govern observance of rules of natural justice, the law expect them to be followed nonetheless. He cited an excerpt from *Onyango v. Attorney General* [1987] KLR 711 to buttress his argument. In that case it was held:-

*"There is also the decision of the English Court of Appeal in R v. Hull...(1970) 1All ER 701 it is clear that the English courts have taken the view that the courts are not to abdicate jurisdiction merely because the proceedings are an administrative nature or of an internal character. It is a lead which I think the courts in Kenya would do well to follow in carrying out their task of*

*balancing the interests of the executive and the citizen, it is in everyone's advantage if the executive exercises its discretion in a manner which is fair to both sides and which is seen to be fair. This process was started as long as 1966...good administration and an honest bona fide decision must as it seems to me require not merely impartiality nor mere bringing one's mind to bear on the problem but acting fairly and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working only to that limited extent do the so called rules of natural justice apply which in a case such as this is merely a duty to act fairly."*

8. The 1st Appellant further cited Judge of the High Court and Another v. Ng'uni [2007] 2EA 201 in which the court held opinion similar to the one in the Onyango v. Attorney General case (supra). It was the 1st Appellant's contention that while Section 74 of the Co-operative Societies Act gave a person who is aggrieved by a decision of the Commissioner under Section 73 the right to against the Co-operative Tribunal within 30 days, the same section gave an aggrieved person a right to appeal to the High Court against the decision of the tribunal. It was submitted that Section 73 of the Cooperative Societies Act is ultra vires the Constitution to the extent to which it does not require the Commissioner to carry out the inquiry as to comply with the fairness as required by Section 77 (9) of the former Constitution.

9. In its submission, the Respondent argued that the appeal is not only misconceived but also non-suited and an abuse of this court's process. It was pointed out that before the Cooperative Tribunal proceeded to consider the pleadings and submissions of the parties herein, the parties and their advocates consented to the procedure to be adopted to dispose the dispute, which was by way of written submissions.

10. The Respondent further argued that the Cooperative Tribunal considered the constitutionality of the issues raised by the Appellants and adequately addressed them and found them to be baseless. It was also stated that the Appellants were heard by the commissioner of Cooperatives and the Appellants never appealed when their application for leave to appeal out of time was refused by the Cooperative Tribunal.

11. I have already enumerated the grounds of appeal put forward by the Appellants. Though the Appellants listed fourteen grounds of appeal, a careful consideration of those grounds will reveal that ones two main grounds commend themselves for consideration.

12. The first ground is whether or not the Cooperative Tribunal breached the rules of natural justice when dealing with the dispute. I have already set out the arguments put forward by both sides. There is no dispute that the Cooperative Tribunal's decision delivered on 2<sup>nd</sup> April 2009, was the result of the Respondent's motion dated 29<sup>th</sup> May 2008. It is also not in dispute that the Appellants filed a preliminary objection and replying affidavits to oppose the aforesaid motion. When the motion came up for hearing, learned counsels appearing before the Cooperative Tribunal recorded a consent order to have the motion disposed of by written submissions. I have carefully perused the Cooperative Tribunal's decision and I am satisfied that the arguments put forward by both sides were considered. It cannot lie in the mouths of the Appellants to now complain on appeal, that the right to a fair hearing was breached by the Cooperative Tribunal. Learned counsels bound themselves to have the dispute resolved in the manner aforementioned. The Appellants are not saying that their arguments were not taken into account. I find that the Cooperative Tribunal did not breach the rules of natural justice. The recorded proceedings show that the parties were given a fair hearing.

13. The second ground which arose is related to the first ground. It is the Appellants argument that the Cooperative Tribunal erred in failing to hold that sections 73 – 75 of the cooperative societies Act were ultra-vire section 77(9) of the constitution for permitting a surcharge order made in violation of the rules of natural justice.

I have carefully analysed the Cooperative Tribunal's decision and it is clear in my mind that the tribunal considered the constitutional issues raised and argued before it and found no merit. Consequently the Cooperative Tribunal entered summary judgement. On my part I have also re-evaluated the dispute and I have come to the conclusion that the commissioner of cooperatives properly instituted an inquiry under section 58 of the Cooperatives Societies Act where the Appellants were given an opportunity to be heard

and indeed they were sufficiently heard. It should be made clear that under section 75(1) of the Cooperative Societies Act no. 2 of 2004, the amount surcharged is recoverable in a summary manner. It would appear the Appellant are saying that there are errors in the Cooperative Tribunal's decision which breached their fundamental rights. I doubt whether the law allows parties who are aggrieved by court or tribunal decisions to elevate their complaints to be regarded as breaches of fundamental human rights or fundamental freedoms. The law envisaged that such aggrieved parties should take advantage of the available remedies of review or appeal mechanisms. The Court of Appeal answered a near similar question in the case of

**Methodist Church of Kenya Registered Trustee & Another = Vs= Rev. Jeremiah Muiku & Another CA no. 233 of 2008 (Unreported)** as follows

**“As the privy council said, it is only in rare cases that an error in the judgement or order of a court can constitute a breach of human rights or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be aired by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.”**

14. In the end, I see no merit in this appeal. The same is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of May, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant