



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

**CIVIL APPEAL NO 168 OF 2009**

**UNIVERSAL TRADERS SACCO.....RESPONDENT**

**VERSUS**

**MARGARET MWIKALI MBITHI.....APPELLANT**

**(An Appeal arising out of the Ruling and Order of S. Gacheru SRM delivered on 7<sup>th</sup> September 2009 in Machakos Chief Magistrate's Court Civil Case No. 428 of 2009)**

**JUDGMENT**

The Appellant moved court through a Memorandum of Appeal dated 30<sup>th</sup> September 2009 wherein it has proffered an appeal against the ruling and order of the learned trial Magistrate S. Gacheru dated 7/9/2009 in Machakos Chief Magistrate's Court Civil Case No. 428 of 2009. The grounds of appeal were as follows:

1. The learned trial magistrate erred in law in holding that the Respondent herein being a member of the Appellant's co-operative society had capacity to bring this suit and the application in Chief Magistrate's Court instead of the Co-operative Tribunal.
2. The learned trial magistrate erred in law in holding that he had and has capacity to hear and entertain the application and suit despite the Respondent admitting being a member of Appellant's co-operative society.
3. The learned trial magistrate erred in law in holding that sections 76 and 77 of the Co-operative Societies Act, Act No. 12 of 1997 do not affect his capacity to deal with the suit in lower court being CMCC No. 428 of 2009.
4. The learned trial magistrate erred in law and in fact in failing to dismiss the entire suit as he did not and still does not have capacity to hear and determine this suit neither any proceedings in it.

The Appellant prays for orders that the said ruling be set aside and the entire suit being Machakos CMCC No. 428 of 2009 be dismissed with costs to the Appellant.

**The Facts**

The brief facts of the case are that the Respondent instituted a suit in the lower court by filing a plaint dated 7<sup>th</sup> April 2009 as amended on 24<sup>th</sup> April 2009. Therein she stated that she was a member of the Appellant cooperative society and that the said Appellant had advanced her a loan of Kshs 500,000/= in 2006 which she had substantially repaid. However, that on 30<sup>th</sup> March 2009 the Appellant instructed auctioneers to proclaim the Respondent's business items, which proclamation was illegal null and void as the Appellant did not have any lawful court orders, decree or authorization from the court for execution.

The Respondent sought orders of a permanent injunction against the Appellant, a declaration that the said proclamation was null and void and damages for illegal attachment and proclamation. The Respondent also filed applications by way of Chamber Summons in the trial court dated 7<sup>th</sup> April 2009, seeking a temporary and permanent injunction against the Appellant.

At the interpartes hearing of the said application on 24<sup>th</sup> June 2009, the Advocate for the Appellant then raised a preliminary objection relating to the jurisdiction of the trial Court, and submitted that under section 76 of the Cooperative Societies Act, the dispute ought to be heard by the Co-operative Tribunal as the Appellant was a co-operative society and the Respondent had admitted to being a member thereof. The Respondent opposed the preliminary objection on the ground that there was a second defendant in the suit before the trial Court, namely the auctioneer firm, which was not a member of the Appellant.

The learned trial magistrate in a ruling delivered on 7<sup>th</sup> September 2009 upheld the preliminary objection as against the application dated 7<sup>th</sup> April 2009 on the ground that the parties to the said application were the Appellant and the Respondent and that the Respondent being a member of the Appellant cooperative society, the said dispute ought to be heard and determined by the Cooperative Tribunal. He however dismissed the preliminary objection as against the entire suit on the ground that the Amended Complaint dated 24<sup>th</sup> April 2009 had introduced a 2<sup>nd</sup> Defendant who was not a member of the Appellant and over whom the trial Court had jurisdiction.

It is this ruling that is being appealed against.

### **The Submissions**

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, J.A. Makau & Company Advocates filed submissions dated 26<sup>th</sup> January 2015. They argued that in admitting that the parties in the application filed by the Respondent on 7<sup>th</sup> April, 2009 were the Respondent who is a member of the Appellant, and that a dispute between them ought to be heard and determined by the Co-operative Tribunal and not the trial Court, the trial magistrate then should then have held that the Respondent did not have capacity to file this suit before the trial court which was not the correct forum. 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.

Further, that in proclaiming the business items of the Respondent, the 2<sup>nd</sup> defendant in the suit in the trial court was acting under instructions and orders of the Appellant who had instructed it. Therefore the said 2<sup>nd</sup> defendant was acting as the agent of the Appellant, and the claim against the 2<sup>nd</sup> defendant does not arise as the dispute is between the Appellant and the Respondent in this suit.

The Appellant relied on the decisions in **Murata Farmers Sacco Society Ltd vs The Co-operative Bank of Kenya Ltd, Nairobi HCC 548 of 2001; Chege Kabatia vs Kariobangi Housing & Settlement Co-operative Society, Nairobi HCC (ELC) No. 587 of 2010; and Gerald Wambua Makau –VS- Lukenya Ranching & Farming Co-operative Society Ltd & Another, Machakos HCC 80 of 2003**

The Respondent's Advocates, B.M. Mungata & Company Advocates filed submissions dated 25<sup>th</sup> May 2015, in which they argued that the Respondent filed an amended complaint in the trial Court on the 24<sup>th</sup> April, 2009, in which it introduced Kande Enterprises as the 2<sup>nd</sup> defendant so as to prohibit it through issuance of a temporary injunction from dealing in any manner whatsoever with the Respondent. Further, that the effect of section 76 of the Co-operative Societies Act is that the Co-operative Tribunal has no jurisdiction to handle this matter, since the said 2<sup>nd</sup> defendant does not fall in any of the categories of persons enunciated therein as it is not and has never been a member of the Appellant. The Respondent relied on the decision in **Republic –VS- Chief Magistrate's Court Ex-parte Edward Kibet Kimetto, [2013] eKLR** that a litigant must prove membership of a co-operative society.

The Respondent submitted further that section 5 of the Civil Procedure Act provides that any court shall

subject to the provisions herein contained have the jurisdiction to try all suits of a civil nature except suits which its cognisance is either expressly or impliedly barred. Further, that the matter before the lower court was mainly to permanently restrain the defendants by themselves or their agents or servants from in any manner attaching, selling, alienating or dealing with plaintiff's property. It was also for a declaration that the attachment and proclamation sought by the 2<sup>nd</sup> defendant is null and void, and that the substantive issue the Respondent wanted resolved was not the issue of debtness but issue of her property being attached and proclaimed.

The Respondent relied on the decisions in **Justus Kyalo Mutunga –VS- Labh Singh Harnacim, [2012] eKLR** and **Africa Management Communication International Limited –VS- Joseph Mathenge Mugo & Another [2013] eKLR**, in this regard.

### **The Issue and Determination**

The issue for determination in this appeal is whether the Chief Magistrates Court at Machakos had jurisdiction to hear and determine the Appellant's suit. The applicable law as regards the jurisdiction being contested is section 3(2) of the Magistrate's Courts Act, which provides that *the Resident Magistrate's Court shall have jurisdiction throughout Kenya. On the jurisdiction of the Cooperatives Tribunal, section 76 of the Cooperative Societies Act 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 license or any other due, from the Authority.”***

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

In terms of limitations to jurisdiction, a subordinate Court has pecuniary, geographical and other limitations as may be prescribed by the law, while a tribunal's jurisdiction is limited to a particular designated matter as is specified by an Act of Parliament. In the present appeal the jurisdiction conferred to the Cooperatives Tribunal is limited to the disputes shown in section 76 and 77 of the Cooperatives Societies Act. Courts as a general rule should follow the procedures laid down in a statute, unless there is a good reason not to do so, as was held in the **Speaker Of The National Assembly vs Hon Karume, Civil Appeal No. 92 of 1992; George & 15 Others vs Limuru Pyrethrum Growers Co-Op Ltd & 9 Others, [1990] KLR 214; and in Kibunja vs AG & 12 Others,[2002] 2 KLR 1.**

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 not in dispute as the Respondent is a member of the Appellant Co-operative Society. The dispute herein revolves around the status of the 2<sup>nd</sup> Defendant in the suit in the trial Court, and if he falls within the ambit of the provisions of section 76 of the Co-operatives Societies Act.

I note from the Amended Plaintiff filed in the trial Court dated 24<sup>th</sup> April 2009 in paragraph 5 that the Respondent claims that the on or about 30<sup>th</sup> March 2009, the Appellant illegally instructed its agents, KANDE AUCTIONEERS, the 2<sup>nd</sup> Defendant in the trial court, to proclaim the Respondent's business items for an item for an amount of Kshs 155,065.20 and auctioneers charges of Kshs 80,000/=. The said proclamation was with respect to a loan the Appellant had advanced the Respondent in 2006 for Kshs 500,000/= , which the Respondent claimed she had substantially repaid.

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 Plaintiff 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.

The Appellant's appeal herein is consequently allowed for the foregoing reasons, and the ruling of S. Gacheru SRM dated 7/9/2009 delivered in Machakos Chief Magistrate's Court Civil Case No. 428 of 2009 and all consequential orders is hereby set aside. Further, that the suit in Machakos Chief Magistrate's Court Civil Case No. 428 of 2009 be and is hereby struck out.

The Respondent shall bear the costs of this appeal and of the suit in Machakos Chief Magistrate's Court Civil Case No. 428 of 2009

It is so ordered.

**DATED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**