



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 91 OF 2008

A. M. NYAMWEYA

(The Liquidator Yamumbi Uasin Gishu Farmers

Co-operative Societies) APPELLANT

VERSUS

1. JOHN KAMANGU

2. CHARLES NJUNGE

3. JACKSON MWANGI

4. JEREMIAH NGUNGE (on behalf of YAMUMBI UASIN GISHU

CO- OPERATIVE SOCIETY (in liquidation) RESPONDENTS

(Being an appeal from the Ruling delivered on 31st July, 2008 in Co-operative Tribunal Case No. 5 of 2007)

JUDGMENT

The Appellant who is the Liquidator, Yamumbi Uasin Gishu Farmers Co-operative Society Limited (hereafter the Society) filed this appeal following a ruling in Co-operative Tribunal Case No. 5 of 2007.

Prior to the Tribunal's ruling there had been a number of correspondences exchanged and applications brought before the court. The claimants claimed that the land belonging to the Society was meant to benefit its members and be used for public utility. The Society was de-registered by the Commissioner for Lands and Settlement - 1985 after the President issued Title Deeds to the members and declared that the Society's status had ceased. And the members of the Society claimed they had no liability at the time of dissolution of the Society.

The first Liquidator who was appointed one Benson Nyambati, was unable to act and it is at this time the Appellant Mr. A. M. Nyamweya was appointed. His obligation was to manage the Society's property but the Claimants (Respondents) found that he was misappropriating their funds and selling their land to third parties who are not members of the Society.

By various correspondences to various government offices the Claimants sought assistance. They knocked on the doors of Registrar of Lands, Registrar of Co-operative Societies, Minister for Co-

operative Development and Marketing, the Government Spokesman, the Eldoret Criminal Investigation Department (CID) and the Commissioner of Co-operative Development.

They also presented grievances to the Njonjo Land Commission where they sought the following grievances:-

(a) Disciplinary action to be meted out against the Liquidator or anyone involved in the irregular sale of the members land.

(b) That the sold land be reinstated to its former status and handed back to members.

(c) That the Commission to issue a document to the effect that public utility land can only be disposed off by members - that there should be no interference by government agents.

Before the Commissioner of Co-operative Development, they asked that the Liquidator disclose the names of the persons who had been involved in grabbing their land. They lamented that the Liquidator had prevented them from accessing the land documents and money deposited in the Society's accounts.

Before the Criminal Investigation Department (CID), Eldoret, they requested that the old Directors be asked to hand over the office and management to the new Directors. They also requested that the Liquidator records a statement with the police disclosing to whom he sold the land and produce the title documents.

They filed their statement of claim listing their grievances and Notice of Motion application dated 11th June, 2007 seeking a temporary injunction against the Liquidator on the grounds that:-

1. The Respondent (Liquidator) has failed to provide accounts amounting to Kshs 300,000/= since his appointment.

2. The Respondent disposed off land belonging to the Claimants.

3. The Respondent acted dictatorially without due regard to the Claimants' interests.

In his defence, the Respondent (Liquidator) denied that he had failed to act properly in his duties. He denied having improperly dealt with Kshs 300,000/= in the Claimants' bank account and added that he had only acted within the mandate, law and instructions of the Commissioner for Co-operative Development. He also argued that the Tribunal had no jurisdiction to issue an injunction to stop him from doing his work as that would amount to removing him from his appointment, yet only the appointing authority could do so. He also claimed that the Claimants had no locus standi to lodge the grievances and had no reasonable cause of action.

In his **Replying Affidavit dated 31st July, 2007**, the Respondent maintained that the Statement of Claim was based on falsehood citing reasons like the fact that the Claimants did not have legal standing, the Society does not exist any longer having been dissolved vide Legal Notice No. 5544 dated 2nd September, 1994 and that the Society did not have any elected officials and hence cannot bring a suit except through the Liquidator. He stated that the suit is bad in law, illegal (contrary to section 64 of the Companies Act) and a preliminary objection shall be taken against the suit. The Liquidator said that there is no specific allegation against him and the annexures attached by the Claimants do not apply to him as he only took over as Liquidator in 2005. He also denied having refused audience with the Claimants. The Liquidator attached a progress report dated 5th December, 2006 to his affidavit stating the activities he was carrying out were in accordance with the directions of the Commissioner for Co-operative Development.

In their **Reply To Defence dated 13th August, 2007**, the Claimants reiterated everything in their Statement of Claim and denied the Respondent averment that the Tribunal had no jurisdiction

putting them to strict proof thereof.

John Kamangu, one of the Claimants and representatives of the members of the Society filed a **Supplementary Affidavit dated 13th August, 2007** where he stated in Reply to the Respondent's defence that the Claimants had locus standi by virtue of the leave granted by the Tribunal on 31st May, 2007. They said that prior to filing the claim the Commissioner of Co-operative Development advised them to file the claim before the Tribunal and thus the claim was valid.

Mr. Kamangu stated that Counsel for the Claimants had advised him that the current Liquidator had to answer to issues brought about by the previous Liquidator. In a **further affidavit dated 16th August, 2007** the Claimants attached annexures showing reluctance on the Respondent's part to hear them and confirmed all averments in the supplementary affidavits by Mr. Kamangu.

Counsel for the Liquidator raised a **preliminary objection as per a notice dated 17th August, 2007** on the basis that;

1. The Claimants had no locus standi to file the case.
2. The Co-operative Society had already been dissolved and was not in existence at the moment.
3. The Claimants have no legal authority.
4. There was no dispute within the meaning of Section 76 of the Co-operative Societies Act.
5. The Liquidator cannot be sued when the Society is in liquidation as this is contrary to the provisions of the Companies Act.
6. The suit has no legal basis.

In their ruling, the Tribunal decided as follows;

“The problem we are confronted with herein arises out of failure to acknowledge that these are proceedings before the Tribunal under the Co-operative Societies Act, Cap 490, Revised 2005 (the Act), as well as failure to appreciate the procedures under the provisions of the Companies Act, Cap 486, Laws of Kenya, as applied under Section 64 of the Act.”

....

“Under the circumstances, the Claimants herein and the claim herein are both covered under the provisions of the Act generally and that includes Section 76, 78 and 80 thereof. The issues in dispute cannot be determined other than on merit after a full hearing and the case must be given a fair hearing within a reasonable time as required under Section 77(9) of the Constitution and Section 78 of the Act.”

...

“The upshot of our deliberations therefore is that the Preliminary Objection is hereby dismissed with costs to the Claimants. The case will proceed to full hearing on merit.”

Being aggrieved by the decision of the Tribunal, the Appellant filed the appeal before the court based on the following grounds:-

1. ***The learned Tribunal erred in law and in fact by dismissing the Appellant's preliminary objection without any legal basis.***
2. ***That the learned Tribunal erred in law in failing to properly apply the provisions of the Co-***

operative Societies Act and all the laws cited to the Tribunal, including the Companies Act, Cap 486 Laws of Kenya.

3. *The Tribunal erred in failing to hold that there was no dispute capable of being resolved by the Tribunal.*

4. *That the Tribunal erred in law in failing to hold that the Respondents could not and cannot file a suit against the Appellant on behalf of a dissolved Co-operative Society.*

5. *The Tribunal erred in failing to hold that it was only the Liquidator (the Appellant) who had authority in law to file suits on behalf of the Co-operative Society, and not the Respondent.*

6. *That the learned Tribunal erred in law in entertaining a claim which was not founded on any law and which transgressed the basic tenets of the law obtaining in the country.*

7. *That the learned Tribunal erred in law in failing to hold that failure to obtain leave of the Registrar of Co-operative Societies under Section 64 of the Act was fatal to the suit and nothing could redeem the suit.*

Parties filed written submissions which I have carefully considered. As rightly pointed out by counsel for the Appellants the appeal can be subdivided into three basic heads namely:-

(i) Locus standi (grounds 1, 4 and 5)

(ii) Procedure (grounds 2 and 7)

(iii) Jurisdiction (grounds 3 and 6)

I will however cut off ground 1 from (i) and apply it to sum up this appeal.

Locus standi:

Grounds of appeal No. 4 and 5 read:-

(4) That the Tribunal erred in law in failing to hold that Respondents could not and cannot file a suit against the Appellant on behalf of a dissolved Co-operative Society.

(5) That the Tribunal erred in failing to hold that it was only the Liquidator (the Appellant) who had authority in law to file suits on behalf of the Co-operative Society, and not the Respondent.

The Appellant's counsel submitted that the power to institute and defend suits and other legal proceedings for and on behalf of a Co-operative Society rests on the Committee which is the governing body of the Society under S. 28 (1) of the Co-operative Societies Act.

The Respondents in their submissions maintain that all disputes and issues for determination under the Co-operative Societies Act are to be determined by the Tribunal. They submit that there is no existing provision in the Co-operative Societies Act that bars members of a Co-operative Society from raising issues dealing with liquidation process before a Tribunal.

Section 28 (1) of the Act reads:-

"Every Co-operative Society shall have a Committee consisting of not less than five and not more than nine members."

On the other hand Section 28 (3) of the Act provides:-

"(3) The Committee shall be the governing body of the Society and shall, subject to any direction from a general meeting or the by-laws of the Co-operative Society, direct the affairs of the Co-operative Society with powers to-

(b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society."

It is factual that after the dissolution the Society ceased to exist. For this reason the society lost its powers to sue and its legal personality as clearly brought out in the Appellant's submissions. As such, past members of Yamumbi Co-operative Society could only sue through the Liquidator. But in this case, it is the Liquidator who had aggrieved them. For this reason, the only recourse is for the members to sue in their individual capacities as provided by Section 69 of the Act which reads:-

"69 (1) A person aggrieved by any order or decision of the Commissioner or the Liquidator under Section 66 or Section 68 as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision.

(2) A person aggrieved by a decision of the Tribunal under sub-section (1) may appeal to the High Court within thirty days of the decision.

The claim before the Tribunal was filed by four (4) past members of the Society in their individual capacities. As such, they (Respondents) had the **locus standi** to sue by virtue of Section 69 of the Act.

The Appellant further submit that the Respondents were not validly elected officials of the Society because the Society had ceased to exist as at the time they say they were appointed. However, the Act is not categorical that only officials of the Society can sue. See Section 69 (1) above) which is clear that, ***"A person aggrieved by any order or decision of the Commissioner or the Liquidator under Section 66 or Section 68 as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision."*** The Respondents presented themselves before the Tribunal as aggrieved persons and were therefore properly before the Tribunal.

Procedure - Grounds 2 and 7

Ground 2: That the learned Tribunal erred in law in failing to properly apply the provisions of the Co-operative Societies Act and all the laws cited to the Tribunal, including the Companies Act, Cap 486 Laws of Kenya.

Ground 7: That the learned Tribunal erred in law in failing to hold that failure to obtain leave of the Registrar of Co-operative Societies under Section 64 of the Act was fatal to the suit and nothing could redeem the suit.

The Appellant submit that the Tribunal erred in failing to hold that failure to obtain leave of the Registrar of Co-operative Societies under Section 64 of the Act is fatal to the suit. The relevant part reads:-

"64 (1) The sections of the Companies Act specified - Part 1 of the Schedule to this Act, modified in accordance with part II of that Schedule, shall apply mutatis mutandis in relation to the winding up of a Co-operative Society as they apply to that of a company registered under the Act."

The Appellant referred to Section 228 of the Companies Act as that being referred to in Section 64 (1) of the Act. The same provides:-

"228. When a winding up order has been made or an interim Liquidator has been appointed under Section 235, no action or proceeding shall be proceeded with or commenced against the

company except by leave of the court and subject to such terms as the court may impose."

Although the winding up of a Co-operative society under Section 64 of the Act applies Mutatis Mulandis as in a company under the Companies Act, in the instant case, the Liquidator of Yamumbi Co-operative Society was appointed not under S.235 of the Companies Act but under S. 65 of the Co-operative Societies Act.

Section 235 of the Companies Act provides as follows:-

"235 (1) The Court may appoint the official receiver to be the Liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order.

(2) Where a Liquidator (in this Act referred to as an interim Liquidator) is so appointed by the court, the court may limit and restrict his powers by the order appointing him."

On the other hand, Part 1 of the Schedule to the Act (Co-operative Societies) lists the instances under which the Companies Act shall apply in handling cases relating to Co-operative societies.

Section 69 of the Act (referred elsewhere in this judgment), which provides for appeals to the Tribunal against the decision or order of a Liquidator or Registrar, does not require that the Registrar of Co-operative Societies grants leave before a case is filed in court. The primary Act which is the Co-operative Societies Act takes precedence over the Companies Act. And in considering the cited case law by the Appellant's counsel, they relate to instances in which orders were made under S. 235 of the Companies Act. The cases cited are:-

(1) The speaker of the National Assembly -Vs- the Honourable James Njenga Karume Civil Application No. 92 of 1992 (place of suing not indicated)

(2) Bisai & Another -Vs- Kenya Commercial Bank Ltd & Others (2002) 2 E.A. 346

It is not therefore correct to state that the Tribunal did not follow the correct procedure under the provisions of the Act and other laws (as in the Companies Act) as the provisions cited before it were not applicable.

Jurisdiction (Ground No. 3 and 6)

Ground 3: That the Tribunal erred in failing to hold that there was no dispute capable of being resolved by the Tribunal.

Ground 6: That the learned Tribunal erred in law in entertaining a claim which was not founded on any law and which transgressed the basic tenets of the law obtaining in the country.

Again reference is made to Section 69 of the Act which allows an aggrieved person to bring a suit or appeal against an order or decision of a Liquidator.

As earlier noted it is the past members of Yamumbi Co-operative Society who were aggrieved by decisions of the Society's Liquidator, particularly on issues touching on their property (land) and money in their bank accounts. With respect to land, they claimed the same was sold to third parties and as regards money, it was mishandled. The grievances were pegged on solid fear, reason and facts. They had written numerous correspondences to various public authorities highlighting their plight, but nothing was addressed. The only recourse they had was to the Tribunal. The law, as I have noted earlier mandates the Tribunal to handle such issues as the Respondents brought before it. As such no error was occasioned by the Tribunal in addressing the issues raised by the Respondents.

It was further the submission of the Appellant as follows:-

"The Respondents herein did not seek to appeal from a decision of the Liquidator of Yamumbi Uasin Gishu Co-operative Society. However, if that was the case, which is categorically denied, their appeal would be time barred having been brought more than ten years after a decision by a Liquidator other than the Liquidator herein."

The Respondents' statement of claim is dated 11th June, 2007 and **NOT** 11th June, 2012 as claimed by the Appellant. Moreover, complaints were made against the first Liquidator and he was removed from office. The second Liquidator who is the Appellant continued to make bad decisions precipitating the claim before the Tribunal. The removal of the first Liquidator conforms with Sections 68 (1) (b) of the Act which empowers the Commissioner to remove a Liquidator from office and appoint a new Liquidator in his place.

For the foregoing reasons, again, I find it as incorrect to say that the Tribunal had no jurisdiction to deal with the claim before it or acted ultra vires its mandate in dealing with the claim.

Finally, under ground of appeal No. 1 that ***"the learned Tribunal erred in law and in fact by dismissing the Appellant's preliminary objection with any legal basis"*** sums up this judgment and why this appeal is misconceived.

It was the Tribunal's view that the case ought to have proceeded for a full hearing. The Preliminary Objection ought to have been raised purely on a point of law and not facts. But the grounds of appeal have raised issues demanding on interference to issues touching on facts and evidence that the hearing before the Tribunal would have addressed. The Tribunal, in my view, properly directed itself that only by full hearing that the claim could be settled. I also refer to an observation by Nambuye ,J (as she then was) in **SARAH MUTHEE MUNYAO -VS- RUTH MUENI KITUNDU, HIGH COURT AT MACHAKOS PROBATE & ADMINISTRATION NO. 42 OF 2002** while citing **MUKISA BISCUIT MANUFACTURERS -VS- WEST END DISTRIBUTORS LTD (1969) E.A 692** at page 701 paragraph AB that ***"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law that is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is being sought is the exercise of judicial discretion."***

Applying the above principle, I hold that the Tribunal was right in dismissing the Preliminary Objection raised by the Appellant. The Respondents' case should therefore proceed to a full hearing as ruled by the Tribunal. I accordingly dismiss this appeal with each party to bear its own costs.

DATED and DELIVERED at ELDORET this 27th day of February, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Makuto for the Appellant

Mr. Kathili for the Respondents