



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 187 OF 2011

REPUBLIC.....APPLICANT
VERSUS

THE CHIEF MAGISTRATE'S COURT.....RESPONDENT
CO-OPERATIVE BANK OF KENYAINTERESTED PARTY

EX-PARTE
EDWARD KIBET KIMETTO

JUDGEMENT

Edward Kibet Kimetto (the ex-parte applicant) through the notice of motion dated 29th August, 2011 prays for an order of prohibition prohibiting the Chief Magistrate's Milimani Commercial Court, Nairobi (the respondent) from effecting, dealing with, executing, implementing or making any further orders in respect of the Chief Magistrate's Court Civil Case Number 1944 of 2008. The background to the application is that the applicant was previously an employee of Kenya Commercial Bank Limited. He, by virtue of his employment, joined Kencom SACCO society Ltd (the SACCO society), a cooperative society which drew its members from Kenya Commercial Bank Ltd. In 2004 he took a loan of Kshs.1,960,000/= from the SACCO society and the loan was paid through deductions from his salary. In June, 2005 he lost his job and the SACCO society started demanding repayment of the loan. On 2nd April, 2008 the Co-operative Bank of Kenya Limited (the Co-operative Bank) filed CMCC No. 1944 of 2008 against him before the respondent. The respondent subsequently entered judgment against him. The applicant contends that the respondent had no jurisdiction to hear the case against him since such jurisdiction was reserved for the Co-operative Tribunal by virtue of Section 76 of the Co-operative Societies Act.

The respondent opposed the application through grounds of opposition dated 1st September, 2011 which grounds of opposition are as follows:-

- 1. The application is fatally and incurably defective;**
- 2. The application is an abuse of the process of court and an abuse of the administration of justice.**

The Co-operative Bank was allowed to join these proceedings as an interested party on 27th October, 2011. Thereafter the interested party opposed the application through the replying affidavit of Anestine Gatakaa the Manager Credit Management Division. In summary the interested party's case is that the

applicant being a member of the SACCO society applied for a personal loan of kshs.2,500,000/= from the interested party. After the loan was disbursed the applicant defaulted and that is when the interested party filed Civil Suit No. 1944 of 2008 before the respondent with a view to recovering its money. It is further the interested party's case that since then the applicant has persistently frustrated its efforts to execute the judgment.

The only issue for this court's determination in this matter is whether the respondent had jurisdiction to hear and determine Nairobi CMCC No. 1944 of 2008. The applicant's case is that the respondent had no jurisdiction because the dispute before the court was one between the applicant, in his capacity as a member of a co-operative society and a co-operative society i.e. the SACCO society. It is the applicant's case that the respondent usurped the jurisdiction vested on the Co-operative Tribunal (the Tribunal) by Section 76 of the Co-operative Societies Act. The said Section provides for the jurisdiction of the Tribunal 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.”

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 society. In the case before me the applicant has indeed established that he was a member of the SACCO society. The applicant submitted that he took the disputed loan from the SACCO society and he was not a party to the agreement between the SACCO SOCIETY and the Co-operative Bank.

The interested party's case, on the other hand, is that the loan advanced to the applicant was directly from the bank and the SACCO society only facilitated the disbursement of the loan to its members among them being the applicant.

The applicant's loan application form was exhibited in the replying affidavit of Anestine Gatakaa as “AG 1”. It is an application for a personal loan and the same is to be repaid through the SACCO society using check-off system. The loan was to be deducted from the applicant's salary and channeled to Co-operative Bank through the SACCO society. The applicant filled the application form and he cannot be heard to say that he was not aware that the interested party advanced him the loan.

The applicant cited the decision of Mbaluto, J (as he then was) in **NAIROBI HIGH COURT, MILIMANI COMMERCIAL COURT, CIVIL CASE NO. 548 OF 2001 MURATA FARMERS**

SACCO SOCIETY LTD V THE CO-OPERATIVE BANK OF KENYA LIMITED to demonstrate that the interested party herein is a society and disputes involving it should be heard by the Tribunal. I have no problem with that argument. However, what the applicant needed to establish is that he is a member of the interested party. He has not done so. In my view, the applicant approached the interested party for a loan like any other customer would do. He cannot therefore benefit from the provisions of Section 76 of the Co-operative Societies Act. The interested party was therefore correct in filing its case before the respondent.

At one point the applicant argued that he had paid the loan to the SACCO society. If this were so, then nothing would have been easier than for him to present the evidence of payment to the respondent. Whether the loan has been serviced or not is an issue that squarely falls within the jurisdiction of the respondent.

For the foregoing reasons the application fails and the same is dismissed with costs to the respondent and the interested party.

Dated, signed and delivered at Nairobi this 19th day of April , 2013

**W. K. KORIR,
JUDGE**