



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 223 of 2009

**KAMUTHI FARMERS CO-OPERATIVE
SOCIETY LTD.RESPONDENT/APPLICANT**

VERSUS

MONICA WANGUI.....APPELLANT/RESPONDENT

RULING

1. By a notice of motion dated 4th September, 2009, filed on 12th September, 2009, Kamuthi Farmers Cooperative Society Limited the respondent to this appeal (hereinafter referred to as the applicant), seeks to have the memorandum of appeal filed on 30th April, 2009, and all the subsequent pleadings struck out with costs. From the grounds stated on the face of the application, and the supporting affidavit sworn by Edward Kungu Maina, the grounds upon which the application is anchored are as follows:
2. The applicant obtained summary judgment against the appellant Monica Wangui, in the Cooperative Tribunal case No.49 of 2007, under Section 75 of the Cooperative Societies Act. In the Tribunal case the appellant was represented by the firm of Kamunye Gichigi & Mburugu Advocates. On 30th April, 2009, the appellant filed a memorandum of appeal in this court through the firm of Kepha Ombati & Co. Advocates. It is contended that the firm of Kepha Ombati & Co. Advocates did not obtain leave of the court or consent from the firm of Kamunye Gichigi & Mburugu Advocates before filing the appeal. The applicant therefore contends that the memorandum of appeal is fatally defective as it contravenes the provisions of the Civil Procedure Rules.
3. The application is opposed through a replying affidavit sworn by Kepha Ombati, in which he concedes that the appellant was represented by the firm of Kamunye Gichigi & Mburugu Advocates, in the Cooperative Tribunal. Kepha Ombati explains that following the award and decree of the Cooperative Tribunal, delivered on 31st March, 2009, the appellant instructed him on 30th April, 2009, to file an appeal against the award and the decree.
4. The firm of Ombati & Company Advocates subsequently filed an application in the Cooperative Tribunal for leave to come on record for the appellant. The firm of Kamunye Gichigi & Mburugu Advocates consented to the firm of Kepha & Co Advocates coming on record for the appellant. Thereafter Kepha Ombati & Co. Advocates filed a notice of change of advocates at the Cooperative Tribunal. On 13th August, 2009, the Cooperative Tribunal made an order allowing the firm of Kepha Ombati & Co. Advocates to come on record for the appellant and to effect the change of advocates.
5. Mr. Ombati who appeared before this court, argued that he did not need leave of the Tribunal to come on record. He contended that the requirement for leave is provided under Order III Rule 9A of the Civil Procedure Rules. He maintained that as at the time of filing the appeal, the Civil Procedure Rules were not applicable to the Cooperative Tribunal proceedings. In that regard, Mr. Ombati referred to Legal Notice No.59 of 2009 “the Cooperative Tribunal (Practice and Procedure Rules)”, Rule 6 of which provided for the application of Civil Procedure Rules in respect to the proceedings of the Cooperative Tribunal. He stated that these rules came into effect on 12th May, 2009 after his appeal was filed. Mr. Ombati referred to Section 1(2) of the Civil Procedure Act which provides for proceedings to which the act is applicable, and noted that such proceedings do not include the Cooperative Tribunal proceedings. Therefore Mr. Ombati argued that the requirements of Order III Rule 9A of the Civil Procedure Rules were not applicable in this matter. Mr. Ombati explained that he filed an application for leave in the Tribunal after the Civil Procedure Rules became effective by virtue of Legal Notice No.59 of 2009.
6. In response to Mr. Ombati’s submissions, Mr. Muriuki Gitonga who appeared for the applicant submitted that Mr. Ombati had

not identified the rules of procedure which were applicable to the Tribunal prior to 12th May, 2009. Mr. Muriuki referred to Section 77 of the Cooperative Societies Act which provides for the composition of the Tribunal. **Referring to HCCA.No.543 of 2002, Gitonga Githinji Muriuki vs Mbarako Ukarara**, Mr. Gitonga maintained that an advocate on record in the lower court is considered to be on record in the appeal, until an appropriate leave for change is obtained.

7. Having considered this application, I find that Order III Rule 9A of the Civil Procedure Rules is clear, that where there is a change of advocate, after judgment has been passed, such change shall not be effected without an order of the court upon an application made with notice to the advocate who was formerly on record. Mr. Ombati has conceded that as at 30th April, 2009, when the firm of Kepha Ombati & Co. Advocates, filed a memorandum of appeal in this court, the advocates had not made any application to the Tribunal for leave for Mr. Ombati to come on record.
8. The question is whether as at 30th April, 2009, the Civil Procedure Act and Rules applied to proceedings before the Tribunal, such that Order III Rule 9A of the Civil Procedure Rules can be said to have been applicable to the proceedings subject of the respondent's appeal. Section 78(5) of the Cooperatives Societies Act No.12 of 1997 provides as follows:

“Except as expressly provided in this act or any rules made thereunder the Tribunal shall regulate its own procedure.”

That provision has been retained verbatim under the Cooperatives Societies Act No.2 of 2004. This means that the Civil Procedure Rules are not applicable to the proceedings of the Cooperative Tribunal unless specifically applied under the above Section.

9. Legal Notice No.59 of 2009 purported to do just that by providing for the Cooperative Tribunal practice and Procedure Rules, 2009, to regulate the proceedings of the Tribunal. Rule 6 of that particular legal notice provides for the application of the Civil Procedure Rules to the proceedings of the Tribunal.
10. Legal Notice No.59 of 2009 does not make any reference to any previous rules of procedure promulgated by the Tribunal to regulate its proceedings. Nor were any other rules produced before me to confirm that any such Rules had been promulgated. I find that the Tribunal had not exercised its powers Under Section 78(5) of the Cooperatives Societies Act prior to Legal Notice No.59 of 2009. Therefore, the Civil Procedure Rules only became applicable to the Cooperative Tribunal proceedings after 12th May, 2009.
11. I accept Mr. Ombati's argument that the Civil Procedure Act and Rules were not applicable to the Cooperative Tribunals proceedings as at 30th April, 2009 when the respondent filed the memorandum of appeal. Thus, the memorandum of appeal filed by the respondent was not subject to Order III Rule 9A of the Civil Procedure Rules. Accordingly, the notice of motion dated 12th September, 2009 filed on 18th September, 2009 is misconceived and without merit. The same is accordingly dismissed.
12. In accordance with the consent recorded by the parties in HCCA No.224 of 2009, this ruling is adopted in HCCA No.224 of 2009 and the notice of motion dated 12th September, 2009 filed on 16th September, 2009, in HCCA No.224 of 2009 is also dismissed. I award costs in both cases to the respondents. Those shall be the orders of this court.

Dated and delivered this 5th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Gitonga Muriuki for the respondent/applicant

Eric - Court clerk

