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

**Civil Appeal 648 of 2006**

**NEW GATANGA FARMERS CO-OP SOCIETY LTD.....APPELLANT**

**VERSUS**

**JOEL MBURU NJOROGE.....1ST RESPONDENT**
**ISAAC NDUNGU.....2ND RESPONDENT**
**MARY WACEKE.....3RD RESPONDENT**
**JULIUS KAMANDE.....4TH RESPONDENT**
**JOSEPH MBURU GICHUGU.....5TH RESPONDENT**

***(Being an appeal from the ruling of A. Lorot Mr., Resident Magistrate, in RMCC No.469 of 2005, delivered on 1st September, 2006 in the Senior Resident Magistrate's Court at Gatundu.)***

**J U D G M E N T**

1. New Gatanga Farmers Co-operative Society Ltd (hereinafter referred to as the appellant), is aggrieved by the ruling delivered on n1st September, 2006, by the Resident Magistrate at Gatundu in RMCC No.469 of 2005. In the ruling the magistrate struck out the appellant's defence and gave judgment in favour of Joel Mburu Njoroge (hereinafter referred to as the 1st respondent), for Kshs.167,307.90. The appellant has filed a memorandum of appeal in which he raises three grounds as follows:

   (i) The learned magistrate erred in law in finding that the appellant's defence was a mere sham and an abuse of the court process and did not raise any triable issues thereby striking it out.

   (ii) The learned magistrate erred in law in finding that the appellant had rightly been sued when the appellant had been improperly sued.

   (iii) The learned magistrate erred in law in failing to find that the Honourable court had no jurisdiction to hear and determine the suit under the Co-operative Societies Act.

2. Counsel for the appellant has filed written submissions in which he faulted the trial magistrate for finding that he had jurisdiction to entertain the suit. Counsel for the appellant has further taken issue with the magistrate for refusing to grant the appellant an adjournment, and time to file a response to the application brought by the

respondent for striking out the appellant's defence. Counsel maintained that the refusal to grant the appellant time to file a response was inequitable in the light of the orders that were being sought in the application. Counsel argued that striking out is a drastic action that should be exercised cautiously and judiciously.

3. It was further maintained that the application filed by the appellant raised triable issues as it challenged the jurisdiction of the court to try the suit. It was contended that the issue of jurisdiction ought to have been addressed before any other issue could be dealt with. Counsel argued that the refusal to allow the appellant time to file its papers, was manifestly harsh, excessive, prejudicial, drastic and an abuse of the discretion granted to the magistrate under Order L Rule 16 of the Civil Procedure Rules. It was argued that the suit before the court was a test suit and the court was under a duty in law and equity to be fair to both litigants.

4. Counsel for the appellant relied on ***Civil Appeal No.37 of 1978 DT Dobbie & Co. Ltd vs Joseph Mbaria Muchina & another***, wherein it was stated that no suit ought to be summarily dismissed unless it appears so hopeless, that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendments.

5. Counsel for the 1st respondent also filed written submissions in which he contended that the firm of Harrison Okeche Advocate, who purported to represent the appellant in the appeal were not properly on record. It was noted that the advocate had first purported to come on record by filing a notice of appointment of advocate, on 18th November, 2008. A notice of change of advocate was later filed on 29th May, 2009 by the same advocate. It was submitted that the advocates failed to comply with Order III Rule 9A of the Civil Procedure Rules as they came on record after judgment and decree had been passed without obtaining leave of the court. The court was therefore urged to strike out the submissions filed by the advocates because they were strangers in the suit.

6. Relying on ***HCCA No.75 of 2004, Nairobi, John Kahiga vs Gichia Ngugi,*** it was submitted that Order III Rule 9A of the Civil Procedure Rules was mandatory, and the 1st respondent could not be estopped from challenging the notice of change, since no party can be deemed to consent to that which is against the provisions of the law. Further, it was submitted that no proper decree or order appealed from was duly filed by the appellant. It was noted that the record of appeal contains what purports to be a decree. However, the document had alterations which have not been countersigned. It was noted that notwithstanding an order by the court that the lower court file be returned to Gatundu for the decree to be certified, no certified copy of the decree has been availed to date.

7. It was therefore submitted that the decree contained in the record of appeal does not meet the requirements of Section 79A of the Civil Procedure Act, and should therefore be expunged from the record. Finally it was submitted that the trial magistrate was alive to the fact that he had the discretion either to allow the application for adjournment or refuse the application, and that he opted to refuse the application for adjournment and gave his reasons for doing so. The court was urged not to interfere with the exercise of the trial magistrate's discretion.

8. With regard to the issue of jurisdiction, it was noted that the appellant's advocate raised the issue, and that the trial magistrate addressed the same. The court was therefore urged to dismiss the appeal.

9. I have carefully reconsidered the record of proceedings before the trial magistrate. I do note the 1st respondent had filed a suit against the appellant in which the 1st respondent who claimed to have been an employee of the appellant sought judgment for Kshs.167,307.90 for unpaid benefits and unpaid salary. The appellant filed a defence to the 1st respondent's claim in which it contended inter alia that it was wrongly sued and that the 1st respondent's suit was incompetent. The appellant further maintained that the court had no

jurisdiction to try the suit.

10. On 2nd November, 2005, the 1st respondent filed an application by way of a chamber summons brought under Order VI Rule 13(1)(d) of the Civil procedure Rules seeking to have the appellant's defence struck out for being an abuse of the court process. The 1st respondent supported his application by an affidavit in which he swore that he was employed by the appellant as a mason, and that the appellant terminated his services on 19th July, 2001 on the grounds of financial problems. The 1st respondent swore that the appellant undertook in writing to pay his dues amounting to Kshs.167,307.90. The 1st respondent maintained that the appellant had no defence to his claim, and that the defence filed was an abuse of the process of the court. The 1st respondent further maintained that his claim was anchored under an employment contract which was not covered under the Cooperatives Act and therefore the lower court had jurisdiction to hear the suit.

11. The application was set down for hearing on 6th of June, 2006 but was adjourned as the parties indicated that they wished to have the matter settled out of court. The matter was fixed for mention on 11th July, 2006, on which date it was stood over generally. The chamber summons was again listed for hearing on 22nd August, 2006, on which date the appellant's counsel applied for adjournment and leave to file a reply to the 1st respondent's application. In his considered ruling, the trial magistrate refused the application for adjournment and ruled that the appellant having failed to file any reply to the 1st respondent's application, in accordance with Order L rule 16(1) of the Civil Procedure Rules, the application was to proceed *ex-parte*, except for points of law which the appellant was at liberty to raise.

12. I find that the trial magistrate cannot be faulted for having exercised his discretion against the appellant. By 22nd August, 2006, the 1st respondent's chamber summons had been pending for over 8 months although the parties were negotiating for settlement, that was no excuse for the appellant failing to file a reply to that application. I concur with the trial magistrate that the appellant was indolent in not filing a reply and it has only itself to blame. Moreover, the appellant had liberty to make submissions on issues of law in response to the 1st respondent's application. The issues raised by the appellant in his defence were essentially issues of law and therefore the appellant's counsel had the opportunity to raise them. No prejudice was therefore caused to the appellant by the refusal to grant an adjournment.

13. With regard to the merits of the application, the 1st respondent exhibited letters signed by the appellant's secretary which clearly set out the amounts due to the 1st respondent but not paid. In the light of the letters the appellant's defence denying the 1st respondent's claim was a clear abuse of the court process. Further, on the issue of the appellant's capacity, the appellant was described as a limited liability company capable of suing and being sued. The letterheads of the appellant show that it was describing itself using the words "limited". The appellant is a cooperative society.

14. Section 12 of the Cooperative Societies Act Cap 490 provides as follows: -

> "***Upon registration, every society shall become a body corporate by the name under which it is registered with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of or in accordance of its by-laws***".

15. Thus, the appellant was properly sued in its corporate name. Further, although the appellant did not so state, it appears that on the issue of jurisdiction, it had in mind the provisions of the Co-operative Societies Act, (Cap 490) under which jurisdiction for settlement of disputes is vested in the Co-operative Societies Tribunal established under Section 77 of the Co-operative Societies Act. Section 76 of the Co-operative Societies Act,

identifies disputes which may be dealt with by the Tribunal as:

***"Any dispute concerning the business of a co-operative society which arises***
***(a) Among members, past members, and persons claiming through members, past and deceased members; or***
***(b) Between members, past members or deceased members and society, its committee or any officer of the society;***
***(c) Between the society and any other cooperative society."***

16. A dispute for the purposes of Section 76 of the Cooperative Societies Act is defined under Section 76(2) of the same act to include:

> ***"(a) a claim by a cooperative 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 the deceased member for any debt or demand entitled due from a cooperative society whether such debt or demand is admitted or not."***

17. It is evident from the above that the Co-operative Societies Tribunal focuses on disputes and concerning the disputes of a business society, between the cooperative society and its members or past members. Disputes between the cooperative society and its employees or any other person not being a member, past member or other cooperative society is not within the jurisdiction of the Cooperative Societies Tribunal. The appellant cannot therefore seek solace under the Cooperative Societies Act.

18. It is true that striking out pleadings is a very drastic action which should only be resorted to in the clearest of cases. From the above, it is apparent that the defence filed by the appellant did not raise any triable issues and was only intended to delay the 1st respondent from getting his lawful dues. The trial magistrate was right in ordering the striking out of the defence. Further, under Order XLI Rule 1A of the Civil Procedure Act, as read with Section 79g of the Civil Procedure Act, an appellant is required to file a certified copy of the decree or order appealed against "*as soon as possible and in any event within such time as the court may order*."

19. On the 23rd April, 2007, this court ordered that the lower court record be referred back to the lower court for purposes of issuance of the decree or order appealed against, and supply of a certified copy, to the appellant. It was following that order that the record of the appeal containing what purports to be the copy of the decree was filed. Nonetheless, the copy of the decree contained in the record of appeal is not certified. Secondly, it is not clear when the decree was issued as there is an alteration of the date which has not been countersigned. To that extent the appellant has not provided a proper certified copy of the decree upon which its appeal is based and its appeal is therefore defective.

20. Further, I do note that the appeal before this court was properly filed by C.K. Muhia & Co. Advocates who was on record for the appellant. The firm of Harrison Okeche Advocate, who purported to take over from this advocate, came on record irregularly as they did not obtain leave of the court as required under Order III Rule 9A of the Civil Procedure Rules. Thus the advocate appeared before this court irregularly. That ought to have been a ground for a preliminary objection and the same not having been raised, it is too late in the day to raise the issue.

21. Having perused the record of the lower court, I do note that although there was no agreement in respect of a test suit in accordance with Order XXXVII Rule 1 of the Civil Procedure Rules, the trial magistrate adopted the order striking out the defence *mutatis mutandis* in Civil case No.471/05, 472/05, 473/05 and 474/05 involving Isaac Ndungu, Mary Waceke, Julius Kamande and Joseph Mburu Gichugu (the 2nd, 3rd, 4th and 5th respondents respectively). No ground of appeal has been raised in this regard and therefore this judgment applies to all the respondents.

22. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 4th day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Kamar H/B for Okeche for the appellant

Advocate for the respondent absent

Eric - Court clerk