



REPUBLIC OF KENYA

HIGH COURT AT NYERI

CIVIL APPEAL 153 OF 2003

HARRISON WILFRED MUCHIRA MAGUH.....APPELLANT

Versus

RUNG'ETO FARMERS CO-OPERATIVE.....RESPONDENT

(Appeal from the original Ruling of the Co-operative Tribunal at Nairobi

C.T.C. No.27 of 2003 delivered on 15th December, 2003.)

J U D G M E N T

On 9th September, 2003, **Rung'eto Farmers Co-operative Society Limited** hereinafter referred to as "*the respondent*" sued **Harrison Wilfred Muchira Maguh**, hereinafter referred to as "*the appellant*" in the Co-operative Tribunal at Nairobi for the sum of Kshs.2,142,914/15 together with 12% co-operative interest from 25th February, 2000 till payment in full. The respondent also prayed for costs and interest in the same suit. The suit was precipitated by the actions of the appellant when he was the chair of the respondent between 8th April, 1997 and 12th July, 1999.

On 12th October, 1999 the registrar for co-operative development appointed inquiry team to inquire into the By-lays, working and financial conditions of the respondent. The team carried out its mandate and presented the report to the members of the respondent for approval. On 25th February, 2000, the report was adopted with recommendations that the appellant and others be surcharged for the loss occasioned to the respondent as a result of their negligence or failure to exercise due care and diligence or any prudence in handling the business of the respondent. According to the report the respondent lost a total of Ksh.7,886,880/55 out of which sum Kshs.21,142,914/15 was attributed to the appellant and he was so surcharged. On 14th March, 2000, the Registrar for Co-operatives issued surcharge notices and on 19th October, 2000 he issued final surcharge orders. The appellant challenged the surcharge before the Minister for co-operatives and the tribunal as required under the co-operative Society Act but those challenges were dismissed summarily, hence the suit for recovery by the respondent.

When served with the suit papers, the appellant reacted by filing a defence. His defence was that the Registrar of Co-operative Development acted erroneously and unlawfully in appointing the inquiry team, the entire process of the inquiry was irregular and the adoption of the report by members was also unlawful and therefore the surcharge does not lie. He also contended that the approval of the report at a general meeting was biased and calculated to injure the appellant and so such the approval was tainted with malice. He denied that the respondent lost a total of Ksh.7,886,680/55 or any other sum and in particular the sum of Ksh.2,142,914/15 attributed to him. He admitted that he had referred the matter to the Minister and tribunal but maintained that no appeal was dismissed either on merit or otherwise and that he was not estopped by any technicality in form of procedure to appeal and deal with the issue as he

deemed necessary.

By an application dated 27th November, 2003 and filed in court on the same date, the appellant sought that the statement of claim filed by the respondent as aforesaid be dismissed with costs to the appellant on the ground that the claim was statute barred under the Limitation of Actions Act. In support of the application, the appellant deponed that the respondent's claim was statute barred under the Limitation of Actions Act and thus the claim was thus frivolous, vexatious and an abuse of the process of the tribunal. Hence the tribunal had no jurisdiction to deal with the matter.

That application was met with opposition from the respondent. In a replying affidavit sworn by **David Mureithi Murigi**, the then Chairman of the respondent, he deponed in pertinent paragraphs that the application was ill-advised, misconceived, malicious, brought in bad faith, lacks merit and was an absolute abuse of the court process. The appellant's allegations that the claim was time barred were baseless and out of time (sic) with the very provisions of the same act. The respondent claim arose from the inquiry report upon which the Registrar of Co-operatives had issued surcharge orders on 19th October, 2000. The appellant then appealed to the Minister for Co-operative under appeal numbers, 4, 5, 6 and 7 of 2000 which were dismissed by the Honourable Minister on 27th July, 2000. The appellant again appealed to the tribunal against the Minister's decision vide appeal numbers 1 and 2 of 2000 which were struck out on 20th February, 2002. After the tribunal's dismissal of the appeals, the appellant again appealed to the Minister for Co-operative Development which appeal was also dismissed on 4th September, 2003.

The application was heard interparties by the tribunal on 5th December, 2003. Having carefully considered the submissions of the two learned counsel, the tribunal delivered its ruling on the same day holding thus:-

“.....The claimant was only entitled to bring this claim after the above appeal process not later. Claim under Section 74 of the suit is a claim under Section 4 (1) (d) of the Limitation Act. i.e. a claim under written law. We find that the claim herein is not time barred. We find that the claim is not a general tort as submitted by Mr. Mahan for the respondent/applicant. We accordingly dismiss the respondent application herein dated 27/11/03 with costs to the claimant....”

That dismissal triggered this appeal. Through **Messrs Bali-sharma & Bali-sharma Advocates** the appellant faults the ruling on 3 grounds, to wit:

- 1. The Tribunal court erred in law when it held that, “A claim under Section 74 of the Act is a claim under Section 4(1) (d) of the Limitation of Action Act i.e. a claim under written law.”**
- 2. The tribunal further erred to conclude that claim of the respondent was not statute barred under the Limitation of Actions Act, Chapter 22, Laws of Kenya.**
- 3. The tribunal laboured under a misconception on the law of tort and failed to understand that it had no jurisdiction abinitio in the said claim.**

When the appeal came up for hearing the court directed that the same be argued by way of written submissions. Subsequent thereto parties filed and exchanged written submissions which I have carefully read and considered.

The Co-operative Tribunal is a special tribunal established under the Co-operative Societies Act to deal with matters affecting the Co-operative Societies. That tribunal has prescribed its rules of procedure and has also imported some aspects of the Civil Procedure Act and the rules made thereunder. The act allows for the appointment of an inquiry team to look into the affairs of a Co-operative society. Such inquiry team is then supposed to present the report to the members of the Co-operative Society for approval. Once approved the recommendations then have to be acted upon. In the event of a surcharge, the Registrar for Co-operatives has to issue the surcharge notices. If there is no compliance, then surcharge orders are made. In so doing however, we must not lose sight of the fact that the person surcharged and

in this case the appellant has of right of appeal to the Minister for the time being in charge of Co-operatives and thereafter to the tribunal.

In the circumstances of this case, there is no doubt at all that the appellant was surcharged for allegedly misappropriating, misapplying and embezzling members funds following an inquiry conducted under Section 58 of the Co-operative Societies Act. He did not comply with the surcharge notice and order. He instead appealed to the Minister and the tribunal as provided for by the Act. Those appeals were all dismissed. It is noteworthy that the inquiry team was appointed on 12th October, 1999. Its report was presented to the members on 25th February, 2000. The Registrar issued surcharge notice and order on 14th March, 2000 and 19th October, 2000 respectively.

From that date until 4th September, 2003, the appellant was involved in the appeal process as provided for under the Act. It is inconceivable that the appellant would have expected the respondent to file the suit in the tribunal whilst he had engaged the respondent in the appellate process. I am certain that had the respondent filed its claim whilst the appellant's appeals aforesaid were pending, it would have been met with the defence that the claim was the subject of an appeal. In my view it is only after the procedures prescribed under the Act having been exhausted that the respondent could then file its claim in the Co-operative Tribunal. Everybody knows that it is unprocedural for a party to maintain more than one suit simultaneously on the same cause of action. In this case there were appeals before the Minister and the tribunal. The respondent could not thus file its claim while there were those appeals. It is for this reason that I am unable to agree with Mr. Mahan's submissions that though section 74 of the Act deals with appeals to the Minister, nowhere in the said Act does it state that the respondent could only lodge a claim as a civil debt after the appeal to the Minister has been dealt with. To my mind, time for the respondent to bring its claim in the co-operative tribunal started to run once the appellant exhausted the appellate jurisdiction enshrined in the Co-operative Societies Act. That must have been on 4th September, 2003 when **Hon. Peter Njeru Ndwiga**, the then Minister for Co-operative Development dismissed the appellant's last appeal. On 9th September, 2003 the respondent lodged its claim in the co-operatives tribunal. The respondent's claim thus cannot be said to have been statute barred then either under tort or contract as claimed by the appellant. I quite agree with the tribunal that the claimant was only entitled to bring this claim after the above appeal process had been exhausted and not earlier. I also quite agree with the tribunal that a claim under Section 74 of the suit is a claim under Section 4 (1) (d) of the Limitation of Actions Act i.e. a claim under written law. The sum was recoverable under a written law. The written law here is the Co-operative Societies Act. The act provides for a surcharge and indeed has elaborate procedure as to the process of surcharge. The respondent's claim was thus under written law whose limitation period is 6 years. It matters note that the respondent had in its prayers in the claim stated "**....a sum of Ksh.2,142,914/15 with Co-operative interest from 25th February, 2000 till payment in full....**" A prayer in the plaint or statement of claim cannot be the basis of computation of time for purposes of limitation as suggested by **Mr. Mahan**. That being the case the authorities cited by **Mr. Mahan** in support of his submissions on this issue are irrelevant.

The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed with costs to respondent.

Dated and delivered at Nyeri this 17th day of September, 2009.

M.S.A. MAKHANDIA

JUDGE