



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL NO. 249 OF 2001

SISIONI DAIRY & PYRETHRUM FAMERS

CO-OPERATIVE SOCIETY LTD APPELLANT

VERSUS

JOSPEH MWANGI WAWERU RESPONDENT

J U D G E M E N T

On 5th July, 1996 the respondent filed a civil suit in the court of the Senior Resident Magistrate at Naivasha to claim from the respondent a sum of Kshs.9231/= plus interest and costs of the suit.

This claim arose from 181 kilos of pyrethrum the respondent alleged he delivered to the appellant on 21st February 1996 and for which it neglected or refused to pay the amount as shown above.

The case was heard by the Senior Resident Magistrate (L.W. Gitari) (Partly) and Senior Principal Magistrate (M.M. Muya) on 3rd July, 1998, 4th December, 1998, 12th October, 2000, and 5th April, 2001 and Judgement delivered on 19th April, 2001 wherein the respondent was awarded the sum claimed in the plaint plus costs and interest.

This decision did not find favour with the appellant who lodged an appeal to this court on 18th May, 2001 in a memorandum of Appeal which listed five (5) grounds of appeal.

The first 2 grounds blamed the learned Magistrate for adjudicating over the claim without jurisdiction, that he erred in holding that the appellant had accepted the respondent's produce, that he further erred in disregarding the appellant's pleadings, evidence and facts generally and that he made a mistake in holding that the respondent had proved his case on a balance of probabilities.

The appeal was fixed for hearing in this court on 1st October 2002 wherein counsel for both parties appeared to either present or oppose the appeal.

According to counsel for the appellant, at the time the suit was filed in the lower court, the Co-operative Societies Act, Chapter 490 Law of Kenya was in force and that by virtue of Section 80 thereof this dispute should have been referred to the Commissioner for Cooperatives and only brought to this court on appeal.

That where there is a remedy under a particular procedure then it must be followed and as the respondent was a past member of the appellant, then his case could only be referred to and heard by the

Commissioner for Co-operatives.

That the respondent had no business taking his produce to the appellant which had expelled him as its member for obtaining a private number and delivering pyrethrum directly to the board.

According to counsel the Magistrate did not appreciate the rules and regulations which govern day to day management of Cooperative Societies.

That there was no evidence as to how the respondent arrived at Kshs.51/= per K.g. to arrive at Kshs.9231/=. He prayed that the appeal be allowed and judgement of the lower court set aside, with costs.

Counsel for the respondent opposed the appeal and referred to the preliminary objection raised in the lower court over lack of the court's jurisdiction three years after the case commenced and which was dismissed and out of which no appeal was lodged.

He submitted that the respondent had delivered his produce to the appellant and he was only seeking payment for it and that by the time he made the delivery of the produce before receiving the letter dismissing him from the appellant society.

According to counsel, by letter dated 16.5.95 it was acknowledged that the respondent had made the delivery of his produce to the appellant and that the case was properly before the lower court.

He prayed that this appeal be dismissed with costs.

These are the submission made before this court by counsel for both parties for consideration and decision. Counsel for the appellant has referred this court to the previous Section 80 of Chapter 490 of the Laws of Kenya which has been reproduced in Section 77 of Act 12 of 1997 These provisions talk about a dispute arising concerning the business of a co-operative society. Before deciding whether or not such dispute should be referred to the Commissioner of Co-operatives, the most important question one should ask should be what is it that should be referred to as the business of the Co-operative Society?

The authorities cited do not describe what is meant by the word business of the Co-operative Society. But both seem refer to particular disputes which occurred to give rise to the said authorities and there is no harm in this court going through them to attempt a description of what the word "business" is all about.

1. High Court Civil Case number 3240 of 1997 involved an application for an order of injunction to restrain the respondent from running the affairs of the society as they were believed to have assumed such office illegally.
2. High Court Civil Case Number 2646 of 1998 sought a declaration and injunction to restrain the defendants from interfering with the management of the affairs of the society.
3. Civil Appeal No. 114 of 1997 concerned a dispute over allocation of plots or trespass and occupation of plots by members of a society against the management allocations.
4. Facts of C.A No. 261 of 1998 have not been given.
5. H.C.Civil Appeal No. 135 of 1967 dealt with a civil debt which would have formed the subject of Civil litigation [1970] E.A. 361.

Reading through authorities 1 to 3 one gets the impression that the phrase in the act – a dispute concerning the business of the society should be confined to disputes regarding internal working and management of the affairs of the society and/or disputes in regard to the Principles which would regulate the conduct of business. However, the decision in the fifth case [1970] E.A 361 the late Harris & Simpson JJ suggest the phrase would include all matters which would form the subject of litigation including demand for payment of a debt as in the case subject to this appeal. Though this case was heard by two

Judges it is a High Court case and therefore, not binding on this court. Is it then persuasive to this court? Given that these type of claims could be sought in ordinary civil courts, I am not convinced it would have been the intention of the legislature to create two different jurisdictions for a similar claim. Take the provisions in the Magistrate courts Act which gives limited pecuniary jurisdiction to Magistrates of different grades and that Chairmen manning tribunals under the Co-operative Societies Act are of similar grade.

How would say, the Chairman of the tribunal who is of the rank of Principal Magistrate entertain a claim of say Kshs.3 million when in the general civil litigation this claim would be litigated in the High Court? It is not certain to anticipate that disputes concerning matters which would form the subject of litigation at the Co-operative Society's Tribunal will always be within the jurisdiction of subordinate courts to be adjudicated upon by the Chairmen holding whatever rank of a Magistrate; or is the issue of pecuniary jurisdiction irrelevant in that tribunal!

This would be an absurd situation. Given this school of thought, I tend to be convinced that the decision in Civil Appeal No. 135 of 1967 as reported in [1970] E.A 361 may not be good law and that the legislature would not have intended such conflict in pecuniary jurisdiction between Magistrates in subordinate court and the Chairmen of the Co-operative Tribunals holding similar rank. And that the dispute concerning the business of a co-operative society must be construed to mean or be confirmed to internal working and management of such society. If this be so, then the Senior Resident Magistrate in Naivasha had the requisite jurisdiction to determine the case subject to this appeal and the appellant's submission to the contrary holds no water.

But let that be as it may. There was a dispute as to whether the respondent's produce was or not received by the appellant on 21st February, 1996. Though the first appellants' witness denied that such delivery was made, he later admitted that the respondent had delivered his pyrethrum to the appellant but that it had been accepted irregularly and wrongfully since he had been expelled from the society.

But the respondent's witness Kinyanjui Kamoni, who was the Chairman of the Society then, admitted the respondent had delivered the pyrethrum in his presence and that as far as he was concerned, the respondent was entitled to payment for his pyrethrum delivered to the appellant.

Though the former chairman said he instructed the clerk to accept the pyrethrum and issue a receipt, no such receipt was issued and/or produced in court.

But the clerk said to have been directed by PW2 to accept the respondent's pyrethrum and issue a receipt therefor was called by the appellant's side. She is Susan Wangare Kariuki.

She said she only found the pyrethrum of the respondent with bags at the society offices and that it was the former chairman who received the plaintiffs' pyrethrum but that this chairman could not control the society.

The witness testified further that she wrote to the respondent 1 or 2 days after the delivery to come and collect the pyrethrum from the appellant offices as he was not a member of the society then to deliver his produce to it. But he did not do so – see Exh. 2.

The witness testified further that she was the clerk then authorized to weigh the pyrethrum for members and issue them with receipts. She did not do so in respect to the respondent's pyrethrum said to have been delivered on 21.2.1996.

This witness was rebutting the evidence of Kinyanjui (PW2) that he had instructed her to accept, and weigh the respondent's pyrethrum and issue a receipt therefor.

And all this was because the respondent had been expelled from the society and was no longer a member thereof.

The evidence of this witness actually destroyed the respondents case and, together with that of the first appellants witness who produced minutes of the society meetings held on 17th March, 1995 and 30th March, 1995 which suspended the respondent from the appellant society, confirmed that by 21.2.96 the said respondent was not a member of the appellant society to purport to deliver some produce to it

By the second defence witness writing to the respondent to collect his pyrethrum from the society's offices one day after the delivery shows how serious she took this matter.

Though the respondent told the lower court he did not know of the suspension, he must have known of it because though he allegedly received a letter telling him to remove his produce from the society offices, he did not say what action he took or whether he even went to the office to check on the minutes suspending him and taking any action about it.

On the other hand, he is aware of a dispute over some members who withdrew society money from the bank and misappropriated it and how he advised members to write a letter of complaint about this to the District Co-operative Officer. That he was not aware of being suspended from the Society cannot be possible true.

This was crucial evidence in this case and if the learned Magistrate had carefully examined it, he would have found that by the time the respondent delivered his produce to the appellant he had been suspended therefrom and that he knew about it but that his action in doing what he did was simply through arrogance.

In any event when the respondent was told to go and collect his pyrethrum from the appellant offices and given reasons why this action had been taken, he should have gone to collect it and then mitigate his damages, if any or else attempt to contest the suspension.

He did none of these only to come and file the case subject to this appeal in the lower court. This was an unwise move and I am not convinced the respondent proved his case before that court on a balance of probabilities.

This appeal is allowed and the lower court order set aside.

In the circumstances of this appeal I direct that each party bears his/its own costs of this appeal and the lower court.

Delivered this 11th day of October, 2002.

D.K.S AGANYANYA

JUDGE