



REPUBLIC OF KENYA
HIGH COURT OF KENYA MILIMANI
COMMERCIAL COURTS NAIROBI
CIVIL SUIT N0.1879 OF 1999

JOHN ODIYO ADERO1ST PLAINTIFF

LEONARD MURIITHI.....2ND PLAINTIFF

VERSUS

ULINZI SACCO SOCIETY LTD..... DEFENDANT

RULING

I have before me a motion on notice expressed to be brought under Section 18 of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules. The relief sought is that the suit be transferred to the Co-operative Tribunal at Nairobi for determination on merits. The application is made on the grounds that the matter falls within the jurisdiction of the Co-operative Tribunal as established under the Co-operative Societies Act, 1997. There is an affidavit in support of the motion. From the affidavit it would appear that the plaintiffs recognized from the very beginning that the dispute between them and the defendant Co-operative Society was one for resolution by the Co-operative Tribunal under the Act. However, since the tribunal had not been established, they filed the case in the High Court. The substance of their application is that now that a tribunal exists, the matter should be transferred there for adjudication in accordance with the provisions of Section 76 of the Co-operative Societies Act, 1997. The application was vigorously opposed on the grounds *inter alia* that it was misconceived, incompetent and bad in law and that the court lacked jurisdiction to grant the orders sought.

On behalf of the applicants it was submitted that the court had powers under Section 18 of the Civil Procedure Act to transfer the suit to a tribunal of competent jurisdiction in the interest of justice. It was also emphasized that at the time the suit was filed in this court, the court had jurisdiction to entertain the matter as the Co-operative Tribunal established under the Co-operative Societies Act had not been constituted. It was also argued that since on 1.3.00 this court had made an order by consent that the matter be referred to the Commissioner of Co-operatives and the department of defence for mediation, the respondents could not now challenge the jurisdiction of this court to have entertained the matter in the first place.

On behalf of the respondents it was contended that the court had no jurisdiction to transfer the suit for two reasons. First, that the suit was filed in a court without jurisdiction and accordingly no order could be made by such a court save one for stay or striking out such suit. That argument was predicated on the provisions of Section 76 of the Co-operative Societies Act, 1997. The case of **KANDARA FARMERS CO OPERATIVE SOCIETY LTD & NINE (9) OTHERS V. JOSEPH KANYUA & 18 OTHERS** [HCCC N0.2646 OF 1998] was cited in support of the proposition. Secondly, it was contended that the Co-operative Tribunal was not a subordinate court within the contemplation of Section 18 of the Civil

Procedure Act. As regards the issue of whether the defendant could raise the issue of jurisdiction in view of the consent order made on 1.3.00 it was contended that the reference to mediation was in fact made pursuant to the defendant raising the issue of jurisdiction and as a result of the reference to mediation the defendant did not argue the issue of jurisdiction.

I have considered the rival arguments. I agree with the submissions made on behalf of the respondent that as the subject matter of the suit was a dispute between a registered Co-operative society and its members, the dispute should not have been filed in the High Court by dint of the provision of Section 76 of the Co-operative Societies Act, 1997. The forum with jurisdiction was the Co-operative Tribunal. In that regard I am in complete agreement with the decision of Otieno Onyango, J in **KANDARA FARMERS CO-OPERATIVE SOCIETY CASE** that the High Court has no jurisdiction to entertain a dispute between a society and its members concerning the business of the society. On whether the High Court could have had jurisdiction at the time the suit was instituted on the grounds that the Co-operative Tribunal had not been constituted, my view is that jurisdiction either exists or does not ***ab initio*** and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal. Having taken the view that this court had no jurisdiction to entertain the matter, it follows that it could not transfer the same to another court. In that regard it is trite law that where a cause is filed in court without jurisdiction, there is no power in that court to transfer it to a court of competent jurisdiction.

I also agree with the submissions of the defendant that the Co-operative Tribunal is not a subordinate court. Subordinate Courts are established by dint of the provisions of Section 65 of the constitution and consist of such Magistrate's courts as have been established by an act of parliament. The tribunal is just that- a quasi judicial administrative body for the settlement of specified disputes. It is not a court within the intendment of the Constitution or the Civil Procedure Act. Not being a court, the High Court has no power under Section 18 of the Civil Procedure Act to transfer any suit to it.

For those reasons, the motion is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 17th day of December, 2002.

A.G. RINGERA

JUDGE

JURISDICTION

- Whether high Court has jurisdiction to entertain disputes between a Co-operative society and its members in view of Section 76 of the Co-operative Societies Act.
- Whether Co-operative Tribunal is a Subordinate Court.
- Whether court has jurisdiction to transfer suit involving a Co-operative Society and its members to the Co-operative Tribunal.