



Oloso (Suing as the Representative of Over 2000 Retirees of Kenya Railways of Member of Reli Sacco) v Reli Sacco Co-operative Society Limited (Civil Appeal E039 of 2024) [2025] KEHC 4899 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4899 (KLR)

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

CIVIL

CIVIL APPEAL E039 OF 2024

TW OUYA, J

APRIL 24, 2025

BETWEEN

JOHN OTIENO OLOSO APPELLANT

**SUING AS THE REPRESENTATIVE OF OVER 2000 RETIREES OF KENYA
RAILWAYS OF MEMBER OF RELI SACCO**

AND

RELI SACCO CO-OPERATIVE SOCIETY LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of the Co-operative Tribunal
at Nairobi delivered on 14th December, 2023 in CTC No. 369 of 2014)*

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 14.12.2023 by the Co-operative Tribunal in Co-operative Tribunal Case. No. 369 OF 2014 (hereinafter the Tribunal). The claim before the Tribunal was instituted via a statement of claim and supplementary statement of claim by John Otieno Oloso (suing as the representative of over 2000 retirees of Kenya Railways of Member of Reli Sacco), the claimant before the Tribunal (hereinafter the Appellant), as against Reli Sacco Co-operative Society Ltd, the 1st Respondent before the Tribunal (hereinafter the Respondent) and The Commissioner of Co-operative Societies, the 2nd Respondent before the Tribunal, seeking inter alia a refund of shares, accrued dividends plus interest at Court's rate to the Appellant within 30 days from date of judgment; general damages for breach of contract; interest on the aforementioned; costs of the suit; and any other remedy that the honorable Tribunal deems fit to grant.



2. It was averred that at all material times to the suit, the Appellant were registered members of the Respondent each having membership numbers whereas it was statutory requirement that the Appellant contribute shares of various amounts to the Respondent which would later form capital of the Respondent to render loan facilities at interest when required by the Appellant. That the Appellant having retired from official duties from The Kenya Railways Co-operation in different years, despite being obligatory of the Respondent, the latter failed and refused to pay the Appellant's respective share, dividends and accrued interest.
3. It was further averred that the Respondent purchased and owns several properties within the Country among them being Dandora Residential Property, Kisumu Kanyakwar Project and Reli Tower Project which despite raising substantial income to the members, the Respondent has failed to pay the Appellant their share dividends. That the Respondent's action 2007 in respect of the sum of Kshs. 4,000,000/- and 2009 in respect of the sum of Kshs. 1,000,000/- amounted to breach of contract and fraudulent action aimed at defrauding the Appellant of their share contributions and accrued dividends. That the Appellant's claim against the Respondent is a refund of shares accrued dividends plus interest and damages for breach of contract.
4. In response the Respondent filed a statement of defence deny the averments and asserting to being a stranger to particular averments in the statement of claim and supplementary statement of claim meanwhile averred that the Appellant has no legal claim against them for refund of shares, accrued dividends plus interest and damages for breach of contract as alleged.
5. The suit proceeded to full hearing, during which the respective parties called evidence in support of the averments of their pleadings. In its judgment, the Tribunal found that the Appellant failed to prove on a balance of probabilities the claims for dividends and interest. It thus proceeded to dismiss the claim with no orders as to costs.

The Appeal

6. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the Tribunal premised on the following grounds in the memorandum of appeal as itemized hereunder: -
 - “ 1. That the learned deputy Chairperson erred in law and in fact by dismissing the Appellant's claim against the Respondent for refusing to refund their shares, accrued dividends plus interest and damages for breach of contract.
 2. That the learned deputy Chairperson erred in law and in fact by making an erroneous finding and contrary to the evidence on record, despite having submitted all the material evidence showing numerous demands made and notice of intention to sue having been given to the Respondent.
 3. That the learned deputy Chairperson erred in law and in fact by failing to determine the issue of liability and quantum as required by the law, despite the fact that he was dismissing the suit therein.
 4. That the learned deputy Chairperson erred in law and in fact by dismissing the suit with costs to the Respondent, despite the overwhelming evidence produced before the Court by the Appellant thereof and the law conferring jurisdiction upon the Court thereof.
 5. That the learned deputy Chairperson erred in law and in fact by failing to take into consideration the entire evidence adduced in Court together with



the Appellant's submissions thereof and she hence arrived at an erroneous decision.

6. That the learned deputy Chairperson erred in law and in fact by failing to find that the Respondent's evidence was contradicting and inconsistent and hence incapable of giving rise to the judgment entered by the Court thereof.
 7. That the learned deputy Chairperson erred in law and in fact by dismissing the Appellants claim with costs and entering judgment in favour of the Respondent as against the weight of the evidence on record.
7. In light of aforecaptioned itemized grounds of appeal, the Appellant seeks before this Court, orders to the effect that: -
- a) That the appeal herein be allowed, the judgment and decree of the Tribunal made on the 14.12.2023 be set aside and replaced and or substituted with judgment in favour of the Appellant as prayed in the supplementary statement of claim
 - b) Costs of the proceedings both in the lower Court and in this appeal be awarded to the Appellant."
8. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Disposition.

9. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal alongside the submissions.
10. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in *Selle v Associated Motor Boat Co.* [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court, it is evident that the appeal turns on the singular issue whether the Appellant was entitled to the relief(s) as sought for in his statement of claim and supplementary statement of claim.
11. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See;- Court of Appeal decision in *Wareham t/ a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court had earlier in this judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having identified what the disputation before the trial Court twirled on, the key query for determination is whether the trial Court's findings on the issues falling for determination before it were well founded.



12. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The Tribunal after restating the evidence tendered before it addressed itself as follows; -

“8. At the end of their case for purposes of clarification and to enable the Tribunal to retire and write their judgment, the parties were to file written submissions..... The Tribunal further directed the Respondent to file Audited Accounts for the year 2001 – 2014. The Respondent filed Audited Accounts as report for the year 2001 to the year 2014. The Tribunal further ordered for Commissioner of Co-operatives to file a status report of the Respondent. The Commissioner did file their report. Having looked at all the reports as they were, we note the issues for determination as;

Whether there were dividends and interest payable between the years 2001-2008?

.....

Which of the projects belong to members of Reli Sacco?

.....

From the documents filed by the Respondent on the audited accounts we have observed, there is income generated from Reli Sacco.

As per the documents produced and evidence of parties we find the claimant has failed in their claim for dividends and interest payable.

There is no evidence that indeed any dividend were declared during the years sought. Claim has no merit. As such the claim dated 27th August, 2014 is dismissed with no orders as to costs”

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments in the respective parties pleading lay with the parties themselves. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

14. However, having reviewed the record of appeal and proceedings before this Court, it is pertinent that I address a preliminary issue that has since piqued my attention. Prior to directions on disposal of the appeal, there was exhortation by counsel for the Respondent that the Record of Appeal was incomplete and on 18.07.2024 this Court directed that the matter be placed before the Deputy Registrar (DR)



to confirm completeness of the Record of Appeal. The matter eventually came up before me on 23.09.2024 wherein counsel for the Respondent, reiterated his exhortation that the Record of Appeal is incomplete, to wit, I directed that alongside filing of submissions, the Appellant avail a complete record of appeal.

15. Why do digress on the issue of completeness of the record of appeal? This Court had earlier in its judgment referred to excerpts of the Tribunal's decision. Notably, therein the Tribunal captured prior to its judgment, it had directed the Respondent to file Audited Accounts for the year 2001 – 2014 and that the Commissioner for Co-operatives to file a status report of the Respondent. It would appear that the Tribunal deemed the forestated documents pertinent to rendering of its decisions and proceeded to refer to the same in its decisions. Aside from the above, the Tribunal equally referenced the Respondent's oral and documentary evidence in its judgment however a perusal of the Record of Appeal before this Court, the report by both the Respondent and Commissioner of Co-operative are absent from the said record. Further, the record does not contain the Respondent's bundle and or list of documents relied on before the Tribunal.
16. As earlier captured, counsel for the Respondent raised concerns about completeness of the record of appeal. Order 42 Rule 13(4) of the CPR, cites documents that ought to be included in a record of appeal. And as noted by this Court, the Record of Appeal before this Court appears to miss certain relevant documents that would enable this Court reasonably and judiciously adjudicate over the instant appeal. The proceedings before the Tribunal evidently capture that the Tribunal ordered for filing of reports of which are glaringly missing from the Record of Appeal whereas it equally captures the Respondent's witnesses adducing into evidence its list of documents dated 22.06.2015, of which is equally not encompassed in the Record of the Appeal before this Court.
17. At the risk of repetition, the instant appeal is being disposed of as part of the Rapid Resultants Initiative (RRI), to wit, this Court only has the benefit of the Record of Appeal and not the original record. And as is, no supplementary record of appeal was filed in the matter upon a further review of the Case Tracking System (CTS). Undoubtedly, it would be difficult for this Court to address itself to the document evidentiary material, where it does not have the benefit of the same.
18. This Court's reading of Rule 13(4)(e) of Order 42 is that the same couched in mandatory terms and it is obligatory of the Appellant and by extension the parties to the appeal to include in the Record of Appeal the documentary material put in evidence before the trial Court. Failure to include such relevant material to the Record of the Appeal, such as, in the instant matter would rendered the Record of Appeal incomplete and by extension incompetent for adjudication before this Court. The claim before the Tribunal appertained a refund of shares, accrued dividends plus interest and general damages for breach of contract whereas without the Audited Report in respect of the Respondent, Report from the Commissioner of Co-operative and Respondent's bundle of documents, it would be an arduous task for this Court to rationally adjudicate over the issue. Consequently, the instant appeal must suffer the unfortunate fate of striking out.

Determination.

19. Accordingly, the appeal is struck out with no orders as to cost given the nature of the cause of action before the Tribunal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24th DAY OF APRIL, 2025.

HON. T. W. Ouya

JUDGE



For Appellant/applicant...No Appearance

For Respondent.....No Appearance

Court Assistant...Doreen Njue

