



REPUBLIC OF KENYA



KENYA LAW
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Abiri & 4 others v Gusii Mwalimu Investment Company Limited & 5 others (Civil Appeal E112 of 2023) [2024] KEHC 2653 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E112 OF 2023
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

**ISAAC OERI ABIRI 1ST APPELLANT
VICTOR NYANGAYA 2ND APPELLANT
RICHARD MOGIRE NGOGE 3RD APPELLANT
JOSEPH MARIMBU 4TH APPELLANT
SHADRACK KIBAGENDI OTACHI 5TH APPELLANT**

AND

**GUSII MWALIMU INVESTMENT COMPANY LIMITED 1ST RESPONDENT
GUSII MWALIMU SAVINGS AND CREDIT CO-OP SOCIETY
LIMITED 2ND RESPONDENT
GILBERT MERABA AMWONA 3RD RESPONDENT
ANDREW OBARA 4TH RESPONDENT
FRANCIS MANGARE 5TH RESPONDENT
THOMAS ONWONGA 6TH RESPONDENT**

(Being an appeal from the Ruling and decree of Honourable P.K Mutai Principal Magistrate in Kisii CMCC No. 711A of 1999, delivered on 18th September 2023)

JUDGMENT

1. This appeal arises from a ruling and decree entered in Kisii Chief Magistrate's Civil Suit No. 711A of 1999. In the said suit, the appellants (who were the plaintiffs) sued the respondents (who were the defendants) and prayed for judgment against them for: -



- i. A declaration that the intended and/or annual General Meeting of the 1st defendant/respondent scheduled and/or on 27th August 1999 is null and invalid.
 - ii. An injunction to restrain the defendants/ respondents by the themselves through their agents and/or persons acting on their behalf from convening acting upon or in any way proceeding with the meeting of 27th August 1999.
 - iii. Damages.
 - iv. Costs.
2. Before the matter was scheduled for hearing in the trial court, several applications were filed by the parties herein and among them were 3 preliminary objections. The instant appeal arises from the Ruling delivered in regard to the preliminary objection dated 28th March 2023 filed by the 5th defendant/respondent. The said preliminary objection raised the issue of jurisdiction and the trial magistrate allowed it based on the provisions of section 76 of the Co-operative Societies Act. He proceeded to dismiss the entire suit with costs to the 5th defendant/respondent.
3. The appellants being aggrieved by the said Ruling lodged this appeal on 22nd September, 2023 setting out the following grounds: -
- i. That the honourable learned trial magistrate in the subordinate court below ignored the law and failed to discern that the plaintiffs were shareholders of a registered company under the repealed company act cap 486 laws of Kenya.
 - ii. That the honourable learned trial magistrate erred and misinterpreted section 76 of the cooperative societies act cap 490 laws of Kenya.
 - iii. That the honourable learned trial magistrate in the subordinate court below ignored and failed to refer to the statement of claim that the plaintiffs had provided shareholder certificate numbers a testament that they were not co-operators.
 - iv. That the learned trial magistrate ignored the law and failed to interrogate that the plaint by the plaintiffs and prayers thereof were a condition precedent to the court assuming jurisdiction and thereby arriving at a decision which is a nullity.
 - v. That the honourable learned trial magistrate in the subordinate court below erred in law and fell into error after being invited by the 5th respondent to audit the actions which were outside the ambit of section 76 of the cooperative societies act.
 - vi. That the honourable learned trial magistrate erred in law and failed to logically (sic) that the dispute before him was not a cooperative business but a registered company shareholder of which the second defendant was an alleged shareholder of the 1st respondent.
 - vii. That the honourable learned trial magistrate was biased and refused to recuse himself despite the 2nd defendant having requested him for recusal and he failed to give reasons for it.
4. The Appeal was canvassed through written submissions

The Appellants' submissions

5. The appellants' submissions were filed by Moriasi Osoro advocates and are dated 21st November, 2023. Counsel identified one issue for determination which is whether the issue in dispute concerned a co-operative society. She submitted that the trial magistrate wrongly relied on section 76 of the Societies



Act for reasons that the parties before him were shareholders of an investment company. She placed reliance on the decisions in Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410 and Anisminic v Foreign Compensation Commission [1969] 1 AII ER 208 at 233.

6. She urged the court to set aside the dismissal order and refer the matter back to the court for determination of real issues.

The 2nd Respondent's submissions

7. These were filed by Mose, Mose and Mose advocates and are dated 5th December, 2023. Counsel submitted that the issues and reliefs sought in the High court matters namely:
 - i. Kisii ELC Case No, 497/2014 Gusii Mwalimu Investment Co. Ltd v Gusii Mwalimu Savings Credit Co-op Society Ltd.
 - ii. Kisii High Court Misc. Application No. 2 of 2017 Casmil Lucas Nyangau & 9 others v Gusii Mwalimu Sacco Ltd.
 - iii. Kisii High Court Petition No. 7 of 2017 – Sylvester Barake Maina & others v The registrar of companies.
 - iv. Kisii High Court Misc. Application E002 of 2022: Victor Osiri Nyangaya & another Vs Gilbert Meraba Amwoma & 22 others; are similar to those sought in Kisii Chief Magistrate Court Civil Case (CMCC No. 711a of 1999. He thus submitted that this matter is resjudicata.
8. Counsel added that the appellants were seeking orders to compel the CEO of the 2nd respondent to make available the records and inventory of the 1st respondent which was now defunct.
9. He further submitted that there was no suit capable of going for re-trial since the issues purported to be contained in Kisii CMCC No. 711A of 1999 had been dealt with by 4 competent High court judges. Counsel placed reliance on the case of Peter v Sunday Post Limited [1958] EA 123 and submitted that this court being an appellate court was vested with jurisdiction to revisit the preliminary objection dated 28th March and make its own independent findings,
10. Lastly, counsel placed reliance on the case of Kisii High Court Misc. Application No. E002 of 2022 Victor Osiri Nyangaya & Another v Gilbert Meraba Amwoma & 22 others and submitted that litigation must come to an end. He urged the court to remind the appellant that they were wasting the court's time.

Analysis and Determination

11. This being a first appeal, it is this court's duty under Section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court, and arrive at its own conclusion.
12. This principle of law was well settled in the case of Selle & Another v Associated Motor Boat Company & others 1968 EA 123

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears based on the demeanor of a witness is inconsistent with the evidence in the case generally”.



13. Having carefully perused the proceedings, the ruling and the record of appeal as a whole including the parties' submissions, I find that the issue arising for determination is whether the trial magistrate erred in law and in fact in declaring that the court had no jurisdiction to entertain the appellants' suit since the same falls within the mandate of the Co-operative Tribunal.
14. In addressing this issue, I note that the appellants in their submissions argued that the trial magistrate wrongly relied on section 76 of the Societies Act for reasons that the parties before him were shareholders of an investment company.
15. The 2nd respondent on its part argued that the matter was res-judicata and that the appellants were seeking orders to compel the CEO of the 2nd respondent to make available the records and inventory of the 1st respondent which was now defunct. It was argued further that there was no suit capable of going for re-trial and this litigation should come to an end.
16. The trial magistrate in his ruling noted that the main prayer in the plaint was for a declaration that the intended and/or annual general meeting of the 1st defendant scheduled and/or 27th August 1999 was null and void and invalid. He proceeded to hold that the said dispute fell within the mandate of the Co-operative Tribunal.
17. To start with, it is important to note that the suit herein was filed on 25th August 1999 and the ruling which is the subject of this appeal was delivered on 18th September 2023. Upon perusal of the court record it is evident that by the time the ruling was being delivered, the 1st respondent in the plaint which is a company had been wound up.
18. This position is confirmed by a letter from the Registrar of Companies dated 6th July 2023 annexed to the letter dated 26th July 2023, addressed to the Chief Magistrate Kisii Law Courts by one Thomas Inchaga Mogire on behalf of the 1st respondent which is the first defendant in the lower court. There is no evidence that the said letter by the Registrar was challenged by the appellants.
19. In view of the above, it is my opinion that once the 1st respondent was wound up it could not be sued or sue. Therefore, this left the parties to the suit being the appellants against the 2nd respondent which is a Co-operative Society and 4 others. By virtue of Section 76 of the Co-operative Societies Act the suit automatically falls within the mandate of the Co-operative Tribunal.
20. Section 76 of the Cooperative Societies Act provides as follows:

Disputes

- (1) If any dispute concerning the business of a co-operative society arises: -
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include: -
 - (a) a claim by a co-operative 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 a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
- (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

21. The appellants herein are clearly members of the 2nd respondent. Their grievances can only be addressed as stated under Section 76 of the Cooperative *Societies Act* by the Co-operative Tribunal.
22. The upshot is that the learned trial Magistrate did not err in law and fact by declaring that the court lacked jurisdiction to entertain the appellants' suit. I therefore find the Appeal to lack merit and dismiss it with costs. The Ruling by the trial court is upheld.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

