



REPUBLIC OF KENYA



Kirui v Maseno University (Civil Appeal E355, E353 & E354 of 2023 (Consolidated)) [2024] KEHC 9397 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E355, E353 & E354 OF 2023 (CONSOLIDATED)
JK NG'ARNG'AR, J
JULY 23, 2024**

BETWEEN

LOI MUHUNJA KIRUI APPELLANT

AND

MASENO UNIVERSITY RESPONDENT

(Being an Appeal from the ruling of the Co-operative Tribunal at Nairobi delivered on 27th April 2023 in Co-operative Tribunal Case No. 272 of 2019)

JUDGMENT

Background

1. The Claimant/Respondent initiated this suit before the Co-operative Tribunal by way of a Statement of claim dated 22nd May 2019 seeking the following reliefs against the Respondent/appellant as follows;
 - a. Kshs. 4,877,200/=.
 - b. Costs of the claim.
 - c. Interest on (a) and (b) above.
2. The Respondent pleaded in its statement of claim that the appellant was a member of the Respondent and was responsible for discharge of duties for and on behalf of the Respondent. Pursuant to complaints from the member of the Respondent, the Commissioner for Co-operative Development (the Commissioner) instituted an inquiry into the business of the Respondent in 2018 at the time the appellant was the Secretary of the Management Committee of the Respondent society.
3. The Respondent stated that an inquiry report was prepared and read to members on 24th November 2018 and members adopted its findings and recommendation.



4. According to the Respondent, the Commissioner issued a Notice of Intention to surcharge the Appellant dated 14th December 2018 surcharging the appellant for Kshs. 4,877,200/=. The appellant failed to show cause why he should not be surcharged the amount set out in the Notice of Intention and consequently the Commissioner issued a surcharge order to the appellant dated 5th February 2019.
5. In response, the appellant filed a statement of defence dated 5th June 2019. In her statement of defence, she states that the outcome of the Inquiry report has been challenged through Co-operative Tribunal Appeal No. 2 of 2019-Richard Olendo & 2 others vs Commissioner for Co-operative Development, Ministry of Industry Trade & Co-operatives which is still pending hearing and determination.
6. According to the appellant the claim is premature, preemptive and incompetent since no claim can be founded on a surcharge subject of an appeal which is still pending under Section 74 of the Co-operative Societies Act. She stated further that according to Section 74 of the Co-operative Societies Act, a surcharge cannot form the basis of a claim unless and until the Commissioner of Co-operative files the surcharge with the Tribunal. No such surcharge has neither been filed nor extracted by the Tribunal.
7. It was the appellant's case that the Respondent has no locus standi to institute the suit since recovery of any surcharge amount under Section 75 of the Act must first exhaust the appeal mechanism under Section 74 of the Act.
8. The Respondent/Claimant filed an application dated 24th August 2021 seeking to the Appellant's/ Respondent's statement of defence dated 5th June 2019 be struck out, enter summary judgment for the claimant against the Respondent as prayed in the statement of claim plus costs. The appellant/Respondent also filed an application dated 25th September 2021 seeking stay of further proceedings pending hearing and determination of High Court Appeal No. E303 of 2021 between Richard Olendo, Dr. Constantine Wasonga, Loi Muhanja Kitui and Commissioner of Co-operative Development, Ministry of Trade and Co-operatives, Maseno University Sacco Society Limited.
9. The two applications were heard simultaneously and a ruling delivered on 27th April 2023. In the said ruling, the Tribunal made a finding that in a suit for recovery of a surcharge order, there can be no defence. It is only in appeal where the amount surcharged and the procedure used by the Commissioner can be questioned and set aside. The tribunal found that the defence raises no triable issues and cannot stand and therefore struck out. The application dated 24th August 2021 was allowed and judgment entered in favour of the Claimant against the Respondent for Kshs. 4,877,200/= plus costs and interest.
10. Being dissatisfied with the ruling and order of the Tribunal delivered on 27th April 2023, the appellant lodged an appeal before this court for determination.

The Appeal

11. In the Memorandum of Appeal dated 5th May 2023, the appellant raises the several grounds of appeal as follows;
 - i. That the Tribunal erred in fact and law in its application of Order 36 Rule 1 of the Civil Procedure Rules with respect to summary judgment.
 - ii. That the Tribunal erred in fact and law in failing to recognize that summary judgment cannot issue where the facts of the case are in contention and unclear as to the circumstances giving rise to the claim.



- iii. That the Tribunal erred in both fact and law in misapplying the provision of Order 2 Rule 15 of the Civil Procedure Rules which states that pleadings may be struck out at any stage of the proceedings on the ground that it discloses no reasonable cause of action or defence in law yet the Appellant's case disclosed reasonable cause of action as to the procedural and substantive legality of the surcharge by the Commissioner of Co-operatives.
- iv. That the Tribunal erred in fact and law in failing to find that the Appellant's Defence raised triable issues on the procedural and substantive grounds giving rise to surcharge.
- v. That the Tribunal erred in fact and law in failing to properly evaluate and analyze the Appellants Defence in line with article 50 of the Constitution which provides for the right to fair hearing.
- vi. That the Tribunal erred in fact and law in condemning the Appellant unheard contrary to the Constitutional dictates of the right to be heard which offends all notions of justice.
- vii. That the Tribunal erred in fact and law in denying the Appellant unconditional leave to defend when his defence raised bonafide triable issues entitling him leave to defend as per Order 36 Rule 7 of the Civil Procedure Rules.
- viii. That the Tribunal erred in fact and law in failing to take into account Article 47 of the Constitution, which provides for every person's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair in their opposition to the surcharge by the Commissioner of Co-operatives.
- ix. That the Tribunal erred in fact and law in failing to consider the principles of justice enshrined in the Constitution especially Article 159 whose guiding principle is that Courts of Law should pay homage to their core duty of serving substantive justice in any judicial proceeding and sustain a suit rather than terminate it.
- x. That the Tribunal erred in fact and law in failing to find that the cost of inquiry had been settled by Maseno University Sacco Limited for which the Appellant is a member and subjecting the appellant to double surcharge amounted to double jeopardy.
- xi. That the Tribunal erred in both fact and law in failing to find that the actions of the Respondent were contrary to the express provisions of Article 47 of the Constitution; the Fair Administrative Action Act and the rules of natural justice as the Appellant was denied a chance by the Commissioner of Co-operatives to defend himself before the impugned decision was made.
- xii. That the Tribunal erred in both fact and law in failing to find that the Appellant as the Management Committee acted within the mandates conferred to him by the Co-operative Societies Act, its bylaws and General Meeting Resolutions and should not be held personally liable.
- xiii. That the Tribunal erred in both fact and law in failing to properly evaluate the evidence adduced by the Appellant in support of his case and wholly relied on the submissions by the Respondent.
- xiv. That the Tribunal erred in fact and law by placing undue and overwhelming reliance on the allegations and evidence adduced by the Respondent and completely failing to evaluate the same adduced by the Appellant.



- xv. That the Tribunal erred in fact and law in failing to find that the Appellant proved his case on the required standards as supported by evidence.
 - xvi. That the upshot of the foregoing is that the Tribunal erred in its decision in failing to find that the Appellant's Defence had merit and ought to have been adjudicated and subsequently allowed on merit.
 - xvii. That the Tribunal erred in fact and law by failing to analyze the case before it properly, impartially and in a judicious manner.
12. The Appellant prays that the entire Ruling delivered on 27th April 2023 in Co-operative Tribunal Case No. 272 by the Honourable Tribunal be set aside and substituted with an order dismissing the Respondent's Notice of Motion Application dated 24th August, 2021.
 13. This appeal was canvassed by way of written submissions. The appellant complied and filed his submissions dated 13th December 2023 whereas the Respondent filed its submissions dated 22nd March 2024. This court will proceed to consider the submissions in determination of the six grounds of appeal raised.

Appellant's submissions

14. On summary judgment, the Appellant submitted that summary judgment is under Order 36 of the Civil Procedure Rules may be made where the Defendant has entered appearance but has not filed defence or where the Defendant has filed defence but there are no triable issues raised in the defence. The appellant urge that the Tribunal erred with respect to summary judgment and striking out the appellant's defence. The actions of the Tribunal amounted to infringement of the appellant's constitutional rights to fair hearing.
15. On whether the Tribunal misapplied the provisions of Order 2 rule of the Civil Procedure Rules, the appellant submitted that pursuant to Order 2 rule 15 of the Civil Procedure Rules, pleadings may be struck out at any stage of the proceedings on the ground that no reasonable cause of action or defence in law. the appellant further submitted that the appellant's defence disclosed a triable issue as to the procedure and substantive legality of the surcharge by the Commissioner of Co-operatives and should have been adjudicated and determined on merit by the Trial court.
16. It was urged that striking out of pleadings divests a party of a hearing, thus driving such a party away from the seat of justice which is a draconian act comparable only to the proverbial drawing of the "sword of Damocles". Such power should be used sparingly. Further, Order 36 Rule 7 of the Civil Procedure Rules grants the Defendant leave to defend which may be given unconditionally or subject to such terms as to give security of the trial.

Respondent's submissions

17. The Respondent on the other hand submitted that it is clear that an inquiry conducted under Section 58 or 73 of the Co-operative Societies Act will result into surcharge for purposes of recovery of the property of the society in the hands or agent of the society. From the material on record, the Commissioner issued Notice of intention to surcharge and surcharge order under both provisions of law and the appellant remained surcharged for misappropriating and stealing from the Respondent society.
18. According to the Respondent, summary judgment entered under Section 75 of the Co-operative Societies Act is not the same with the summary judgment envisaged under Order 36 Rule 7 of the Civil



Procedure Rules. The Respondent's application for summary judgment was never made under Section 36 Rule 7 of the Civil Procedure Rules but pursuant to Section 75 of the Co-operative Societies Act.

19. It was urged that Section 75 of the Co-operative Societies Act is very categorical that without any appeal pending under Section 74 of the Act, the surcharge sum becomes a civil debt recoverable summarily. Therefore, the Tribunal was very apt that there cannot be a defence to challenge the recovery proceedings under Section 75 of the Act.

Analysis and Determination

20. I have perused and considered the record of appeal, the grounds of appeal and the submissions by both parties herein alongside the cited authorities. I find the following issues relevant for determination;

- i. Whether striking out of the Appellant's statement of defence and entering summary judgment was merited in line with the rules of natural justice?
- ii. Whether the Co-operative Tribunal complied with the provisions of Sections 73 – 75 of the Co-operative Societies Act in enforcing the surcharge order?
- iii. Who bears the costs of this appeal?

21. On the first issue, it is important to state the law guiding striking out of pleadings. Order 2 rule 15 (1) of the Civil procedure Rules, is the relevant provision on striking out of pleadings. It Provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. it discloses no reasonable cause of action or defence in law; or
- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

22. It is equally important to note that striking out of pleadings is a discretionary power of the court which ought to be exercised by courts sparingly and judiciously. Such power can only be exercised if a pleading meets the description under Order 2 rule 15(1) (a), (b), (c) and (d) of the Civil Procedure Rules. To be precise a pleading may be struck out if it discloses no cause of action or defence, if it is scandalous or frivolous, if it may embarrass or delay trial and if it is an abuse of the process of court. The position in the above provision was buttressed by the Court of appeal in the case of D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another (1980) eKLR where it held thus:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way"'. (Sellers, L.J. (supra). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.



If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.

If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

23. In the case of *Postal Corporation of Kenya vs I.T.Inamdar & 2 others* (2004) eKLR, the court of appeal stated that;

“The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”

24. Again in the case of *The Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated that:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

25. Therefore, before the court can proceed to exercise its power to strike out pleadings, it must be satisfied that such pleadings raise no triable issues. This can be ascertained by a cursory perusal of the pleadings themselves.

26. The application for striking out of the appellant’s defence before the Tribunal was anchored majorly on the grounds that there was no appeal or any other proceedings in respect of the said surcharge order before the Tribunal or elsewhere challenging the findings and recommendations of the inquiry report.

27. In my considered view, the provisions of the Co-operative Societies Act cannot supersede the provisions of the Constitution which provides for the right to be heard and fair administrative action. It clear that substantive justice entails that parties are granted the opportunity to be heard on merit in a fairly manner as mandated by the provisions of Articles 47 and 50 of the Constitution.

28. On summary judgment, the principles guiding court in applications for summary judgment were laid down in the case of *Industrial & Commercial Development Corporation vs Daber Enterprises Ltd* (2000) 1EA 75 the court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.



29. In the instant appeal, the appellant filed a statement of defence and ought to have been given the opportunity to defend her other than it being summarily dismissed when it was challenged with a proper defence on record.
30. The next issue regards to the compliance with Sections 73-75 of the Co-operative Societies Act. Section 73 of the Co-operative Societies Act stipulates as follows: -
1. Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—
 - a. has misapplied or retained or become liable or accountable for any money or property of the society; or
 - b. has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.
 2. Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.
 3. This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.
31. Further, Section 74 of the Co-operative Societies Act provides as follows:-
1. Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.
 2. A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.”
32. Again Section 75 of the Act provides that;
1. Subject to section 74, an order made pursuant to section 73 for any moneys to be repaid or contributed to a co-operative society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.
 2. Without prejudice to the powers by the Committee of a society to take action for recovery of the sum surcharged under section 73, the Commissioner may, on behalf of the society, institute such action.
33. My understanding of the above provisions is that Section 73 of the Act obligates the Commissioner to make an order requiring the person who has misapplied or retained money or property of the society to repay or restore the money or property of the society together with interest. Section 75 of the Co-operative Societies Act grants any aggrieved party by the order of the Commissioner to file an appeal to the Tribunal within thirty days. Similarly the same Section also provides an aggrieved party with the opportunity to file an appeal to the High Court to challenge the decision of the Tribunal, which should be done within thirty days. My understanding of Section 75 (1) of the Act is that in the event that there is no appeal or if appeals are lodged and lost the surcharged amount in the order becomes a civil debt recoverable summarily.



34. Therefore, it is clear that once the Commissioner makes an inquiry and considers it appropriate to make a surcharge order, the affected person can only have the order set aside upon filing an appeal to the Co-operative Tribunal within thirty days and if not satisfied with the decision of the Tribunal to the High Court within thirty days on questions of law only. The law envisaged that an aggrieved party must first appeal to the Co-operative Tribunal before filing an appeal to the High Court. My interpretation of the provisions is that an aggrieved party only approaches the High Court by way of an appeal challenging the decision of the Tribunal. It is important to also state that the appeal to the High court is only on questions of law.
35. I have perused the record of appeal and the consolidated appeals and noted that the appellants are challenging a decision of the Tribunal striking out statements of defence and not against the surcharge order to the Tribunal. The record shows that the appellant filed an appeal before the Tribunal challenging the surcharge order vide Tribunal appeal case No. 2 of 2019 which was dismissed.
36. It has clearly been stated in the ruling by the Tribunal that there is an appeal still pending before the High court challenging the decision of the Tribunal being Civil Appeal No. E303 of 2021. The surcharge order in my view cannot be enforced where the appellant has not exhausted the appeal mechanism as provided by Section 74 of the Co-operative Societies Act and in the instance case, there is an appeal pending determination before the High Court.
37. On the third issue of costs, it is trite law that costs follow the event as provided for under Section 27 of the Civil Procedure Act. The appellant having succeeded in this appeal, I proceed to award costs.
38. For the aforesaid reasons, this appeal has merit and is allowed as prayed. This judgment shall apply to the other consolidated appeals as consolidated.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JULY, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Appellant

Ariga Advocate for the Respondent

Court Assistant – Peter Ong'indi

