



Migori Teachers Co-operative Savings & Credit Society Limited v MSL Savings & Credit Co-operative Society Limited; Co-opholdings Co-operative Society Limited (Interested Party) (Civil Appeal 134 of 2020) [2023] KEHC 2113 (KLR) (Civ) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2113 (KLR)

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

CIVIL

CIVIL APPEAL 134 OF 2020

AN ONGERI, J

MARCH 17, 2023

BETWEEN

**MIGORI TEACHERS CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED APPELLANT**

AND

**MSL SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

AND

**CO-OPHOLDINGS CO-OPERATIVE SOCIETY LIMITED INTERESTED
PARTY**

(Being an appeal from the judgment and decree of the Co-operative Tribunal of Nairobi in Tribunal Case No. 361 of 2015 delivered on 26/2/2020 by the Tribunal.)

JUDGMENT

1. The appellant in this case, Migori Teacher's Cooperative Savings and Credit Society Limited (hereafter referred to as the appellant only) was the respondent in Cooperative Tribunal Case no. 361 of 2015.
2. The respondent in this appeal MSL Savings and Credit Cooperative Society LTD (hereafter referred to as the respondent only) was the claimant in Cooperative case no. 361 of 2015.
3. The respondent's case in summary was that on September 16, 2008, the respondent entered into a sale agreement with the appellant for the purchase of sixty one thousand two hundred and forty five (61,245) shares held by the interested party, Co-opholdings Co-operative Society Limited (hereafter referred to as the interested party only).



4. The respondent paid a purchase price of Kenya shillings (Kshs) Six million nine hundred and twenty thousand, six hundred and eighty five (6,920,685) as agreed with expectation that the appellant would transfer the bought shares as agreed.
5. The respondent instituted Cooperative Tribunal case no. 361 of 2015 *vide* statement of claim dated 12/6/2015 which was later amended on 5/12/2017 seeking orders of specific performance against the appellant in respect of the transfer of the said shares to themselves.
6. In response to the said statement of claim, the appellant filed a defence and counterclaim dated 15/1/2018 denying the respondent's claim.
7. After hearing the case, the Cooperative Tribunal entered judgment in favour of the respondent and granted the following prayers:

- i. An injunction is granted restraining the appellant by itself, its servants, employee, agents assigns and/or any other person howsoever:-

- (1) From selling, transferring, disposing or otherwise dealing for the benefit of any person other than the claimant with the ten million two hundred and eight-nine thousand one hundred and sixty (10,289,160) shares held in Cooop holdings Co-operative Society Limited (formally Co-operative Bank of Kenya) together with any other bandit accruing to the share including share bonuses and dividends, broken down as follows:-

- a) Original sixty-one thousand two hundred and forty-five (61,245 shares of par value 100) which translates to six million one hundred and twenty-four thousand five hundred (6,124,500 shares) par value one consequence of the share split Coop Holdings Co-operative Society Limited thereafter issued certificate number 3069 for the 6,124,500 shares and

- b) A total of sixty-eight per cent 68% bonus on the original six million one hundred and twenty-four thousand five hundred which amounts to four million one hundred and sixty-four thousand six hundred and sixty (4,164,660) bonus shares issued by Coop holding Cooperative Society Limited broken down as follows:-

- I. In 2012 Coop Holdings Co-operative Society Limited issued a bonus of 20% that is one share for five held thus the bonus shares issued were one million two hundred and twenty-four thousand nine hundred (1,224,900 bonus shares) under certificate number 7090 issued by Coop Holdings Co-operative Society Limited. The shares thereafter totaled seven million three hundred and forty-nine thousand four hundred (7,349,400 Coop Holdings shares).



II. In 2014 Coop Holdings Co-operative Society Limited issued another bonus of 16.66% that is one share for every 6 held thus the bonus shares issued were another one million two hundred and twenty-four thousand nine hundred (1,224,900 bonus shares) under certificate number 12174 issued by Coop Holdings Co-operative Society Limited. The shares thereafter totaled eight million five hundred and seventy-four thousand three hundred (8,574,300 Coop holdings shares); and

III. In 2016 Coop Holdings Co-operative Society Limited issued a bonus of 20% that is one share for every held thus the bonus shares issued were one million seven hundred and fourteen thousand eight hundred and sixty (1,714,860 bonus shares). Therefore, the shares now total ten million two hundred and eight-nine thousand one hundred and sixty (10,289,160 Coop Holding shares) at par value one.

2. From selling, transferring, disposing or otherwise continuing to deal with the said ten million two hundred and eight-nine thousand one hundred and sixty (10,289,160) Coop Holdings Co-operative Society Limited shares as broken down herein above.
3. From appropriating, utilizing claiming, acquiring, obtaining, disposing or otherwise dealing with any dividends declared and issued by Coop Holdings Co-operative Society Limited on account of the respondent's ten million two hundred and eight-nine thousand one hundred and sixty shares (10,289,160) Coop Holdings Co-operative Society Limited shares owned by the respondent.
4. From appropriating, utilizing claiming, acquiring, obtaining, disposing or otherwise dealing with any dividends declared and issued by Coop Holdings Co-operative Society Limited on account of the respondent's ten million two hundred and eight-nine thousand one hundred and sixty (10,289,160) Coop Holdings Co-operative Society Limited and issue orders prohibiting payment of any dividends declared and issued on account of the ten million two hundred and eighty-nine thousand one hundred and sixty (10,289,160) Coop Holdings Co-operative Society Limited shares owned by the respondent.
 - ii. A declaration is granted/issued that the appellant is liable to account and register the transfer to the claimant for all the four million one hundred and sixty-four thousand six hundred and sixty (4,164,660) bonus shares yielding from the six million, one hundred and twenty-four thousand, five hundred (6,124,500) shares plus any other that



may have been issued during the pendency of this claim.

- iii. A mandatory injunction is granted compelling that the claimants do all such acts and execute all such documents as may be necessary to deliver the share certificates numbers 3069, 7090 and 12174 and any other that may be issued in the course of the determination of this claim and transfer the said ten million two hundred and eighty-nine thousand one hundred and sixty (10,289,160) Coop Holdings Co-operative Society Limited shares to the claimant plus any other shares that may have been issued as a result of a share split or a bonus on the 10,289,160 Coop Holdings Co-operative Society Limited during the pendency of this claim.
- iv. Alternatively, should the appellants default in delivering all the shares certificates number 3069, 7090 and 12174 issued to the appellant plus any other that may be issued in the course of the determination of this claim an order is issued directing the share Registrar Coop Holdings Co-operative Society Limited previously share Registrar of Cooperative Bank Limited to:
 - (III) Transfer all the said ten millions two hundred and eighty-nine thousand one hundred and sixty (10,289,160) Coop Holdings Co-operative Society Limited shares, plus any other shares yielding from share split or bonus shares issued during the pendency of this claim and
 - (IV) The dividends paid out over the years since the year 2008 on all the above shares be traced and found to be due, be hereby registered in favour of the claimant and that the appellant do pay to the claimant all the said accounted amounts traced by the Share Registrars Coop Holdings Co-operative Society Limited formerly share Registrar Co-operative Bank of Kenya.
- v. It is hereby declared that the appellant is liable to account to the claimant for all the dividends sums it has received from the said shares since the year 2008 to date.

8. The appellant is aggrieved with this judgment and decree of the Cooperative Tribunal and have now filed this appeal on the following grounds
 - a. That the honorable members of the Co-operative Tribunal erred in law and in fact by making a determination which was against the weight of evidence adduced.



- b. The honorable members at the Co-operative Tribunal erred in law and in fact by holding that there was a valid contract between the appellant and the respondent.
 - c. The honorable members of the Co-operative Tribunal wrongfully exercised their discretion to grant specific performance against the weight of evidence.
 - d. The honorable members of the Co-operative tribunal erred both in law and in fact by failing to understand the law governing decisions in a Co-operative Society as provided in section 27 (1) and section 28 (3) of the *Co-operative Societies Act*.
 - e. The honorable members of the Co-operative Tribunal erred in both law and in fact by failing to make a determination on the legal position touching on quorum of the management committee to effectively and lawfully transact the affairs of a Co-operative Society.
 - f. The honorable members of the Co-operative Tribunal failed to make a proper determination on the counterclaim based on the evidence adduced in court.
9. The parties filed the written submissions as follows:
10. The appellant submitted that there was no valid contract as there was no offer, acceptance and consideration. It denied selling shares to the respondent and contended that there was no evidence provided at the trial to prove the same. The appellant claimed that there was no evidence or admission that it offered its shares to the public by inviting bids to purchase shares. Thus, there was no offer which is an essential requirement for a valid contract. The appellant further stated that there was no acceptance as no testimonies of witnesses made it clear how negotiations were made that resulted in the purchase of the shares. Lastly on consideration the appellant argued that the respondent attached a copy of a bankers cheque which it indicated was paid and the tribunal shifted the burden to the appellant and held that it indeed admitted in a tripartite meeting that it received payment for the respondent. That in the end the tribunal came to the wrong conclusion since it was not an acknowledgement on its part.
11. The appellants indicated that the purpose of the tripartite meeting that was held on March 25, 2015 between the representatives of the appellant and the respondent was meant to unlock the stand off between the parties. The court should not rely on the comments by the chairman or the respondent as more time to consent was sought and the negotiation was never concluded.
12. It was submitted that only four of their directors executed the Sale Agreement and the other five directors were never involved. The said four officials were not competent to sell the shares of the appellant and the letter of indemnity and the execution of the transfer were illegal, fraudulent and not binding on the appellant.
13. The appellant submitted that the ultimate decision-making organ in a Co-operative Society is its General Meeting according to section 27 (1) of the *Co-operative Societies Act*. That the sale of its shares was never featured on the notice calling for the annual general meeting on June 7, 2008 and the issue was never discussed in the said meeting.
14. The appellants submitted that under section 3 of the *Co-operative Societies Act* the Commissioner is the regulator of the Co-operatives who is responsible for their organization, registration, operation, advancement, dissolution and administration of the provisions of the Act. The Commissioner keeps the record of all the minutes and Notices of the meeting and in his testimony DW2 informed the tribunal that the minutes filed in court purporting to be the resolution for the sale of the shares were a forgery since the signature contained in the said minutes and stamp were not from his office.



15. On specific performance the appellants submitted that the tribunal failed to keenly interrogate the reasons as to why the shares were not transferred under the contract and which remedies were provided therein. That Clause 12 provided that in the event the shares are not successfully transferred due to the default of the vendor the purchaser was entitled to a refund of the full purchase price together with interest at the rate of 20% per annum from the date of receiving the purchase price. There was thus no clause for specific performance in the Sale Agreement. In support it cited *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2000] eKLR where Maraga J observed that specific performance cannot be ordered where there is an adequate remedy.
16. The appellant argued that it was entitled to the prayers in the counterclaim as there was no lawful sale of the shares and consequently the claim should be dismissed.
17. The respondent submitted that the appellant and the respondent entered into a Share Purchase Agreement dated September 16, 2008 for the sale and purchase of 61,245 shares per value Kenya Shillings One Hundred of the issued Share Capital of Co-operative Bank Kenya Limited. The agreement was duly executed by the respective parties. Consideration was duly paid to the appellant for the sale of the said shares as a bankers cheque was issued for the sum of Kshs. 6,920,685 which the tribunal confirmed by relying on the minutes of the Tripartite meeting that was held on March 25, 2015.
18. The respondent submitted that the appellant's committee was constituted with nine members, the appellant issued the respondent with a power of attorney giving four members of the committee the powers to act on behalf of the appellant in the transaction for the sale of the shares. That the law is clear on the composition of the board of management but does not make any provision as to how many members of the board makes a quorum for decision making purposes.
19. The appellant also provided minutes of an annual general meeting that was held on June 7, 2008 where it was resolved that 61,245 shares held at the Co-operative Bank be put on sale. There were also additional minutes of the appellants executive committee meeting which resolved the sale of the subject shares.
20. The respondent submitted that it dealt with authorized representatives of the appellant and had no business inquiring whether they were acting legitimately or otherwise. The respondent relied on the commercial law principle that was set out in the case of *Royal British Bank v Turquand* [1885] E & B 327 which provides that the respondent need not have enquired into the internal affairs of the appellant and is right to have assumed all requirements had been complied with upon looking at the documents that had been presented.
21. It was therefore the respondent's argument that all the proper legal procedure was followed by the appellant in the decision to sell the shares to the respondent. The appellant is therefore estopped from reneging on its obligations under the share purchase agreement on the grounds that some of its committee members acted outside of their powers.
22. On remedies that were available the respondent submitted that after having established that there had been a breach of contract it was entitled to enjoy equitable remedies to compensate it to the extent that the breach never occurred. That the tribunal was correct in finding that the respondent had proved its case on a balance of probability and the equitable remedies issued.
23. The interested party in its submission indicated that appellant and the respondent did not notify the share registrar to confirm the price of shares, the transaction was not approved by the share registrar, there was no authority to sell shares from the Commissioner of Co-operatives, payment was not done through the interested party as required to ensure that stamp duty and costs of issuance of a new share



certificate were paid and certificate of payment was not issued by the share registrar acknowledging payment of purchase price for the shares. Thus, Clause 13 of the interested party's by laws was never followed by the parties which invalidates the alleged sale shares.

24. The interested party further elucidated that the number of shares being sold is confirmed by the share certificate and in this matter, there was no share certificate issued to the respondent at the time of sale. They were never notified of the transaction and never gave approval of the transaction. The appellant and the respondent failed to follow the laid down procedure for the sale of shares and made their contract unenforceable.
25. The duty of the appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court.
26. The issues for determination in this appeal are as follows:
 - i. Whether there was a valid contract between the appellant and the respondent.
 - ii. Whether the management committee being the governing body of the appellant had the full capacity to enter into the agreement.
 - iii. Whether the appellant was in breach of the agreement.
 - iv. Whether the respondent was entitled to an order of specific performance.
 - v. Whether the appellant proved its counterclaim against the respondent.
 - vi. Whether the appeal should be allowed.
 - vii. Who pays the costs of the appeal.
27. On the issue as to whether there was a valid contract between the appellant and the respondent, the appellant's submission was that the Tribunal did not understand the law applicable to this case.
28. The appellant submitted that the ultimate decision-making organ in a Co-operative Society is its General Meeting according to section 27 (1) of the *Co-operative Societies Act*. That the sale of its shares was never featured on the notice calling for the Annual General Meeting on 7th June 2008 and the issue was never discussed in the said meeting.
29. The Co-operative Society manages the Society affairs through its management committee which is a creature of section 28 of the *Co-operative Societies Act*. The Section provides:

“Section 28

 - (1) Every Co-operative Society shall have a Committee consisting of not less than five and not more than nine members;
 - (2) The members of the Committee shall elect a chairman and vice chairman from among their number;
 - (3) The committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the Co-operative society, direct the affairs of the Co-operative society with powers to:-
 - (a) Enter into contracts;



- (b) Institute and defend suits and other legal proceedings brought in the name of or against the Co-operative Society; and
 - (c) Do all other things necessary to achieve the objects of the Co-operative Society in accordance with its by-laws.
- 30. I find that the Management Committee is supposed to act subject to any direction from the general meeting or in accordance with the by-laws of the Co-operative society in directing the affairs of the Co-operative society.
- 31. In the current case, at page 689 there were only four officials who signed the transfer of shares as follows:
 - i. Paul Owuor - Chairman
 - ii. Jairus O. Owiti - Vice chairman
 - iii. Peter Wadeya - Secretary
 - iv. Eunice A. Odera- Treasurer
- 32. There is also no evidence that the said transaction was approved by the AGM of the appellant.
- 33. John Osewe (DW 1) said that he has been the chairman of the appellant since 2/9/2009. He said he was present in the AGM held on 7/6/2006.
- 34. DW1 said the issue of the sale of shares was not discussed during that annual general meeting held on 7/6/2006.
- 35. DW 1 also said no resolution was made to sell the shares. He said the minutes had been doctored to include the issue at the margin and this was illegal.
- 36. I therefore find that management committee was not properly constituted and its decision cannot bind the respondent.
- 37. I also find that the management committee had no mandate to bind the appellant since the sale of the shares was not approved by the AGM.
- 38. There was also an element of fraud which the Tribunal ignored.
- 39. DW 2 David Mwenda Maranga also said he attended the annual general meeting held on 7/6/2006. He said the issue of the shares was not discussed at the said AGM.

DW 2 was the Deputy Cooperative Officer (DCO) at that time at the Migori District Cooperative office and he attended the Board meetings and AGMs as required by Section 93B of the Cooperative [Societies Act](#).
- 40. The Commissioner keeps the record of all the minutes and Notices of the meeting and in his testimony DW2 informed the tribunal that the minutes filed in court purporting to be the resolution for the sale of the shares were a forgery since the signature contained in the said minutes and stamp were not from his office.
- 41. I therefore find that the transaction was not done in accordance with the provisions of the [Cooperative Society Act](#).
- 42. I also find that the Interested Party was not served with a notice of sale of the shares and the sale price of the shares was not approved by the registrar.



43. I find that there is no evidence that both the appellant and the respondent met to set conditions before the sale.
44. There is no evidence that the minimum price was set by the board of the Interested Party or that the commissioner of cooperatives issued authority for the sale of the shares.
45. According to section 3 of the *Co-operative Societies Act*, the Commissioner is the regulator of the Co-operatives who is responsible for their organization, registration, operation, advancement, dissolution and administration of the provisions of the Act.
46. I also find that the purchase price was not deposited with the Interested Party and no certificate of payment was signed, or stamp duty paid and no new share certificate was issued.
47. In the circumstances, I find that there was no valid contract between the appellant and the respondent for the sale of the shares.
48. On the issue as to whether the appellant was in breach of the sale agreement, the answer is in the negative since the agreement was fraudulently entered by only four members of the committee without the approval of the AGM and therefore the same did not meet the legal threshold for entry of contracts.
49. I find that the appellant is an autonomous, self-help organization controlled by the members. If it enters into agreements with other organizations, including governments, or raises capital from external sources, it does so on terms that ensure democratic control by its members and maintains its co-operative autonomy.
50. The four committee members cannot purport to act for the appellant without democratic control by the members.
51. On the issue as to whether the respondent was entitled to the order of specific performance the answer is in the negative since there was no valid contract between the parties to entitle the respondent to an order of specific performance.
52. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the Court held that: -
- “The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”
53. *Thrift Homes Ltd v Kenya Investment Ltd* [2015] eKLR, the court stated that: -
- “specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.
54. On the issue as to whether the appellant proved its counter-claim, I find that the answer is in the affirmative for reasons that the shares rightfully belong to the appellant.



55. I therefore allow the appeal and I set aside the orders of the Tribunal issued in the judgment delivered on 26/2/2020 and I allow the counter claim in the following terms:

- i. A declaration be and is hereby issued that the appellant is the registered owner of ALL the initio 61,245 shares together with shares gained after being split and all bonuses on shares given over the years and registered in the names of the appellant.
- ii. A declaration be and is hereby issued that there was no lawful sale of the 61,245 shares on 16/9/2008 or any other time and there was not authority permission and/or consent sought and obtained by the appellant's AGM on 7/6/2008 or any other date and the alleged consent/permission to sell the shares obtained on 7/6/2008 was unlawful, null and void.
- iii. A permanent injunction be and is hereby issued against the respondent, its agents, servants, officials, employees or any other persons acting on the directions of its current officials from laying claim on the appellants shares currently held at the Interested Party or previously held at Cooperative Bank of Kenya Ltd.
- iv. On the issue of who pays the costs of the appeal, I direct that the respondent pays the appellants costs and the costs of the Interested Party.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

.....

A. ONGERI

JUDGE

In the presence of:

..... for the appellant

..... for the respondent

..... for the Interested Party

