



**Republic v Co-operative Society Tribunal; Imarisha Sacco Society Limited
(Exparte); Geoffrey & another (Interested Parties) (Judicial Review E012 of 2023)
[2024] KEHC 14817 (KLR) (Judicial Review) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E012 OF 2023
JM CHIGITI, J
OCTOBER 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CO-OPERATIVE SOCIETY TRIBUNAL RESPONDENT

AND

IMARISHA SACCO SOCIETY LIMITED EXPARTE

AND

KIPROTICH KORIR GEOFFREY INTERESTED PARTY

PAUL KIPNGETICH LANGAT INTERESTED PARTY

JUDGMENT

1. The Application that is before this court for determination is the one dated 1st December 2023 wherein the Applicant seeks that: -
 1. An order of certiorari to remove into the High Court for purposes of being quashed and the quashing of the decision made by made on 27th April, 2023 by the Tribunal that the Claim No. 130 of 2018 before the Tribunal do proceed to full hearing.
 2. The High Court do issue an order prohibiting the Respondent herein from conducting hearing of Claim No. 130 of 2018.



3. An order of Declaration be hereby issued declaring that the proceedings before the Tribunal in Claim Number 130 Of 2023 is null and void for failure on the part of the Interested Parties to comply with the mandatory provisions of the law relating to filing of claims and service of summons and availing original documents for inspection and verification on their genuineness and validity.
4. Costs of this Application be awarded to the Exparte Applicants.
2. The Application is opposed

Applicant's case

Background;

3. This matter was originally given the file Number Misc. Application No. 871 of 2023. When the matter was placed before Hon. Mr. Justice David Majanja on 19th October, 2023, he ordered that the same to be transferred to the Judicial Review Division of this court.
4. The Interested Parties' Notice of Preliminary Objection dated 31st October, 2023 proceeded on misplaced premises that the Hon. Mr. Justice David Majanja dismissed the matter. According to the Applicant this is not the position. Hon. Justice Majanja simply transferred the matter to Judicial Review Division and did not dismiss it. Court records will show that.
5. It is its case that the case has merit as seen from the Statutory Statement and verifying Affidavit sworn by its CEO, one Mathew Rotich on 28th September, 2023.
6. It is its case that the Respondent the Co-operative Society Tribunal had initially ordered the Interested Parties herein to avail all the documents in their possession being the original form for inspection and verification by the Ex-parte Applicants and its advocates.
7. Later on the tribunal contracted itself by directing that the matter does proceed to full hearing, notwithstanding its initial decision. It is the Applicant's case that that the inspection of original document, authentication of its sources was crucial in enabling the Ex-parte Applicants to conduct effective cross-examination.
8. The Interested Parties failed to adduce all the aforesaid documents despite being ordered to do so. It argues that a proper hearing could not proceed before compliance with previous orders. It is its view that The Respondent should never be heard issuing contradicting orders and directing that the matter be heard before its initial orders are complied with. This amounts to unprocedurally irregularity.
9. It also has issues with the summons. The jurisdiction of the Respondent is based on its authority to issue summons. Summons is a mandatory requirement. As it is, the Interested Parties did not prepare and lodge summons. Summons were never effected on the Ex-parte Applicants. The Ex-parte Applicant is not obliged or under any duty to file a Defence in the absence of Summons.
10. The Tribunal Rules of Procedure makes service of Summons mandatory. According to Rule 10 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 Cap 490 makes it mandatory to file and serve summons, alongside verifying Affidavit and Memorandum of Claim. This was not done.



The 2nd Interested Party's case;

11. The Interested Parties who are members of the Ex-parte Applicants, filed their dispute No. 130 of 2018 pursuant to Co-operative Societies Act 490 Section 76 on allegations of misappropriation of SACCO funds by its Board of Directors and Senior Management staff.
12. According to them, they do not have originals of any of the said documents as alleged by the Ex-parte Applicants. The Interested Parties have tried time and again to explain the source of their documentary evidence used to back up their dispute.
13. The Co-operative Societies Act 490 Section 21 (d) gives a member an entitlement to all legitimate information which includes: -internal regulations, registers, minutes of general meetings, annual reports and investigation reports among others, which information the Interested Parties have utilized to challenge Ex-parte misappropriation of funds.
14. The Ex-parte Applicants urged the Co-operative Tribunal/court to expunge a number of documents on allegation that they want to verify the originals from the Interested Parties.
15. That, they urge the Honourable Court to look at instances where correspondences were exchanged between the Interested Parties, KRA, SASRA and Langat & Associates as hereunder explained:
 - i. KKG 1G is a letter from Kenya Revenue Authority (KRA) addressed to the Chief Executive Officer of Sacco Societies Regulatory Authority (SASRA) and copied to Interested Parties in response to their complaints.
 - ii. KKG 12A is a management letter from Langat & Associates, while KKG 12B and KKG 6 are letters from SASRA, the regulator of SACCOS. The Board of directors of the Ex-parte Applicants cannot claim to be the makers of these documents and a recourse to verify them would be made to KRA. SASRA and Langat & Associates who are the makers and the Interested Parties have clearly indicated to the Tribunal that through their leave they will invite them to testify.
 - iii. KKG 19A & KKG 19B are independent Auditor's Reports addressed to the members of the Ex-parte Applicants which the Interested Parties are members, whereas KKG 5A, 5B and 17B are extracts of Balance sheet which are public documents having been displayed to members during the annual general meetings and is governed by Co-operative Societies Act 490 section 21 (d).
16. They argue that it is evident that the Interested Parties could not be in possession of the original documents. The documents in issue were not in the list of annexures.
17. As insinuated by the Ex-parte Applicants that a claim is only sustainable when one has a document in original form which is not true and that documentary evidence is normally produced to proof the existence of content.
18. According to Section 66 and 68 1(a), of The Evidence Act Cap 80 it is in line with how the Interested Parties have supported their claim. It is his case that given that the dispute has not gone to trial, the court is guided by section 83 of the evidence Act, until such a time where evidence is tested through cross-examination at the trial stage.
19. The Applicant is prematurely pushing for the dismissal of the entire suit by way of technicalities by just a mere denial of facts where the Interested Parties want to proof a case against them as envisaged in Evidence Act 80 Section 68 1(a) Where secondary evidence may be given of the existence, condition



or contents of a document in the following cases: When the original is shown or appears to be in possession or powers of the person against whom the document is sought to be proved.

20. It is its case that contrary to assertion of the Ex-parte Applicants there was an order to verify original documents is not true and if at all it was true, then we were not served with the same.
21. It argues that the Ex-parte Applicants does not require original copies of the documents which are under their custody given that the annexures are letter-headed with appended signatures of the Ex-parte employees which they can easily recognize and give an account to it and therefore the Application to expunge documents is bad in law and abuse of court processes and the Ex-parte Applicants is using delaying tactics as a means to delay justice and the same should be dismissed and/or strike out with cost.

Analysis and determination;

22. Upon perusing the pleadings and the rival submissions of parties alongside the authorities cited, this court finds the following to be the issues for determination:
 1. Whether or not this court has Jurisdiction to hear and determine this suit.
 2. Whether or not the Applicant is entitled to the orders sought.

On the first issue;

23. In the case of Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus:

“(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicants), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law.” (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated: -

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”(underlining supplied)



[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

24. In the instant suit, Section 81 (1) of the cooperative *societies act* stipulates that any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court. The Applicants herein is aggrieved by the decision made on 27th April, 2023 by the Cooperative Tribunal that the Claim No. 130 of 2018.
25. The Applicants did not lodge any appeal in the High Court. The Applicants engaged in the wrong procedure in law in the filing of judicial review proceedings as opposed to an appeal in the High Court. Nothing stopped it from lodging an appeal in the High Court. Unfortunately, Article 159 of *the constitution* cannot cure the defect in the Suit. The Application defective ab initio and I so hold.

The second issue;

26. Having found that this court lacks jurisdiction this court cannot determine the other issues and I so hold. In so finding, I am guided by the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.

Disposition:

27. This court lacks jurisdiction to hear this matter under their cooperative *societies act* of Kenya and I so hold.

Order:

This suit is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2024.

J. M. CHIGITI (SC)

JUDGE

