



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Barichu Famers Co-operative Society (Civil Appeal E929 of 2022)
[2024] KEHC 14041 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14041 (KLR)

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

**CIVIL
CIVIL APPEAL E929 OF 2022**

**MA OTIENO, J
NOVEMBER 7, 2024**

BETWEEN

JOSEPH MWANGI MAINA APPELLANT

AND

BARICHU FAMERS CO-OPERATIVE SOCIETY RESPONDENT

*(Being an appeal from the Judgment and decree of the Co-operative Tribunal
at Nairobi delivered on 14th October 2022 in the Nyeri CTC No. 260 of 2020)*

JUDGMENT

Introduction

1. This Appeal is from the decision of the Co-operative Tribunal dated 14th October 2020 in the Nyeri Cooperative Tribunal Case No. 260 of 2020 in which the Tribunal delivered judgment in favour of the Appellant by upholding the Appellant's claim that he had been unlawfully suspended from the Respondent's Management Committee and thereby awarding him a sum of Kshs. 75,000/- as damages for the breach.
2. The background of the dispute is that the Appellant who was a member of the Respondent and served in the Respondent's Management Committee as the Vice-Chairman. On 15th July 2020 was suspended by the Committee members from the Committee on allegations of gross misconduct on his part.
3. Dissatisfied with the decision of the Respondent's Management Committee, the Appellant, alleging breach of his rights, commenced proceedings in the Nyeri Co-operative Tribunal Case No. 260 of 2022, seeking the following orders against the Respondent; -
 - i. An order do issue compelling the Respondent either by itself, its servants, agents or howsoever to unconditionally reinstate the Claimant to its Management Committee forthwith;



- ii. An order do issue permanently restraining the Respondent either by itself, its servants, agents or howsoever from harassing, intimidating or in any other manner whatsoever interfering with the claimant's position and membership in the Respondent;
 - iii. Aggravated damages
 - iv. Exemplary damages;
 - v. Costs and interests;
 - vi. Any other relief that this honourable Tribunal may deem just and fit.
4. On 14th October 2020, the Tribunal rendered its judgment in favour of the Appellant and awarded him a global sum of Kshs. 75,000/- in damages. The Tribunal however declined to grant reinstatement and restraint orders (prayers (i) and (ii) in paragraph 3 above), finding that the prayers had been overtaken by events.

The Appeal

5. Aggrieved with the decision of the Tribunal, the Appellant, vide his memorandum of appeal dated 12th November 2023 appealed to this Court against the Tribunal's decision raising eleven grounds of appeal that; -
- i. The Learned Honourable Cooperative Tribunal erred in law and fact in holding that the Claimant was given an opportunity to defend himself during the Management Committee's meeting held on 15th July 2020.
 - ii. The Learned Honourable Cooperative Tribunal erred in law and fact in awarding the Claimant KShs.75,000/= as aggravated damages which amount was so inordinately low in light of the facts of the case.
 - iii. The Learned Honourable Cooperative Tribunal erred in law and fact in failing to base the inordinate award of KShs.75,000/= on any legal and/or judicial precedent and/or explain the same.
 - iv. The Learned Honourable Cooperative Tribunal erred in law and fact in awarding the Appellant the meagre sum of KShs.75,000/= as aggravated damages seemingly because the Appellant did not propose any figure for the same.
 - v. The Learned Honourable Cooperative Tribunal erred in law and fact in failing to address itself to the fact that the Respondent was denied its representation by the Appellant, who was a duly elected official, owing to the illegal suspension.
 - vi. The Learned Honourable Cooperative Tribunal erred in law and fact by exercising its discretion arbitrarily and in a manner that caused an injustice to the Appellant.
 - vii. The Learned Honourable Cooperative Tribunal erred in law and fact in failing to address itself to the issue of exemplary damages.
 - viii. The Learned Honourable Cooperative Tribunal erred in law and fact in failing to award the Appellant exemplary damages despite defining the same and the Appellant seemingly being entitled to the same.



- ix. The Learned Honourable Cooperative Tribunal erred in law and fact by taking an inordinately period in delivering the Judgment thereby infringing upon the Appellant's rights and rendering some of his prayers moot.
- x. The Learned Honourable Cooperative Tribunal erred in law and fact by failing to allow the prayer for the reinstatement of the Appellant despite there being no evidence that the same had been overtaken by event or otherwise because of lapse of time.
- xi. The Learned Honourable Cooperative Tribunal erred in law and fact as it failed to properly evaluate the Appellant's case and evidence placed before it.

Submissions

6. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 6th February 2024. The Respondent did not however file any submissions despite the court's directions in that regard.
7. The Appellant submitted that the Tribunal erred in failing to award exemplary damages as was pleaded. Citing among others, the case of Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR, the Appellant asserted that in the circumstances of this case, the Tribunal ought to have awarded him exemplary damages.
8. Regarding the damages of Kshs. 75,000/- awarded by the Tribunal, the Appellant submitted that the amount is inordinately low, particularly taking into account the harsh and embarrassing manner in which he was he was moved from the Respondent's Management Committee meeting of 15th July 2020. The Appellant cited the case of [*Nation Media Group Limited v Ndegwa \(Civil Appeal E037 of 2022\)*](#) [2023] KEHC 21127 (KLR) (3 August 2023) (Judgment) in support of his submissions.
9. In the premises, the Appellant urged this court to allow the appeal and award exemplary damages and further, that the sum of Kshs. 75,000/- awarded to him as aggravated damages by the Tribunal be enhanced.

Analysis and determination

10. This is an appeal emanating from the Co-operative Tribunal pursuant to section 81 of the Cooperative [*Societies Act*](#) which provides as follows; -

“ 81. Appeal to High Court

1. 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:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

2. Upon the hearing of an appeal under this section, the High Court may—
 - a. confirm, set aside or vary the order in question;
 - b. remit the proceedings to the Tribunal with such instructions for further consideration, report,



proceedings or evidence as the court may deem fit to give;

- c. exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
- d. make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

3. The decision of the High Court on any appeal shall be final.

11. I have considered this appeal in terms of the Judgment of the Tribunal, the proceedings at trial and the Appellant's submissions in this appeal as well as the authorities relied on. Despite the fact that the Appellant has raised eleven (11) grounds of appeal, I believe that this appeal turns only on two issues for determination as follows: -

- i. Whether the Appellant is entitled to exemplary damages
- ii. Whether the amount of Kshs. 75,000/- awarded by the Tribunal was inordinately low

Whether the Appellant is entitled to exemplary damages

12. The Appellant argued that the Tribunal erred in failing to award him exemplary damages for the embarrassment and humiliation he received when he was commandeered out of the Appellant's board committee meeting of 15th July 2020 without any reasonable cause. That the Respondent's conduct was oppressive, arbitrary and demeaning to his person.

13. It is trite law that exemplary damages, unlike ordinary damages, by its very nature is intended to punish and deter the Respondent. In *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR the Court of Appeal (Githinji, Visram & J. Mohammed, JJ. A) stated as follows; -

“The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”

14. It is equally settled that before making an award of exemplary damages, it must always be borne in mind that the power to award exemplary damages must be used with restraint. That the same are only to be awarded in limited instances. Paragraph 243 of the of Halsbury's Laws of England sets out the categories in which exemplary damages should be awarded as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- 1. Oppressive, arbitrary on unconstitutional action by servants of government;
- 2. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or



3. Cases in which the payment of exemplary damages is authorized by statute.
15. From the proceedings, it is apparent that the Appellant seeks to have the Respondent punished (by award of exemplary damages) for the actions of the Respondent's Management Committee, of which he was part prior to his suspension of 15th July 2020.
16. From the fact of this case, and taking guidance from the preceding paragraphs that the award of exemplary damages should only be made in exceptional circumstances, I do not think this is case deserving the award of exemplary damages. I say so because an award of exemplary damages in favour of the Appellant as against the Respondent will only exert undue burden and financial pressure on the innocent members of the Respondent who, though have nothing to do with the 'boardroom wars', will be required to compensate any of the aggrieved committee members through their hard-earned income which they faithfully contribute to finance the operations of the Respondent.
17. In the context of the state/government, the Court of Appeal [Visam, Sichale & A. Mohammed, JJ. A] in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR) declined to award exemplary damages on account of the fact that doing so would be a burden to the innocent members of the public/taxpayers and stated as follows; -
- “Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations....”
18. In any event, the Appellant did not tender any evidence at the Tribunal to the effect that his claim fell within any of the three (3) categories outlined by Paragraph 243 of the Halsbury's Laws of England (*supra*) to justify an award of exemplary damages as against the Respondent.
19. In the premises, I find no merit in the Appellant's argument that the Tribunal erred in failing to award exemplary damages.

On whether the award of Kshs. 75,000/- was inordinately low

20. On whether the award of Kshs. 75,000/- was inordinately low, the general rule is that assessment of damages lies in the discretion of the trial court and an appellate court will only interfere with the award of damages where it is inordinately high or inordinately low as to represent an erroneous estimate. This was the holding of the court in *Butt - vs - Khan* (1977) I KAR where it was held that: -
- “An appellate court will not disturb an award for damages unless it is inordinately high or low as to entirely represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
21. The Court of Appeal reiterated the above position in the case of *Hellen Waruguru Waweru* (Suing as the legal representative of Peter Waweru Mwenya) vs *Kiarie Shore Stores Limited* [2015] eKLR where it was held: -
- “As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on



wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure, which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.”

22. I have reviewed the reasons advanced by the Appellant, both at the Tribunal and in this appeal and find no reason to depart from the finding of the Tribunal. In my view, a higher award would be against the doctrine of mutuality as applicable in cooperative societies, which stipulates that a person cannot make a profit from himself.
23. The Appellant and the Respondent are in a sense, one and the same. As indicated elsewhere in this judgment, it must always be borne in mind that damages so awarded are to be met from the contributions of the innocent members of the society who have nothing to do with the boardroom wars of its committee members.
24. In the circumstances, I find it against public policy to give any award in damages which higher than the Kshs. 75,000/- issued by the Tribunal.
25. The upshot is that this appeal has no merit and is dismissed with no order as to costs since the Respondent did not participate in the Appeal.
26. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of

Moses – Court Assistant

Njoroge..... for the Appellant

N/A..... for the Respondent.

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