



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL APPEAL NO 37 OF 2014

UFUNDI SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

=VERSUS=

BERNARD NDUNGU KARIUKI & 99 OTHERS.....1ST RESPONDENT

TITUS E OBARA & 199 OTHERS.....2ND RESPONDENT

ALEX G MARETE & 19 OTHERS.....1ST INTERESTED PARTY

CO-OPERATIVE BANK OF KENYA

LIMITED.....2ND INTERESTED PARTY

EUNITA KERUBO RATEMO &

60 OTHERS.....3RD INTERESTED PARTY

(Being an A appeal against the Award of the Co-operative

Tribunal at Nairobi in Tribunal Case No. CTC 375 of 2010)

BETWEEN

FRANCIS GITARI NDIRANGU &

OTHERS.....CLAIMANTS

AND

UFUNDI SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED.....1ST RESPONDENT

TITUS E. OBARA & 199 OTHERS.....2ND RESPONDENT

ALEX G. MARETE & 19 OTHERS.....INTERESTED PARTIES

JUDGMENT

BACKGROUND

1. The Appellant, Ufundi Savings and Credit Co-operative Society Limited, is a savings and co-operative society registered pursuant to the Co-operative Societies Act. The 1st and 2nd Respondents, and the 1st and 3rd Interested Parties claim to be members of the Appellant. The 2nd Interested party, Co-operative Bank of Kenya (the Co-operative Bank) is a financial institution registered pursuant to the Banking Act.
2. In the statement of claim dated 26/10/2010 which was amended on 30/9/2011, the Claimants, who are the 1st Respondent in this Appeal, instituted **Nairobi Co-operative Tribunal CTC No. 375 of 2010** in which they sought a permanent injunction to restrain the Respondent (the Appellant in this Appeal) and its officials, servants and or agents from selling or disposing of, setting up an adverse title, charging or transferring the property known as Ufundi Co-op Plaza, erected on land reference number (L.R. No.) 209/2571, registered as IR No. 47000 (hereafter Ufundi Co-op Plaza). They also sought a declaration that the Claimant and 14,999 Ufundi Investment Members were the only rightful proprietors of **Ufundi Co-op Plaza**. They sought to have the Appellant compelled to effect the separation of the Appellant's Sacco affairs and the investment venture and that Ufundi Co-op Plaza be transferred to an independent entity comprising of the rightful shareholders or members of the investment venture. Additionally, the 1st Respondent sought to be furnished with proper accounts of the rental income from the building and to have the Appellant compelled to pay rent for the premises under its occupation at the prevailing market rates.
3. Briefly, the 1st Respondent's case was that they were members of the Appellant and that sometime in 1988, they decided to contribute funds towards the purchase of a building in Nairobi as an investment venture. 15,000 out of the 30,000 members of the Appellant, including the 1st Respondent, voluntarily joined the investment venture and contributed Kshs 2,100/= each, which was deducted from their savings and wages at the rate of Kshs 40/=per month. That a building known as Gateway House located within Nairobi City was purchased for Kshs 30,000,000/=.
4. It was the 1st Respondent's case that the 15,000 members of the Appellant raised Kshs 12,000,000/= towards the purchase of Gateway House while the balance of Kshs 18,000,000/= came from a loan which the Appellant negotiated on their behalf and which was granted by the Co-operative Bank (the 2nd Interested Party). That after the purchase of Gateway House, it was agreed that the land would be registered in the Appellant's name, to hold on behalf of the 15,000 members who contributed towards its purchase since those members were not registered as a distinct entity. They contended that, by the end of 1989, the loan of Kshs 18,000,000/= had been fully repaid from the rental income derived from the purchased building where the Appellant was a tenant. The building was renamed "Ufundi House" and each of the 15,000 shareholders was issued with a share certificate as confirmation of their shareholding investment in the building.
5. It was their case that on 7/8/1998, Ufundi House collapsed as a result of a terror attack on the adjacent American Embassy. The 1st Respondent contended that through the humanitarian aid extended by USAID, a replacement building known as Ufundi Co-op Plaza was acquired.
6. According to the 1st Respondent, vide resolutions of the Annual Delegates Meetings of the Appellant in 1991 and 2002, the Investment Members resolved to delink and separate the investment venture from the Appellant to ensure that the affairs of the Appellant and the investment venture were run separately for efficiency but the resolution was frustrated. Subsequently at an Annual Delegates Meeting held on 29/4/2010 it was resolved that Ufundi Co-op Plaza would be sold to defray a massive debt incurred by the Appellant. The **1st Respondent argued that that resolution was passed without involving them and other members**. They maintained that Ufundi Co-op Plaza was not owned by the Appellant but by the 15,000 Investment Members who made contributions towards its purchase and that the Appellant could not have passed a resolution to sell it.
7. The Appellant's response was that it initiated the acquisition of a building and that a number of the 1st Respondent joined the investment venture but that their number did not reach 15,000. The Appellant stated that it serviced the loan of Kshs 18,000,000/= together with costs and other expenses incurred in the purchase of Ufundi House. They urged that being a society, its decisions were guided by by-laws and by decisions of the Annual Delegates Meetings and that the 1st Respondent did not have *locus standi* to seek the orders that they sought in the suit.
8. With respect to Ufundi Co-op Plaza, it was the Appellant's contention that the property was a gift which the American Government gave to it through USAID and was neither compensation nor was it a replacement of Ufundi House.
9. The 2nd Respondent was added to the proceedings on 5/4/2012. It was their case that, as members of the Appellant, most of whom had either retired or been retrenched, they had contributed towards the purchase of Ufundi House and that after it was destroyed in the 1998 bomb attack, the Appellant's management assisted them to acquire a new building, Ufundi Co-op Plaza, in which they had a stake.
10. The 2nd Respondent contended that although the Appellant did not contribute to the purchase of Ufundi Co-op Plaza, it should have a stake in it because most of the 2nd Respondent left with loans from the Appellant and were therefore responsible for the massive debts which the Appellant had incurred. They added that most of them had never benefitted from their investment and the best resolution would be to have Ufundi Co-op Plaza sold and the proceeds divided on a 50:50 basis between the Appellant and the members.
11. The 1st Interested Party's case was that Ufundi House was not an exclusive project of the members but that it was also one of the Appellant's investments. It urged that the sale of Ufundi Co-op Plaza had the blessing of a majority of the members of the Appellant. The 1st Interested Party claimed that the 1st Respondent was seeking to frustrate the disposal of Ufundi Co-op Plaza which they urged should be carried out in a transparent manner to enable all the shareholders get their investment back.
12. In the majority award of two members of the Co-operative Tribunal against one who dissented, delivered on 9/12/2014, the Tribunal found in favour of the 1st Respondent and granted a permanent injunction restraining the Appellant from dealing with Ufundi Co-op Plaza. They declared that the 1st Respondent and the 14,999 other members of Ufundi Investment were the rightful and only proprietors of Ufundi Co-op Plaza and directed the Appellant to effect the resolution for the separation of the Appellant's Sacco affairs on the one hand and the

investment venture on the other hand. Further, they directed that Ufundi Co-op Plaza be transferred to a separate entity comprising of the rightful members or shareholders of the investment venture and that that entity was to be constituted in line with the resolution that had called for separation of the Appellant's Sacco affairs and the investment venture. The Appellant was also directed to pay rent for the premises it was occupying at the prevailing market rate which was to be agreed upon between the Appellant as tenant and the separate entity that would be created.

13. The Chairman of the Tribunal delivered a dissenting award to the effect that Ufundi Co-op Plaza was to be sold and the sale proceeds apportioned in the ratio of 60: 40% in favour of the Appellant.

THE APPEAL

14. Being dissatisfied with the award of the majority members of the Tribunal, the Appellant brought this appeal vide the Memorandum of Appeal dated 19/12/2014. The main grounds of the appeal are that the two Honourable Members of the Co-operative Tribunal failed to distinguish and contrast their award with the reasoning, decision and opinion of the dissenting member of the Tribunal; that the two Members failed to take into consideration the evidence of the parties and that they did not analyse and evaluate the documentary evidence adduced before the Tribunal; that they failed to address all the key aspects of the matter; that their findings were not supported by the key documents filed before the Tribunal; and that they failed to apply the provisions of the Co-operative Societies Act Cap 490 and the regulations under that Act. The Appellant also faulted the majority members of the Tribunal for failing to take into consideration the fact that the title in question was charged to the Co-operative Bank to secure payment of Kshs 160,000,000/= and that the Co-operative Bank was not a party to the proceedings before it.

15. The Appellant took issue with the manner in which the majority members of the Tribunal gave their award. It contended that what was availed to the parties was different from what was read in court and had several amendments. Further, that the two members failed to surrender their files. In the Appellant's view, the majority decision was not conclusive because one of the two members was not present during all the sittings of the Tribunal. The Appellant contended that the award was impractical and unenforceable.

16. The Appellant urged that the Members erred in holding that the interests of 100 members outweighed the interests of the 2nd Respondent who had 200 members, the Interested Party with more than 20 members and the other over 1400 members who did not participate in the proceedings before the Tribunal which in effect favoured a minority of the Appellant society comprising the 1st Respondent. It contended that the award by the majority members failed to distinguish the shareholding and contribution made in respect of Ufundi House and Ufundi Co-op Plaza and urged that the two properties were distinctly different in acquisition and ownership.

17. The Appellant urged the court to set aside the award of the Co-operative Tribunal and substitute it with an order giving effect to the members' resolution of 29/4/2010 to sell Ufundi Co-op Plaza for the benefit of the members.

SUBMISSIONS BY THE PARTIES

18. The Appellant submitted that the majority decision of the Tribunal was materially wrong on the finding that Ufundi Co-op Plaza belonged to the Investment Members yet there was no evidence of their contribution towards its acquisition. It pointed out that there is no legal entity known as Investment Members or group and that the practice was that the Appellant carried out several activities for the benefit of its members.

19. It also urged that the holding that Ufundi Co-op Plaza was held in trust for the Investment Members was not supported by any evidence and maintained that neither the title for Ufundi House nor the one for Ufundi Co-op Plaza indicated that the property was registered in trust for the Investment Members.

20. The Appellant relied on the case of **Mary Wanjiru Kihugu & 6 others v Regency Co-operative Savings and Credit Society Limited [2021] eKLR** where the court reinforced the supremacy of the General Meeting of a Co-operative Society as envisaged under Section 27 of the Co-operative Societies Act.

21. On the question as to whether Ufundi Co-op Plaza was a replacement building, the Appellant submitted that these were two separate entities, with the first having been purchased in 1988 at Kshs. 35.1 Million and the second purchased in 2000 at a cost of Kshs. 232 Million through a substantial contribution from the American Government through USAID who contributed Kshs 205 Million. It emphasised that Ufundi Co-op Plaza was given to the Appellant as humanitarian assistance and not as compensation for the destroyed Ufundi House and argued that the majority members' finding that Ufundi Co-op Plaza was a replacement of Ufundi House was speculative. Further, it faulted the majority members for placing the burden of proving that it was not a replacement on the Appellant rather than on the 1st Respondent which it contended was contrary to Section 107 and 108 of the Evidence Act. It relied on the case of **Mbilo Nzeki Munyasa & Another v Malde Transporters Ltd & 2 others [2015] eKLR** in which the case of **Susan Mumbi Vs Kefala Grebedhim (Nairobi HCCC No 332 of 1993)** was cited as follows;

“The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

22. On whether the Investment Group was sanctioned by the Annual General Meeting, counsel submitted that all decisions with respect to any registered co-operative society are informed by the decisions of its Annual General Meeting pursuant to its by-laws and in particular by-law no 38 and Section 27(1) of the Co-operative Societies Act Cap 490. It relied on the case of **Mary Wanjiru Kihugu (supra)**.

23. The Appellant submitted that Ufundi House was never fully owned by the Investment Members as the majority members of the Tribunal

concluded, which was the basis upon which they granted 100 percent ownership of Ufundi Co-op Plaza to the 1st Respondent. The Appellant submitted that the majority members ignored the Appellant's initial contribution of Kshs 3.6 Million and Kshs 8.4 Million from the members. Further, that they ignored the Kshs 18 Million that was repaid from the rent and members' contribution and a further sum of Kshs 5.1 Million from the Appellant which was expended on conveyance costs at the time Ufundi House was purchased.

24. The Appellant argued that the actual number of members who contributed towards the purchase of Ufundi House was only 8975 as evidenced in the membership register contained in volume 4 of the record of appeal. It contended that each of the members of the Tribunal should have written a separate award and that the majority members should have further distinguished the minority award. It averred that a member of the Tribunal did not participate in the proceedings and that there were no comprehensive proceedings by the two bench members which begged the question of what informed their analysis and determination of the dispute.

25. The Appellant faulted the majority members of the Tribunal for not upholding the fact that the supreme body of any registered Co-operative Society is its General Meeting whose decisions are binding upon all the members and that it is the elected delegates and not all members who are eligible to attend the meetings as set out in by-law No. 57 which states as follows;

“The supreme authority shall be vested in the General Meeting at which delegates shall have the right to attend, participate and vote on all matters and which shall be constituted by the branch delegates and the number shall be approved by the Annual General Meeting.”

26. Counsel further submitted that the award is unenforceable, unexecutable and that it offended the provisions of the Co-operative Societies Act as it was only through the Annual General Meeting that decisions in respect of the affairs and business of the Appellant could be conducted. It urged that the award amounted to interfering with the mechanisms set out by law to regulate the management of affairs of registered co-operative societies. Reliance was placed on the case of **Kandara Farmers Society Limited & 9 Others v Joseph Kinyua & 18 others in Civil Application No. 48 of 1999(19/99 UR)** where the court stated that it would loathe to select or choose management committees for co-operative societies.

27. The Appellant urged the court to set aside the award of the Tribunal since it had the judicial discretion where it was of the opinion that the trial court failed to consider relevant matters or considered irrelevant matters. It relied on the case of **Mbogo v Shah[1968] EA 93** where De Lestang VP observed at page 94 as follows:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

It would be wrong for this court to interfere with the exercise of the trial judge's discretion merely because this court's decision would have been different.”

28. The Appellant urged that this was a proper case for the court to exercise its discretion as the majority members of the Tribunal ignored the evidence adduced by the Appellants, the 2nd Respondents and the Interested Parties and instead considered unsubstantiated theories by the 1st Respondent. It urged that the 1st Respondent did not have documentation to prove ownership of Ufundi Co-op Plaza and that it failed to demonstrate how a gift granted on humanitarian grounds translated into compensation for the investors. It added that the majority members of the Tribunal failed to appreciate that the two buildings were of different values and that no other party was compensated by the American Government despite suffering damage and loss. It faulted the majority members of the Tribunal for ignoring the sharing ratio proposed by the Appellant of 60:40 and that proposed by the 2nd Respondent and 1st Interested Party of 50:50 which in its view was justifiable, well thought out, conscionable and equitable.

29. The 1st Respondent submitted that it disagreed with the Appellant's contention that the majority members of the Tribunal did not appreciate the reasoning by the dissenting member and pointed out that the two majority members concluded their award by stating thus: *“As this is the majority decision, the Chairman having been of a different decision, this shall be the award of the Tribunal.* Further, that it was not necessary for the two members to write different decisions as they were in agreement and it was not expected that the two members would have read the decision of the dissenting member or fault him. It maintained that the majority members duly evaluated the oral and documentary evidence as demonstrated in the award.

30. The 1st Respondent submitted that the Appellant's indebtedness was duly appreciated by the Tribunal members as evidenced by their statement...*“We sympathize with the 1st Respondent's present woes including her being highly indebted and her myriad of members' shares refund costs.”* Further, that at the Tribunal, it was the 1st Respondent's submission that the investment should not be sold off to answer debts which were not associated with the Investment Members.

31. It was the 1st Respondent's submission that as the majority members of the Tribunal rightly held, the question of the charge in favour of the Co-operative Bank only arose at the Tribunal at the hearing during further cross-examination of the Appellant, and that despite this allegation, no evidence of the registration of the charge was adduced by the Appellant. It urged that in any event such a charge having been registered on 9/12/2013 was contemptuous because on 30/5/2012, the Tribunal granted temporary injunctive orders restraining dealings with Ufundi Co-op Plaza and the orders were to subsist until the determination of the dispute. It was emphatic that the court should not aid the Appellant and perpetuate an illegality while citing the case of **National Bank of Kenya Limited v Wilson Ndolo Ayah [2009] eKLR**, where the Court of Appeal stated that courts should not aid in the perpetuation of illegalities.

32. The 1st Respondent stated that its case before the Tribunal was that the Appellant's decision to sell Ufundi Co-op Plaza was illegal because it belonged to the Investment Members and that the over 15,000 members of the investment were not consulted. It pointed out that

the Appellant's chairlady admitted during the trial that the Appellant's main intention in purchasing Ufundi House was to have office space and that the Appellant did not have funds of its own and the board recommended that members were to be deducted a sum of Kshs. 40/=; and those who agreed had the sum of Kshs. 2,100/= deducted from their salaries.

33. Further, that the Appellant's chairlady admitted that those who agreed were about 9000 and that the figure of 15,000 was only anticipatory and intended to enable the Sacco obtain the necessary approval. Further, that the Appellant having lied to its members, it was equally possible that it lied about contributing the sum of Kshs 3.6 million towards the purchase of Ufundi House. It emphasised that the Investment Members had persistently agitated for separation from as early as 1991 and the Appellant issued identity cards in the name of Ufundi Housing Co-operative Society knowing very well that no such entity existed.

34. The 1st Respondent submitted that the Appellant's hesitation to register an investment co-operative to deal with the investment in Ufundi House so that its affairs could be run by the Investment Members independently was a misuse of the delegates system to deprive the shareholders of their voice regarding the issue of investments. It further contended that the Appellant failed to provide evidence to show that it contributed Kshs. 7.5 Million towards the purchase of the Ufundi Co-op Plaza.

35. It urged that as the manager of the Investment Members, the Appellant was registered as trustee to hold the property in trust for and on behalf of the beneficiaries. It urged the court to assist the 15,000 members of the Appellant by confirming the award and order the separation of the Appellant's Sacco affairs from the investment in the building and transfer Ufundi Co-op Plaza to the 1st Respondent.

36. The 2nd Respondent challenged the dissenting decision of the Chairman and urged that it was based on wrong principles of law, was contradictory and that to uphold it would result in rewarding a blatant illegality. It argued that the Appellant was trying to wrongfully place a duty on the Tribunal to reason, make a decision or arrive at an opinion that accords with the presiding member yet no such duty is imposed by law and no greater decisional power is given to the chairman of the Tribunal. It also urged that the Appellant made general allegations without demonstrating the failures he accused the majority members of. Further, it contended that the Appellant should have pointed out the specific provisions of the Co-operative Societies Act, subsidiary legislation and by-laws which it alleged were contravened.

37. It submitted that the Tribunal was at liberty to dismiss or allow any contentions but was not bound to accept a finding that accorded with any of the parties' position while pointing out that the position taken by the 2nd Respondent and the Interested Party was that Ufundi House was purchased by the Investment Members. The 2nd Respondent submitted that the attack on the majority members of the Tribunal was unwarranted because there was no provision in the Co-operative Societies Act or the rules under it requiring that each of the members of the tribunal must write and read a distinct decision.

38. The 2nd Respondent submitted that the charge for Kshs 160,000,000/= in favour of Co-operative Bank was not an issue before the Tribunal and that the Tribunal would not have had jurisdiction by virtue of Section 76 of the Co-operative Societies Act. It conceded that the Co-operative Bank was not a party before the Tribunal but argued that its presence was not warranted in the present appeal. It urged that any dispute regarding the charging of Ufundi Co-op Plaza should have been brought within the purview of the Registration of Titles Act which was the relevant law at the time.

39. The 2nd Respondent submitted that grounds 11 and 12 in the Memorandum of Appeal were aimed at scandalising and bringing into disrepute the majority members of the Tribunal. It pointed out that the allegations made by the Appellant were not backed by any evidence such as a letter of complaint and that there were circumstances in which a Tribunal could proceed with only two members as set out in Section 80(1) of the Co-operative Societies Act which states thus;

“For the purpose of hearing and determining any cause or matter under this Act, the Chairman and two members of the Tribunal shall form a quorum.

Provided that where for any reason either or both the members is or are not present for any part of the hearing, the jurisdiction of the Tribunal may be exercised by the Chairman, sitting either with on such member or alone as the case may be.”

40. The 2nd Respondent submitted that the Appellant had not sufficiently demonstrated how the award was impracticable or could not be implemented or enforced. It argued that the Appellant neither purchased Ufundi House nor Ufundi Co-op Plaza but was only registered as a trustee of the 15,000 people and that it therefore had no authority to sell what it held as a trustee.

41. The 2nd Respondent submitted that the Appellant was bound by its Memorandum of Appeal and could not seek to have the court accept the minority decision while pointing out that the jurisdiction of the court must be informed by Section 81(1) of the Co-operative Societies Act.

42. The 1st Interested party supported the appeal and disagreed with the findings of the majority members of the Tribunal while agreeing with the decision of the dissenting member who according to it, rightly held that Ufundi Co-op Plaza was jointly owned by the Appellant and the Investment Members. It reiterated the grounds propounded by the Appellant and submitted that there was no dispute that they were part of the Investment Members. It prayed that the sale of Ufundi Co-op Plaza be allowed to proceed and that the sale proceeds be divided on a 50:50 basis with the Appellant retaining 50% while the 50% is shared among its members.

43. The 1st Interested submitted that they had not enjoyed the fruits of their investment in the Sacco and the loan advanced by Co-operative Bank should be separated from the demands made by the Investment Members. They echoed the Appellant's concerns about the conduct of the proceedings on the issue of the difference in the decision read to parties and the one read in court and the failure by the majority members to surrender their files after delivering their judgement.

44. The 1st Interested Party agreed with the findings of the Chairman of the Tribunal on the issue of joint ownership of Ufundi House and Ufundi Co-op Plaza. It prayed for the award to be set aside, for the court to order the immediate sale of Ufundi Co-op Plaza and for the proceeds of the sale to be shared on 50:50 basis.

45. The 2nd Interested Party submitted that the Appellant approached it requesting for credit facilities in the sum of Kshs. 160,000,000/= as working capital which was secured by a charge over Ufundi Co-op Plaza and that the Appellant provided security in the form of all assets fixed and a floating debenture in respect of Kshs 160,000,000/=. It submitted that clause 5.9 of the charge provided that no other person other than the chargor should during the subsistence of the security and without prior consent of the chargee in writing be registered as the proprietor of the charged property or any part thereof or of any interest therein nor without such consent first being sought shall the chargor create or permit to arise or subsist any overriding interest in relation to the charged property. According to Co-operative Bank, the purpose of the working capital was to offset the outstanding loan the Appellant owed to K-Rep Bank arising from the lending to its members and the Sacco operations. It stated that the facility was applied for in October 2013 and perfected in November 2013 before the Co-operatives Tribunal issued the injunction restraining the Appellant from dealing with Ufundi Co-op Plaza.

46. The 2nd Interested Party submitted that it sought leave to be joined in these proceedings once orders were issued which threatened its interest in Ufundi Co-op Plaza and that not having been a party in the case before the Tribunal, it could not appeal against the Tribunal's decision. The bank maintained that it had an interest in the suit based on the charge registered over Ufundi Co-op Plaza which it contended was protected by law and could only be divested through the legal process. Further, that the registered charge was first in time compared to the alleged equitable interest of the Respondents and that its interests ranked higher in priority.

47. The bank submitted that the mere fact that the 1st Respondent obtained orders without disclosing the liabilities attached to Ufundi Co-op Plaza could not relieve it of its obligations and relied on the Court of Appeal decision in **Equip Agencies Limited v I & M Bank Limited (2017) eKLR** where the court stated that courts were not inclined to uphold arguments questioning the validity of charge documents long after the borrower had received the banking facility, utilised the funds and was in default. It argued that the 1st Respondent was questioning the validity of the charge after the Appellant had made use of the funds.

48. The 2nd Interested party argued that the Appellant whom it entered into an agreement with, was a registered body and the registered proprietor of the charged property and that it was contrary to the law to assert a trust over Ufundi Co-op Plaza whose terms are implied to favour the 1st Respondent in isolation of the duties attached to it and from which the Respondent likely benefitted. The bank argued that to extend the trust and cause the transfer of Ufundi Co-op Plaza without due regard to the attaching encumbrances was alien to equity and trust. It urged that a valid enforceable charge subsists in all circumstances and the terms of the charge and deed of assignment of rental income must be fulfilled by either the registered owner of Ufundi Co-op Plaza or the beneficiary to whom the property may be ordered to be transferred or to both if the interest in the property is to be split in whatever proportion.

49. It added that due to the non-repayment of the money owed to it, it had been occasioned great injustice due to failure to service the loan facility and that the outstanding loan stood at Kshs 254,991,648.75/= and it would be severely prejudiced if the court did not order the fulfillment of the terms of the charge and deed of assignment. Further, that the only recourse would be to declare default and exercise the remedies available to a chargee which would convolute issues and may lead to the collapse the Appellant. It urged the court to declare the charge and deed of assignment as valid contractual documents whose obligations must be fulfilled by the registered proprietor of Ufundi Co-op Plaza. It also urged the court to direct that the funds paid into court be released to it as part payment of the outstanding loan.

50. Counsel for 3rd Interested Party submitted that they joined the Appellant in 1979 by making monthly contributions and later bought shares of Kshs. 2,100/= each in Ufundi House. It exhibited copies of various documents while urging that it had not been paid its shares for Ufundi House which was destroyed by the terror attack on 7/8/1998.

51. Counsel submitted that the 3rd Interested Parties were senior members of the society most of whom were retired, sickly and urgently needed a refund of their deposits from the Appellant. They urged that this matter should be settled without delay given the fact that it had taken a long time to be concluded and as a result the members continued to suffer. Counsel criticised the Appellant for applying to withdraw the sum deposited in the court to buy lifts for Ufundi Co-op Plaza without considering that they had not been refunded their savings deposited with the Appellant. They added that the Appellant had refused to refund their monthly deposits and shares and urged the court to make a determination that the rightful owners of Ufundi Co-op Plaza are the members who have share certificates as evidence of their ownership; that the amount which was deposited in court be released to the Members in order for them to get to enjoy the fruits of their investments and returns in the ratio of 50/50.

52. The 3rd Interested Party gave a list of the members who had not been refunded their dues. Those on the list were said to be retired and sickly. It also gave a long list of cases filed in 2014 in which judgements were entered against the Appellant but it had not satisfied those judgments. It urged the court to order the Appellant to comply with the consent order entered between their lawyer Gitonga Muriuki and the members' lawyer Ratemo Oira Advocate. Further, it urged the court to intervene and order that the money deposited in court be refunded to the members of the Sacco.

ANALYSIS AND DETERMINATION

53. We have examined and considered the record of appeal, the Memorandum of Appeal together with the submissions made by the parties. Our duty as the Appellate court was well captured in the case of **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212** as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce

extraneous matters not dealt with by the parties in evidence.”

54. The main issues for determination are:-

i. Who owned L.R No 209/4291 commonly known as Ufundi House (formerly known as Gateway House)?

ii. Who owns L.R No.209/2571 commonly known as Ufundi Co-op Plaza?

iii. Was the decision to sell Ufundi Co-op Plaza properly made?

iv. What orders should be made in relation to the existing encumbrance on LR No.209/2571 on which Ufundi Co-op Plaza stands.

v. What disposal orders should be made in this appeal?

55. The first issue for determination is who owned **Ufundi House**. Ufundi House which was formerly known as **Gateway House** lay on **L.R. No 209/4291**, which had been erected at the intersection of Haile Selassie Avenue and Moi Avenue. That building was purchased for Kshs 30,000,000/=, which sum was raised as follows: -

a) Kshs 3,600,000/= came from the Indivisible Surplus and Statutory Reserve held by the Appellant;

b) Kshs 8,400,000/= came from members of the Appellant who were deducted Kshs 40/- per month.

c) Kshs 18,000,000/= came from a loan taken from Co-operative Bank.

56. The legal fees, valuation fees and other related charges came to **Kshs 5,100,000/=** which brought the total cost of the building to Kshs 35,100,000/=.

57. During the hearing of the dispute before the Co-operatives Tribunal, the 1st Respondent, who was the Claimant argued that Ufundi House was solely owned by the 15,000 members who made contributions towards its purchase. The award by the majority members of the Tribunal agreed with the 1st Respondent's contention that the building entirely belonged to the members who made contributions totaling to Kshs 2,100/= per member.

58. On 7/8/1998, there was a terror attack on the American Embassy, which was adjacent to Ufundi House. The impact of the terror blast completely destroyed Ufundi House. The empty land on which Ufundi House lay was subsequently purchased by the American Government, where it set up a Memorial Park in honour and memory of those who died during the terror attack.

59. We have reviewed the evidence adduced before the Tribunal as well as the submissions before us in this appeal. It is clear that the finding by the majority members of the Tribunal that the building solely belonged to the Investment Members was not in tandem with the evidence presented to the Tribunal and was therefore wrong. The minutes of the Special Delegates Meeting held on 16/4/1988 at Hilton Hotel are clear that the Appellant contributed **Kshs 3,600,000/=** from its Statutory Reserve Fund. The Appellant invested part of the Statutory Reserve Fund pursuant to the provisions of Section 45(e) of the Co-operative Societies Act Cap 490. Section 47(4) of the Co-operative Societies Act is clear that members cannot claim any specific share of the Reserve Fund. The Appellant also raised legal fees and other expenses to the tune of **Kshs 5,100,000/=**. The total contribution of the Appellant was therefore Kshs 8,700,000/=. Investment Members of the Appellant contributed Kshs 8,400,000/=. The balance of the purchase price was sourced from Co-operative Bank as a loan.

60. The minutes of the Special Delegates Meeting of 16/4/1988 are clear on the source of the funds which went towards the purchase of Ufundi House. The majority members of the Tribunal therefore had no basis in making a finding in the award that Ufundi House was solely purchased by the Investment Members. We therefore find that Ufundi House was owned by both the Appellant and the Investment Members whose exact number can only be ascertained through a painstaking process given that all documents, including the register of members, were destroyed when Ufundi House collapsed during the terror attack on 7/8/1998.

61. The second issue for determination is who owns **Ufundi Co-op Plaza**. During the hearing at the Tribunal, submissions were made to the effect that once Ufundi Co-op Plaza is sold, the proceeds should be shared between the Appellant and the Investment Members on a 50%:50% basis. In the minority decision which was made by the Chairman of the Tribunal, he found that the proceeds of the sale of Ufundi Co-op Plaza should be shared at 60%:40% in favour of the Appellant and Investment Members. The Chairman's justification for this ratio was that the Appellant was instrumental in sourcing for the Kshs 205,000,000/= from the American Government as a replacement for Ufundi House.

62. The Chairman further argued that had the Appellant not pursued the funds from the American Government, the only other option for raising funds would have been to ask the members to contribute so that they could rebuild the collapsed building. We do not agree with the Chairman's reasoning. The Appellant was under an obligation to ensure that its members got funds to purchase another building after the insurers of Ufundi House declined to compensate the Appellant for the collapsed building.

63. As we have found that Ufundi House was co-owned by the Appellant and the Investment Members, it is our duty as the Appellate Court to devise a suitable formula for sharing the proceeds of the sale of Ufundi Co-op Plaza. We have looked at the source of funds which went towards the purchase of Ufundi House. The Appellant raised Kshs 8,700,000/=. The Investment Members raised Kshs 8,400,000/=. This makes the total amount raised by the two Kshs 17,100,000/=. We do not wish to address the issue of the Kshs 18,000,000/= loan from Co-

operative Bank because that loan was repaid through the rental income derived from Ufundi House as confirmed through the evidence presented to the Tribunal.

64. Taking the figure of **Kshs. 17,100,000/=** as the total contribution made by the two parties, the contribution by each party translates to:

i. For the Appellant: **8,7000,000** x 100=50.88%

17,100,000

ii. For the Investment members **8,400,000** x 100=49.12%

17,1000,000

65. The proceeds of the sale of Ufundi Co-op Plaza will therefore be shared at the ratio of 50.88% and 49.12% in favour of the Appellant and the Investment Members respectively.

66. Ufundi Co-op Plaza which was formerly called Garden Plaza was purchased in the year 2000 after Ufundi House was destroyed in the bomb blast of 7/8/1998. The building lies on L.R No. 209/2571. The total purchase price for Ufundi Co-op Plaza was Kshs 232,500,000/=. The money which went towards the purchase price was raised as follows:

i. **Kshs 205,000,000 by the American Government through USAID.**

ii. **Kshs 20,000,000/= which were the proceeds of the sale of the empty plot where Ufundi House used to be.**

iii. **Kshs 7,500,000/= from the tenants cash deposits.**

67. During the hearing at the Tribunal and the appeal before us, there were considerable arguments from the 1st Respondent in this appeal and the Appellant. The 1st Respondent argued that Ufundi Co-op Plaza entirely belonged to the Investment Members but was only registered in the Appellant's name to hold it in trust for the Investment Members. We find that the issue of trust does not arise as the provisions of Section 47 (4) of the Co-operative Societies Act bars any member from claiming any specific share of the Reserve Fund. The Reserve Fund therefore gave the Appellant a right of ownership in its own right and not as a trustee.

68. The Appellant on the other hand argued that Ufundi Co-op Plaza belongs to it as the bulk of the cash which went into the purchase of the building was given by the American Government through USAID. We have reviewed the evidence adduced before the Tribunal and the submissions before us in this appeal. There is no doubt that the bulk of the cash came from the American Government through USAID.

69. The sum of Kshs 20,000,000/= came from the sale of the empty plot where Ufundi House used to be. The rest of the money came from cash deposits of the society's tenants. The press release by the Embassy of the United States of America and the speech by the Chairman of the Appellant dated 3/8/2000 and 7/8/2000 respectively are clear that the purchase of Ufundi Co-op Plaza was a replacement of the destroyed Ufundi House.

70. The findings of the majority members of the Tribunal that the building solely belonged to the Investment Members was therefore wrong. Equally, the argument by the Appellant that Ufundi Co-op Plaza belonged to it solely has no evidential basis. Ufundi Co-op Plaza was a replacement of Ufundi House. The American Government extended the assistance to the Sacco because Ufundi House had been destroyed as a result of a terror attack targeting the American Embassy. Since the destroyed Ufundi House was co-owned by the Appellant and the Investment Members, it therefore follows that Ufundi Co-op Plaza is also co-owned by the Appellant and the Investment Members who include the 1st Respondent's members and the 1st Interested Party.

71. The third issue is whether the decision to sell **Ufundi Co-op Plaza** was proper. There was common ground that the decision to sell **Ufundi Co-op Plaza** was made in an **Annual Delegates Meeting (ADM)** of **Ufundi Sacco**, held on **29/4/2010** at **Meridian Hotel, Nairobi**. **Francis Gitari Ndirangu** who testified as **CW1**, produced and relied on the minutes of the ADM during the trial. His evidence was that the proposal to sell Ufundi Co-op Plaza did not address the interests of the shareholders. He stated that he was not happy with the decision. He added that out of the 1858 delegates who attended that meeting, less than 300 were Investment Members. His position was that a decision of that nature could not be made without representation of the 15,000 members who he contended had contributed money towards the purchase of Ufundi Co-op House. He added that the delegates who sanctioned the sale of the property were members of **Ufundi Sacco** and not members of **Ufundi Investments**.

72. What emerges from the evidence which was placed before the Tribunal is that, although at one point there was a proposal to run the investment portfolio of the Appellant under a different corporate entity, the requisite approval for registration of the contemplated entity was declined. Consequently, the investment portfolio of the Appellant continued to be run by its relevant organs. The supreme decision-making organ of the Appellant was the delegates meeting. There were two categories of delegates meetings, that is the Annual Delegates Meeting (ADM), and the Special Delegates Meeting (SDM). The by-laws of the Appellant contained a clear framework on how delegates to the delegates' meetings were elected.

73. From the record of the Tribunal, there was evidence that decisions affecting the Appellant's affairs, as well as those affecting its investing members, were made by the relevant organs of the Appellant, with the ADM and the SDM being the two supreme organs. Further, there was evidence that the delegates elected to attend the general meetings of the Appellant represented both the general membership as well as the Investment Members of the Appellant. Indeed, **CW1** and a number of the Claimant's witnesses were past delegates to the general meetings

of the Appellant.

74. Although CW1 disapproved the decision reached by the ADM of 29/4/2010, he did not present any evidence to suggest the existence of any other legitimate organ of the Appellant vested with the mandate to deal with the matter. Further, he did not tender any evidence to suggest that the delegates who attended the ADM were not entitled to attend. From the evidence before the Tribunal, CW1 had in the past attended similar delegates' meetings where fundamental decisions affecting all cadres of members of the Appellant were taken by the Appellant.

75. Indeed, the purchase of **Gateway House** which subsequently was renamed **Ufundi House** was done pursuant to resolutions of the delegates meetings held in May 1986 and April 1987 respectively. **CW1** attended the Annual Delegates Meeting of 25/4/1987 in his capacity as delegate No 44 representing Kirinyaga District. He similarly attended the special delegates meeting of 16/4/1988 as delegate number 78 representing Kirinyaga District. Similarly, the decisions to sell **Ufundi House** and the one to purchase **Ufundi Co-op Plaza** were made through meetings of appropriate organs of the Appellant.

76. Given the above evidence, we do not think CW1 was justified in faulting the decision made by the Annual Delegates Meeting held on 29/4/2010. In our view, the fact that CW1 did not attend the meeting as a delegate cannot be a proper basis for faulting the resolutions reached in the meeting. Similarly, the fact that CW1 held a different view from the position taken by the delegates cannot be a proper basis for faulting the decision taken in the ADM.

77. Consequently, it is our finding that the decision to dispose **Ufundi Co-operative Plaza** was properly made in a proper Annual Delegates Meeting of the Appellant held on 29/4/2010 at Meridian Hotel, Nairobi. We do not find any impropriety in the decision. We now turn to the fourth issue.

78. The fourth issue relates to the appropriate orders which should be made in relation to the existing encumbrance registered against Ufundi Co-op Plaza. We have examined the title relating to this land. We have also examined the documents presented to this court during the proceedings in this appeal. On 20/12/2001, the property was charged to **K-Rep Bank Limited** to secure a loan of Kshs 100,000,000/=. The record of the Tribunal indicates that on 30/5/2012 the Tribunal issued an interlocutory injunction restraining dealings with Ufundi-Co-op Plaza. There is, however, no evidence indicating that the injunctive order was duly registered against the title it was intended to preserve.

79. It does emerge from a perusal of the title that, on 9/12/2013, a charge was registered against the title to secure a loan of Kshs 160,000,000/= which the Co-operative Bank (the 2nd Interested Party) advanced to the Appellant. There is also a certificate of registration of charge dated 11/12/2013 issued by the Commissioner of Co-operatives, indicating that on 25/11/2013, a charge was created by the Appellant in favour of the Co-operative Bank of Kenya.

80. The conclusion we make from the totality of the above evidence is that there is a subsisting charge registered against Ufundi Co-op Plaza. The charge was in place at the time the Tribunal rendered its award. Neither the majority nor the minority Tribunal members addressed the issue of the charge.

81. In his oral submissions before us, Mr Roy Mwenesi, counsel for the 2nd Interested Party, submitted that the 2nd Interested Party granted facilities to the Appellant in 2013 in the sum of Kshs 160,000,000/=. At the time of making the oral submissions on 23/9/2021, the debt owed to the 2nd Interested Party stood at Kshs 254,991,648/=. Further, the 2nd Interested Party presented evidence indicating that through a deed of assignment dated 25/11/2013, the Appellant assigned to the 2nd Interested Party all the rental income realized from Ufundi Co-op Plaza.

82. As at the time the case giving rise to this appeal was lodged in the Tribunal, the charge in favour of K-Rep Bank Limited subsisted. None of the parties to this suit challenged or questioned the indebtedness of the Appellant to the chargees. From the evidence of DW1 the loan owed to K-Rep Limited together with other loans were taken over by the Co-operative Bank.

83. We have reflected on the appropriateness of remaining silent on the issue of the charge, like the Tribunal elected to do. In our view, we do not think it would be appropriate not to pronounce ourselves on the charge. Our view is informed by various reasons. First, **Section 81(2) of the Co-operative Societies Act** gives us wide jurisdiction, including jurisdiction to exercise any of the powers which could have been exercised by the Tribunal in the proceedings giving rise to this appeal. Further, the Act gives us jurisdiction to make such other order as we may deem just. Considering the fact that this dispute has been the subject of litigation for the last 11 years, it is our view that it would not be in the best interest of justice to leave the issue relating to the charge unresolved.

84. The second reason why we think it is appropriate to dispose of the issue relating to the charge is that none of the parties challenged the charge, notwithstanding the fact that it existed as an encumbrance created initially in favour of K-Rep Limited and subsequently in favour of the 2nd Interested Party. Thirdly, no final order can be properly made by us in complete adjudication of the dispute in this appeal without appropriate orders relating to the existing encumbrance or charge.

85. The evidence before us and before the Tribunal indicate that the charge in favour of K-Rep Limited was created in 2001. The Co-operative Bank of Kenya subsequently took over the loan. The encumbrances in favour of the two banks were never challenged.

86. **DW1-Judith Mango**, who was the chairlady of the Appellant at the time of trial testified that the loan from K-Rep was sanctioned by the Annual Delegates Meeting and was authorised by the Commissioner of Co-operatives. She added that the destruction of Ufundi House led to the destruction of the Appellant's records and made it impossible to recover loans which the Sacco members, including the Investment Members, had taken from the Appellant. No dividends were forthcoming, and consequently, membership of the Appellant started dwindling. Withdrawing members demanded to be paid their savings. They sued and obtained decrees against the Appellant. This is what necessitated the borrowing by the Appellant.

87. Against the above background, it is our view that to fully dispose of this dispute, appropriate provision should be made in relation to the existing encumbrance. The provision will be that disposal of Ufundi Co-op Plaza will be subject to redemption of the title by clearing the outstanding loan amount owed to the Co-operative Bank. Further, all the rental income deposited in court shall be applied towards defraying the bank loan.

DISPOSAL ORDERS

88. In light of the above findings, we allow this appeal in the following terms:-

a) The Award of the Co-operative Tribunal in Nairobi Tribunal Case Number CTC 375 of 2010 dated 9/12/2014 is hereby set aside and replaced with the orders hereunder.

(i) It is hereby declared that L.R. No. 209/2571 together with the developments thereon (Ufundi Co-op Plaza) is co-owned by Ufundi Savings and Credit Co-operative Society Limited (the Sacco) on one part and the Investing Members of the Sacco who contributed money towards the purchase of L.R. No. 209/4291 and the developments thereon (Ufundi House) on the other part in the ratio of 50.88% to 49.12% respectively.

(ii) The Sacco is hereby allowed to dispose L.R. No. 209/2571 together with the developments thereon (Ufundi Co-op Plaza);

(iii) The proceeds of the sale shall first be utilised to redeem the title over L.R. No. 209/2571 by paying the outstanding loan owed to the Co-operative Bank of Kenya Limited and the net balance shall be shared out in the ratio of 50:88% to 49:12% in favour of Appellant and Investment Members respectively.

(iv) The portion of 49.12% of the sale proceeds belonging to the Investment Members shall forthwith be paid to the Sacco members who contributed money for the purchase of L.R. No. 209/4291 (Ufundi House).

(v) Parties shall bear their respective costs relating to Nairobi CTC No. 375 of 2010.

b) All the rental income deposited in court shall be forthwith released to the Co-operative Bank of Kenya Limited towards redemption of the title charged to it.

c) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2021.

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E. OBAGA

JUDGE

.....

K. BOR

JUDGE

.....

B.M. EBOSO

JUDGE

In the presence of: -

Mr Gitonga Muriuki and Ratemo Amenia for the Appellant

Mr G Mahinda for the 1st Respondent

Mr N Amollo, Mr Kirimi & M/s Alice Oeri for the 2nd Respondent

Ms.Wanyama holding brief for Mr Walubengo for the 1st Interested Party

Mr Mwenesi for the 2nd Interested Party

Mr Ratemo Amenity holding brief for Ms Kwamboka for the 3rd Interested Party

Court Assistants: John and Vincent