REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 13 OF 2020

CONSOLIDATED WITH NOS. 14, 15 AND 16 OF 2020

ALFAYO NYAIRO.....APPELLANT

VERSUS

NYABOMITE FARMERS CO-OP SOCIETY LIMITED.....RESPONDENT

{Being an appeal against the Ruling of Hon. B. Kimemia, Hon. F. Terer & Hon. P. Gichuki

both of the Co-operative Tribunal at Nairobi dated and delivered on the 23rd day of July 2020

in Nairobi Co-operative Tribunal Case No. 229 of 2019}

JUDGEMENT

This is an appeal against the ruling of the Co-operative Tribunal dated 23rd July 2020 which struck out the respondents' **Statements of Defence** all dated 30th May 2019 and thereby adopted the surcharge orders of the Commissioner for Co-operative Development against them. In striking out the **Statements of Defence** the Tribunal found it a fact that there existed a surcharge order(s) against the appellants; that the claimant, now the respondent herein, had moved the Tribunal for adoption of the order by way of entry of summary judgement and all that was required of the tribunal at that point was to ascertain whether there was indeed a surcharge order made under **Section 73** of the **Co-operative Societies Act** and once satisfied that there was an order to adopt it as provided in **Section 75 (1)** of the **Co-operative Societies Act.** It was the Tribunal's finding that in that respect it was merely exercising its original jurisdiction and that a party aggrieved by the Commissioner's order for a surcharge was required to approach the Tribunal by way of appeal as provided in **Section 74** of the **Co-operative Societies Act** but not by way of a Statement of Defence as the appellants had done. It was for that reason that the Tribunal struck out the Statements of Defence and entered summary judgement for the respondent against the appellants in the surcharged amounts together with interest and costs.

Being aggrieved the appellants filed separate appeals which were subsequently consolidated with consent of Counsel for the parties. The grounds of appeal are: -

> **"1. THAT the Tribunal erred in law and in fact in striking out the Appellant's Defence.**
>
> **2. THAT the Tribunal erred in law and in fact in entering summary against the Appellant when there was a valid Defence on record.**
>
> **3. THAT the Tribunal erred in law and in fact in entering judgement against the Appellant when there was a substantive case pending between the parties herein.**
>
> **4. THAT the Tribunal decided the case against the overwhelming evidence on record which could not allow the suit to be dealt with summarily."**

By these appeals it is urged that the orders made by the Co-operative Tribunal on 23rd July 2020 be set aside and the **Statements of Defence** filed by the appellants be reinstated and the proceedings before the Tribunal be heard on merits.

The appeals proceeded by way of written submissions. The appellants were represented by Mr. GJM Masese Advocate and the respondents by Mr. Bw'oigara Getange Advocate.

Learned Counsel for the appellants submitted that despite that the appellants' **Statements of Defence** were filed before the respondent applied for summary judgement and despite that the appellants had also filed affidavits in opposition, the Tribunal proceeded to strike out their defences and condemned them to pay the surcharged amounts without giving them a hearing. Counsel submitted that the appellants were never issued with notices of intention to surcharge them and that such notices were also not produced in court as required. Counsel submitted that the appellants had also challenged the jurisdiction of the Tribunal to hear the dispute and that they had also put it on notice that there was a High Court case challenging the actions taken by the Commissioner including the surcharge and that the suit in the High Court was yet to be determined. Counsel contended that the appellants had obtained stay in the High Court and the Tribunal was bound to respect the status quo awaiting the outcome of the High Court suit against the Commissioner. Counsel emphasized that the poignant issue raised in the appellants' defence was the suit in the High Court between the appellants and the Commissioner which suit is still pending. Counsel further submitted that the other issue is that it is not clear how the sums of the surcharge arose and that the appellants dispute that they were served with a notice to surcharge and also deny owing the surcharged amount or any part thereof and hence the same must be proved. Counsel contended that the appellants moved to the High Court as soon as the Commissioner issued the surcharge and it was not proper for the Tribunal to proceed before the High Court suit was determined or to rule against the appellants merely because they had not appealed against the surcharge within thirty days. Counsel contended that the appellants cannot be punished because they did not appeal to the Tribunal as they were already in the High Court. Counsel urged this court to uphold the cardinal principle in law that **a party should not be condemned unheard and that a party who wants to be heard must be heard.** Counsel urged this court to allow these appeals and order that the matters before the Tribunal be heard on merit.

For the respondent, it was submitted that this appeal(s) has no merit because upon the surcharge the appellants should have appealed to the Tribunal as provided in **Section 74 of the Co-operative Societies Act** but not come directly to this court as they did by filing Nyamira HCCC No. 1 of 2018. To support this argument Counsel for the respondent relied on the case of **Wakenya Pamoja Sacco Society Ltd v Stephen Ogamba [2008] eKLR** wherein Musinga J (as he then was) stated: -

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament that procedure should be strictly followed."**

Counsel submitted that the Commissioner of Co-operatives Development properly invoked his powers as provided under **Section 58** read together with **Section 73** of the **Co-operative Societies Act** and instituted an inquiry into the affairs of the respondent; that an inquiry was diligently conducted by the officers appointed by the Commissioner and the recommendations were subsequently adopted in a Special General Meeting as provided in the law. Counsel submitted that in effect, the appellants were found to have stolen, embezzled and/or misappropriated the respondent's funds and were surcharged under **Section 73** of the **Co-operative Societies Act.** That thereafter the respondent so as to enforce the surcharge orders filed the applications before the Co-operative Tribunal and obtained the orders being challenged in these appeals. Counsel for the respondent submitted that these appeals are an extreme abuse of the court process and that his argument is fortified by the provisions of **Section 74** of the **Co-operative Societies Act** which stipulates that once the Commissioner surcharges an officer of a Co-operative Society the proper course of action is for the aggrieved party/officer to appeal to the Tribunal and only once the party appealing is dissatisfied with the decision of the Tribunal can they appeal to the High Court. Counsel contended that the appellants have never challenged their surcharge before the Co-operative Tribunal in the manner provided in **Section 74 (1)** of the **Co-operative Societies Act;** that instead they moved this court in Nyamira HCCC No. 1 of 2018 and unprocedurally sought to quash the decision of the Commissioner made under **Section 58 (4)** of the **Co-operative Societies Act** to remove them from office. Counsel submitted that the High Court suit Nyamira HCCC No. 1 of 2018 was referred to the Co-operative Tribunal by the court and that the Tribunal set aside the interim orders issued by the court. Counsel pointed out that the appellants have never prosecuted the said suit. Counsel stated that the decision of the Tribunal to strike out the **Statements of Defence** filed by the appellants in the applications for summary judgement was guided by **Section 75 of the Co-operative Societies Act**. To buttress this submission Counsel cited the case of **Republic v the Commissioner for Co-operative Development NBI JR case No. 28 of 2012.** Counsel submitted that the Tribunal was totally right in striking out the defence and entering judgement as it did. He urged this court to dismiss these appeals with costs to the respondent.

I have carefully considered the rival submissions, the proceedings in the Co-operative Tribunal, the impugned ruling and the law. The genesis of these appeals (now consolidated) are surcharge orders slapped upon the appellants by the Commissioner for Co-operatives following an inquiry conducted under **Section 58** of the **Co-operative Societies Act.** That the appellants were officers of the Respondent Society is not disputed. The Commissioner's power to surcharge officers of a Co-operative Society are provided for in **Section 73 of the Co-operative Societies Act** which states: -

> **"(1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society—**
>
> **a. has misapplied or retained or become liable or accountable for any money or property of the society; or**
>
> **b. has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.**
>
> **(2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.**
>
> **(3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted."**

What follows upon the making of a surcharge is provided at **Section 74 of the Co-operative Societies Act** which states that: -

"(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law."

The wording of **Section 74** is plain and unambiguous and does not require any interpretation. **Section 75 (1) of the Co-operative Societies Act** requires the Commissioner to file the surcharge order made pursuant to **Section 73** at the Tribunal and the Section provides that without prejudice to any other mode of recovery, the sum shall be a civil debt recoverable summarily. My reading of **Section 75 (1)** of the **Act** is that in the event that there is no appeal or if appeals are lodged and lost the surcharged amount becomes a civil debt recoverable summarily and cannot be defended at that point. As I have already stated the language of the provisions regarding **surcharge** is plain and unambiguous. Once the Commissioner makes an inquiry whether on his own motion or on the application of a liquidator, creditor or member of a society and he considers it appropriate to make an order for a surcharge the person affected can only have the order set aside upon an appeal first to the Co-operative Tribunal within thirty days and if not satisfied with the decision of the Tribunal to the High Court within thirty days on matters of law. The procedure is not only simple but clear. In essence it leaves no doubt that the law contemplated that one must first appeal to the Co-operative Tribunal before coming to the High Court. The aggrieved party only comes to the High Court by way of an appeal against the decision of the Tribunal but not otherwise. The appeals herein are not against the decision of the Tribunal sitting on appeal against the order of the Commissioner as provided in **Section 74 (1)** but rather appeals against the Tribunal's decision to strike out their statements of defence. Apparently the appellants did not appeal against the surcharge to the Tribunal. Instead their first action in the matter of the surcharge was by way of a suit Nyamira HCCC No. 1 of 2018 where they sought to have the Commissioner of Co-operatives restrained from implementing the resolution of the Annual General Meeting to remove them from office. Simultaneously with the plaint in that suit they filed a Notice of Motion dated 15th October 2018 in which they urged this court to issue an injunction restraining the Commissioner of Co-operatives (the defendant in that suit), his agents and or servants from in any way removing them from the management committee of the Society until the suit (Nyamira HCCC No. 1 of 2018) was heard and determined. Upon considering the submissions by both parties this court considered that Notice of Motion and granted the orders. This court was however careful in the manner it crafted the order given that it had considered the dispute to be one that broadly concerned the business of the society and referred it to the Tribunal for hearing and determination. In granting the order this court ordered that ***"…..the respondent is hereby restrained from in any way removing the applicants from the management committee of the Society pending the hearing and determination of this suit"*** and being alive to the fact that the appellants' terms were elective and hence limited this court continued to state ***"For the avoidance of doubt, that period shall not extend beyond the period within which the applicants' term of office comes to an end."*** Thereafter on November 2018 the appellants brought another Notice of Motion in which they urged this court to recall Nyamira HCCC No. 1 of 2018 from the Tribunal and to restrain the interested parties from assuming office in the management of the affairs of the respondent society herein on the ground that the Tribunal did not have jurisdiction to hear and determine the suit. Upon hearing the parties, I declined to recall the file but reiterated the order granted on 1st November 2018 but was careful to direct that the same would remain in force unless set aside by consent of the parties or by the Co-operative Tribunal. Counsel for the respondent has informed this court that the order was set aside by the Tribunal. It therefore no longer exists and it is a misconception for Counsel for the appellants to brief the appellants that the injunction against the Commissioner of Co-operatives persists. Counsel must also be alive to the provisions of **Order 40 rule 6** of the **Civil Procedure Rules** which states: -

"6. Where a suit in respect of which an interlocutory judgement has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

Moreover, this court brought clarity to the order issued in Nyamira HCCC No. 1 of 2018 in a ruling delivered in Nyamira HC Miscellaneous Application No. 40 of 2019 in which these very appellants sought similar orders to recall Nyamira HCCC No. 1 of 2018. In that ruling this court made it clear that it would not recall the suit from the Co-operative Tribunal because it was the best forum, so to speak, to adjudicate the dispute and for that reason the appellants must pursue it there. I agree with Counsel for the respondent that the appellants have been hell bent in their abuse of the process of this court in an endeavour to set aside the surcharge by the Commissioner of Co-operatives. This despite the clear provisions of **Section 74 (1) & (2) of** the **Co-operative Societies Act** which require that if they were aggrieved with the decision of the Commissioner they should have appealed to the Tribunal first and only once they felt aggrieved with the tribunal's decision could they appeal to this court. Filing a civil suit against the Commissioner and a miscellaneous application as they have done is certainly not the kind of appeal envisaged by **Section 74 (1)** of the **Co-operative Societies Act.** Neither is filing **Statements of Defence** at the Tribunal as they did. Indeed, **Section 75 (1)** of the **Act** provides that once a surcharge order is made it becomes a civil debt recoverable summarily this of course being only subject to any decision of the Tribunal in the event an appeal was made or subject to the decision of the High Court if the second appeal on issues of law was made thereto and it succeeded.

Further, there is now a long line of cases where the courts have upheld the doctrine of exhaustion which is simply that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure must be followed strictly before parties come to *court (see* ***Wakenya Pamoja Sacco Society Ltd v Stephen Ogamba [2008] eKLR).*** In the case of **East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others [2015] eKLR** the court stated: -

"72. It is trite law where a statute establishes a dispute resolution procedure, then the procedure must be strictly followed in resolving the dispute.

73. …….

74. …….the principle that where an institution or a statute has established a dispute resolution procedure then that process must be strictly followed or applied is of universal application. The mere fact that the constitution is cited or invoked is not sufficient to qualify the matter to be a Constitutional matter and confirm a license to High Court to inquire, investigate, arbitrate surcharge or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by the constitution or statute.

75. That though the court has jurisdiction to deal with plaintiff's complaints it is premature as they did not strictly follow

the church constitution providing for dispute resolution mechanism. The plaintiffs having failed to pursue their grievance as provided in the church constitution they should be allowed to proceed with their dispute resolution mechanism as members of church before pursuing claim before a court of law. I find the plaintiff's acted in violation of the laid down procedure in dispute resolution procedure by the constitution of the petitioner's church and as such I am satisfied all civil suits filed concerning the petitioner church affairs to be improperly before courts."

In the case of **Council of County Governors v Lake Basin Development & 6 others [2017] eKLR** the court stated: -

"20. I am fully aware that where a specific dispute resolution mechanism is prescribed by the constitution or a statute, parties should to (sic) resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court."

It is my finding that the case before me is no different and the appellants should have exhausted the procedure set out in **Section 74** of the **Co-operative Societies Act** before coming to this court. My reading of **Section 75 (1) of the Act** is that if there has been no appeal the Tribunal automatically enters judgement in terms of the surcharge and it would be too late in the day for a party to try and intercept the order at that point. Counsel for the appellants allege that they were not served with notices to surcharge them yet in their application at the Tribunal to set aside the surcharge their averment was that the Commissioner had ordered the inquiry which culminated in the surcharge and also that the inquiry report had been presented to the Society's General Meeting on 26th September 2009 and was unanimously adopted with recommendations for its implementation. Moreover, in their Notice of Motion dated 15th October 2018 in Nyamira HCCC No. 1 of 2018 they alleged to have been the ones who called for and provided evidence for the probe or inquiry that culminated in the decision of the Commissioner to have them removed. Their removal was, as a matter of fact, the basis of their suit against the Commissioner of Co-operatives in Nyamira HCCC No. 1 of 2018 and it is therefore misleading for them to contend that they were not aware of the surcharge. In any event the issues they raise here are what they should have raised in an appeal to the Tribunal.

I think that I have said enough to demonstrate the appeals before this court are devoid of merit and the orders sought cannot be granted. In the premises the appeal(s) are dismissed with costs to the respondent. **(This judgement shall apply to all the appeals as consolidated).** It is so ordered.

SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 1ST DAY OF JULY 2021.

E. N. MAINA

JUDGE