



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.10 OF 2018

PHILIP MUIRURI NDARUGA.....APPELLANT

-VERSUS-

GATEMU HOUSING CO.LTD.....RESPONDENT

(Being an appeal from the Judgment of Hon. W. Kagendo, CM, delivered on 16th February, 2018 in Nyeri CMCC No13 of 2002)

JUDGMENT

The only issue for determination is whether the appellant's counter claim suit should be heard by the Co-operative Tribunal under the Co-operative Societies Act Cap 490 Laws of Kenya or by a magistrate with jurisdiction to hear and determine Employment and Labour relations matters under the Magistrates Act.

Background

As noted by the Hon. W. Kagendo CM in her judgment dated 16th February 2018. This case has had a long, tortuous and troubled history.

The respondent herein filed a suit **Nyeri CMCC 13 of 2002 Gatemu Housing Cooperative Limited vs Philip Mururi Ndaruga** by plaint dated 2nd January 2002 (although the court stamp shows it was received on 1st January 2001 most unlikely as 1st January is always a public holiday in the Republic of Kenya).

The defendant filed a defence dated 13th February 2002 or 14th February 2001 (again the court stamp). On 29th October 2002 he filed an application to amend the defence, to include a counter claim. This was allowed by an order of 17th June 2003.

He filed the amended defence on 24th June 2003 through S. K. Njuguna & Co. Advocates.

The plaintiff filed reply and defence to counter claim on 27th June 2003.

The claim

The plaintiff's claim was that the defendant was its employee. That in the years 1998, 1999 and 2000 at Nyeri town due to his dishonesty the plaintiff suffered a shortage of Kshs. 371,853.70/- which had been entrusted to him as the plaintiff's employee for receipt, custody and payment- that he had admitted the dishonesty and loss in writing but had refused to settle.

The plaintiff prayed for judgment against the defendant for;

1. Kshs. 371,853/70.
2. Costs of the suit.
3. Interest on (1) and (2) at court rates.

In his defence and counter claim the defendant denied the plaintiff's claims and put plaintiff to strict proof hereof. He prayed that the suit be dismissed with costs.

His counter claim was that the plaintiff had employed him from 1994 to May 2001 and had been under paying him. He claimed house allowance and gratuity all totaling to Kshs. 252,972/00 plus costs and interest at court rates. In support of his claim he annexed an analysis of the claim to his plaint.

In reply to defence and counter claim the plaintiff denied the counterclaim averring that the defendant having been found to be dishonest, was not entitled to gratuity, secondly that the claim was time barred and ought to be struck out having been filed out of time and without leave.

Meanwhile The defendant was charged in Nyeri CMC Criminal Case No.2743/2007. He was tried, found guilty and convicted on 2 counts for the offences of stealing by clerk contrary to section 281 of the Penal Code of the total sum of Kshs.371,833/-. On 3rd April 2012 E. K. Makori SPM (as he then was) sentenced him to pay fine of Kshs. 100,000/- on the first count in default 1 year imprisonment and Kshs.50,000/- in default 1 year imprisonment on the 2nd count. 8th August 2012, the civil suit was heard exparte on and a judgment delivered on 19th September 2012 allowing the plaintiff's claim and dismissing the defendant's counter claim.

The appellant herein appealed against both Judgments;- In Nyeri High Court Criminal Appeal 76/2012 his appeal was allowed and the conviction was quashed and sentence set aside.

In Nyeri High Court 2012 in Civil Appeal 73/12 his appeal was allowed on 20th September 2016 and the matter was remitted to the Lower court for hearing of the matter afresh as a defended case.

On 24th April 2017 Mr. Wahome counsel for the plaintiff withdrew the plaintiff's claim, leaving only the counter claim.

The Counterclaim

The counterclaim came for hearing before the Hon. Kagendo CM on 4th October 2017 Mr. Wahome raised a preliminary Objection to the effect that the court had no jurisdiction as the matter fell within the ambit of s.76 of the Cooperative Societies Act. The learned magistrate declined to determine the matter on that issue alone and directed that the counterclaim be heard and she would make a determination on both issues.

She heard the defendant.

Relying on the case of **Kieni Farmers' Co-operative Society vs. Rose Wanjiru Murage** the learned magistrate found she had no jurisdiction to hear the matter, dismissed the counter claim and ordered that each party to bear its own costs.

It is against that judgment and orders that the appellant brings this appeal.

The Appeal

In the Memorandum of Appeal, the appellant sets out 6 grounds.

- 1. The learned trial magistrate erred in law and fact in observing that this court has no jurisdiction in hearing my counter claim without referring the case with records of the original trial to the relevant court or tribunal.**
- 2. The learned trial magistrate erred in law and fact in allowing the withdrawal of the plaintiff's suit without taking into consideration costs in favour of the appellant as provided for in the rules pertaining to withdrawal/discontinuance of suits and particularly that the appellant has been in court for the last fifteen years and has served civil jail for six months and has been tried for the same in of the criminal case No.2743/07 which was finally defeated.**
- 3. The learned trial magistrate erred in law and the orders of the High Court judgment for retrial of the case sighting lack of jurisdiction which in fact the appellant have confirmed otherwise.**
- 4. The learned trial magistrate erred in law and fact in dismissing the counter claim considering there was a court order to produce audited reports in 2007 which was ignored by the respondents raising confusion as to the authority of the courts.**
- 5. The learned trial magistrate erred in law and fact in agreeing with the respondent argument that jurisdiction can be raised at any time without citing the relevant law to the effect given that the respondents are the ones who brought appellant to the magistrate court in the year 2002- fifteen years ago.**
- 6. The learned trial magistrate erred in law and fact in not properly analyzing the tired and costly journey the appellant has been subjected to by the respondent i.e. from civil suit to criminal to jurisdiction to withdrawal without costs, etc against the spirit of dismissing applications on technicalities or want of form that does affect the substance of the application.**

The appellant filed written submissions dated 15th November 2018. The appeal was argued orally.

The appellant's arguments

He submitted that he had filed his Record of Appeal together with Gazette Notice No.6024/2018 which gives Magistrates jurisdiction to hear

and determine employment matters. He argued further that this case was not suitable for the tribunal as argued by counsel for the respondent as he was the sole employee and was not unionized.

Respondent's argument

Mr. Wahome Gikonyo argued that there was no dispute that the appellant was an employee of the defendant. That the court found it had no jurisdiction and downed its tools and dismissed the appellant's counter claim.

He read from s.76 (1) (b) of the Co-operative Societies Act with regard to disputes between a cooperative tribunal and its officer and I quote

“any officer of the society it shall be referred to the tribunal”

That the appellant was an officer of the respondent and hence this dispute would have to be referred to the Co-operative Tribunal under s.76 (1) (b) of the Act. That the trial court was bound by the decision of Mativo J.

That the Gazette notice 6024/18 giving magistrates jurisdiction had come long after the horse had bolted on 22nd June 2018 after the decision of the trial Magistrate on 16th February 2018 that it relates to Employment and Labour Relations matters and not tribunal matters.

That the gazette notice would not apply retrospectively. He sought dismissal of the appeal.

Appellant's Response

In response the appellant argued that the gazette notice applied to cases of employment and not the business of co-operative societies. That the gazette notice came to rescue employment matters that had stayed for too long in the courts because magistrates' courts are more accessible.

He urged the court to allow the appeal so that his case would be heard on its merits.

The Law

Section 76 (a) of the Co-operative Societies Act provides for Disputes in the following terms:-

76. Disputes

(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

My plain reading of the section is that where there is a dispute concerning the business of a Co-operative Society- among members between members, between the Society and any other Co-operative Society – then it will fall with the Tribunal.

s.76(2) defines the disputes: -

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority. The law also defines a member (s) as

“Includes a person or a Cooperative Society joining the application from the registration of a society, and a person or cooperative society admitted to membership after registration in accordance with the by-laws”.

An officer is defined as

“.....a chairman, vice-chairman, secretary, treasurer, committee, employee or any other person empowered under any rules

made under this Act, or by –laws of a Cooperative Society to give directions with regard to the business of the society”

The Employment and Labour Relations Court Act No.20 of 2011 defines an employee as

“any person employed for wages or a salary and include an apprentice andlearner”.

The jurisdiction of the Employment and Labour Relations court is set out under s.12 of the Act to include

“Disputes relating or arising out of employment between an employer and an employee”.

The Magistrate’s Act No.26/2015 provides at s.11 (b) that the court may subject to its pecuniary jurisdiction hear and determine claims relating to employment and Labour relations.

In the gazette notice dated 22/6/2018 the Chief Justice acting under powers confirmed to him under ss.2a(3) and 4 (b) of the Employment and Labour Relations Court Act 2011 appointed all the Senior Resident Magistrates and above as special magistrates to hear and determine among others-

“Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act) where employees gross monthly pay does not exceed Kshs.80000/- as commenced and continued in accordance with the Employment and Labour Relations Court (procedure) Rules, 2016”.

Case Law

I have read the case **Kieni Farmers’ Co-operative Society Limited Vs.Rose Wanjiru Mwangi (2016)eKLR** where Justice Mativo was of the view that s.76(1) covered an officer of the Society and therefore any dispute arising between the officer and the Co-operative Society would have to be referred to the Co-operative tribunal. This was based on his finding as to the meaning of the “business of the society” citing several authorities I am in agreement with the definition of “Business of the Society” by the Judge **In Bernard Mugo & Others Vs. Kagaari S.Farmers Coop Society & 4 others (2015)eKLR-**

“s.4 of the Act defines the business of the society as that which has the object of providing the welfare and economic interest of its members”

Although the plaintiffs were registered members of the society, the defendant had suspended them for unexplained reasons. The court was of the view that the dispute related to infringement of the rights of the plaintiffs and did not fall with the ambit of s.76 (1) and (2) of the Cooperative Societies Act.

However, with due respect, I am of a different view. The Cooperative Societies Act defines the **parties** and **the nature of the dispute** that is to be referred to the Tribunal.

The parties have to be members, past members, persons claiming through members, past members, deceased members, and the dispute? – among members, past/deceased members and the society, its committee or any officer of the society- between the society and any other co-operative society.

My wholistic reading of s. 76(1) (b) is as follows:

If any dispute concerning the business of a co-operative society arises between members, past members or deceased members, and the society, its Committee or any officer of the society;

The dispute referred to herein is the one arising out the conduct of business of the society. The dispute could be between members themselves, it could be between past or deceased members and the society, it could be between members and the society’s committee and it could be between these members and any officer of the society. I do not understand that provision of the law to mean an employment and labour relations dispute between the society and its officer.

The nature of the dispute is also defined to fall in the following categories;

A claim by the co-operative society for any debt, demand due to it.

A claim by a member/nominee/personal representative for any debt/demand due from a co-operative.

A claim by a Sacco Society on issues of licencing. There is no mention of employment and labour disputes.

There is a reason why the Constitution Article 162 (2) (a) set up Employment and Labour Relations courts with specific jurisdiction to deal with those issues.

If the intention was to let the Co-operative Tribunal deal with Employment and labour relations issues, the law which came later would have exempted to issues of employees of co-operative from the jurisdiction of the labour relations court.

My view is that it is clear from the wording of s. 4(1) (a) Co-operative Societies have specific businesses in the interest of the economic welfare of their members- coffee, tea, money, milk and members join because they have a specific relationship with that society- employees cannot be lumped together with the members as the relationships are completely different. In addition the Constitution and the law has created a specific forum to deal with all Employment and labour Relations disputes.

I therefore respectively disagree with the learned Judge's interpretation on the application of s.76 of the Co-operative Societies Act to 'officers' of cooperatives with regard to employment related disputes. I am therefore of the view that the Appellant's claim is an Employment and Labour Relations claim and ought to be heard and determined by the Employment and Labour Relations Court.

Has the Horse Bolted?

It was argued for the respondent that the appellant's counterclaim had been overtaken by events, and was brought without leave.

The appellants claim has been in the system since the year 2003 as a counter claim. It was first dismissed for non -attendance, resinated on appeal and dismissed on the basis that the learned magistrate did not have jurisdiction as at 16th June 2018.

However as at that time the substantive law conferring jurisdiction to magistrates was in force having commenced on 2nd January 2016 i.e. the Magistrate's Courts Act – the only thing that had not happened was the gazettelement of the magistrates to hear the matters – a purely administrative act. That in itself does not take away the appellants right to hearing and determination of his claim on its own merit as provided for under Article 50(1) of the constitution- the right to have his dispute by the application of the law, in a fair and public hearing

In **Speaker of the National Assembly vs. James Njenga Karume (1992)eKLR (2008) 1KLR (EP) 428** the court stated

“Where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed”.

We have the law. There is a procedure under that law. Matters that were filed before that law and still in the court system are being heard and determined under that law and that procedure. The appellant's claim cannot be the exemption. A procedural technicality should be allowed to unseat him from the seat of justice. That is the edict of e Article 159 Constitution. He has a claim which requires to be heard on merit.

On issue of costs

Upon the plaintiff withdrawing its claim in the lower court, having instituted the suit in the first place, costs followed the event. The appellant who was the defendant, and who had responded to the claim, deserved his costs.

Conclusion

The appeal is allowed.

The Appellant will have costs of the appeal and half the costs of the case below.

The matter is remitted back to the Chief Magistrate's court for hearing by magistrate with jurisdiction except Hon Kagendo CM.

Dated, signed and delivered in open court at Nyeri this 4th April, 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Appellant

Ms. Miriti for Mr. Wahome for respondent

The Lower Court file be returned to the CM Civil Registry.

Mention on 6th May, 2019 before the Chief Magistrate for directions.

Judge