



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 38 OF 2019

RAPID P. KENYA LIMITED.....APPLICANT

VERSUS

NITUNZE SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED(In Liquidation).....1ST RESPONDENT

OFFICIAL LIQUIDATOR NITUNZE SACCO LIMITED)....2ND RESPONDENT

COMMISSIONER OF CO-OPERATIVE SOCIETIES.....3RD RESPONDENT

VALLEY AUCTIONEERS.....4TH RESPONDENT

RULING

1. The applicant herein filed a miscellaneous application under certificate of urgency and by way of Notice of Motion dated 15th March 2019 seeking *inter alia* injunctive orders against the respondents from selling by way of auction property known as LR. No. 8056/322 and further orders declaring that the applicant is a creditor of the 1st respondent and that the liquidation of the 1st respondent should not proceed to the exclusion of the applicant.

2. On 20th March 2019, the court issued temporary injunctive orders *inter alia* restraining the respondents from selling by way auction property known as LR. No. 8056/322 and liquidation of the 1st respondent to the exclusion of the applicant, pending the hearing and determination of the application.

3. The applicant filed another application under Certificate of Urgency and dated 27th March 2019 by way on Notice of Motion seeking temporary injunctive orders pending the hearing and determination of the application *inter alia* that the respondents be restrained from utilizing proceeds of the sale of property L.R No. 8056/322 which was done in a public auction carried out on 19th March 2019. The Court granted the prayers of the applicant in an order dated 28th March 2019.

4. The respondents replied to the application by way of a replying affidavit sworn on 18th April 2019 by Joel Kipsanai Barbengi for and on behalf of the joint liquidators of the 1st respondent. The respondents then filed a notice of preliminary objection on 23rd April 2019 and dated 18th April 2019 on the following grounds THAT:

a) The court lacks jurisdiction to entertain the matter

b) There was no challenge or appeal to the revocation of deposit-taking license of the 1st respondent pursuant to section 27(5) of the Sacco Societies Act No. 14 of 2008

c) There was no appeal against the cancellation/liquidation order dated 29th June 2018 and the variation of liquidation order dated 10th July 2018 in respect of the 1st respondent pursuant to section 61(1), 62 of the Societies Act, CAP 490

d) The alternative remedy or settlement of dispute mechanisms under the provisions of the Sacco Societies Act No. 14 of 2008 and the Co-operatives Societies Act have not been exhausted by the applicant prior to the institution of this matter before this court.

e) The provisions of section 65, 66(1)(a) of the Co-operative Societies Act on presentation of creditors' claims within sixty (60) days or so required under that law was not complied with

f) *This matter is an abuse of court process and ought to have been filed in the correct forum*

5. The notice of preliminary objection proceeded by way of written submissions which were filed and highlighted by both the applicant and the respondents.

6. From the matters pleaded and the averments made in the applications and the affidavits the only issue for determination is whether the court lacks the requisite jurisdiction to hear and determine this matter and whether the respondents ought to have exhausted the dispute resolution mechanisms provided for by the Sacco Societies Act and the Co-operatives Societies Act before moving to this court.

7. Jurisdiction goes into the heart and soul of any proceeding and that if there is a valid question or objection in Law on a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection or question should be raised at the earliest opportunity.

8. In *Owner of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited*, it was held that: *'...Jurisdiction of the Court which may be raised by way of Preliminary Objection ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it...'*

9. It was the respondents' submission through their counsel Mr. Cheptarus that after the 1st respondent's Deposit-Taking Sacco Business License was revoked *vide Gazette Notice No. 6391* on 29th June 2018 pursuant to section 27(3) of the *Sacco Societies Act No. 14 of 2008*, there was no appeal against that revocation pursuant to section 27(5) of the *Sacco Societies Act*. Additionally, the respondents submitted that the cancellation of the registration and order for the Liquidation of the 1st respondent *vide Gazette Notice No. 6972* on 29th June 2019 pursuant to Section 61(1) of the *Co-operative Societies Act* was not challenged by way of an appeal pursuant to section 61(2) of the *Co-operative Societies Act*. The respondents further submitted that there was no appeal on the appointment of and vesting of the property of the 1st respondent in the Liquidators of the 1st respondent pursuant to Section 61(2) of the *Co-operative Societies Act*.

10. It was the respondents' further submission that the exercise of the powers conferred upon the liquidators pursuant to section 66(1)(a)(g) (h) of the *Co-operative Societies Act* were not and have not been, challenged in law under both the *Sacco Societies Act* and the *Co-operative Societies Act*.

11. The respondents stated that this matter was not before the correct/right forum, which was an abuse of the court process and must be struck out with costs to the respondents. It was the respondents' submission that the applicant should have strictly followed the alternative remedy or procedure of redress under the provisions of section 27 of the *Sacco Societies Act*, Section 61, 66, 69 of *Co-operative Societies Act* and/or the Constitution or the Acts of Parliament in force as far as the jurisdiction of the Co-operatives Tribunal, the High Court and the Court of Appeal are concerned. The respondents urged that the preliminary objection should be allowed as prayed.

12. On their part, the applicant submitted through its counsel, Mr. Wangira that section 27(5) of the *Sacco Societies Act* does not apply to it as it is not a Sacco whose license had been revoked to entitle it seek the intervention of the Minister through an appeal as provided for by that section of the law. The applicant stated that it is a decree holder who wishes to have its decretal debt paid notwithstanding whether or not the 1st respondent had a license. The applicant further submitted that sections 61(1) and (2) of the *Co-operative Societies Act* are inapplicable to it as well in that it was neither questioning the powers of the 3rd respondent nor was it a member of the 1st respondent. The applicant further submitted that sections 65 and 66 of the *Co-operative Societies Act* were also inapplicable to it as it was not contesting the appointment of the liquidators in any way. The applicant submitted that the provisions cited by the respondents were inapplicable to it and do not oust the jurisdiction of the court and that the relationship between the applicant and the 1st respondent is that of a decree holder and a judgment debtor. The applicant stated that all it sought was recognition of its debt in the books of the 1st respondent.

13. The applicants further contended that this is a matter that could not be handled by the Co-operatives Tribunal as the judgment debt resulted from a judgment of this court and payment of the same should be handled in the same forum. The applicant added that the dispute between it and the 1st respondent does not fall within the categories of Section 76 of the *Co-operative Societies Act* which can be handled by the Co-operatives Tribunal and thus the dispute ought to be decided by the court.

14. The applicant submitted in conclusion that the respondents' preliminary objection was misplaced and inapplicable and urged the court to dismiss it with costs.

15. Section 27(5) of the *Sacco Societies Act* provides as follows:

"(5) An aggrieved Sacco society may appeal to the Minister in respect of a revocation of its licence within thirty days after being notified of the revocation."

16. Section 61(1) and (2) of the *Co-operatives Societies Act* provides as follows:

"61. Procedure for dissolution

(1) If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.

(2) Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the

making of such order, appeal against the order to the Minister with a final appeal to the High Court."

17. Section 66(1)(a) of the Co-operative Societies Act provides as follows:

"66. Powers of liquidator

(1) The liquidator shall, subject to this Act, have the following powers—

(a) to appoint a day, in the prescribed manner, before which the creditors whose claims are not already recorded in the books of the co-operative society shall state their claims for admission, or be excluded from any distribution made before they have proved them..."

18. Section 76 of the Co-operatives Societies Act provides as follows:

"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.

(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."

19. In *Republic vs Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR Odunga J cited the Court of Appeal case of *Speaker of National Assembly vs. Karume* [1992] KLR 21 where it was stated that:

"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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

20. The Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR, stated that:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution....."

21. The justification for the doctrine of exhaustion was further captured by this court in *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR, where it was held that:

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system."

22. The question is whether the dispute herein is one that falls within the ambit of Section 76 of the Co-operatives Act and thus ought to be heard and determined by the Co-operatives Tribunal or it is one outside the said provision and thus can be heard and determined by this court. It has not been denied or contested that the applicant is not and has never been a member of the 1st respondent. Section 76 of the *Co-operative Societies Act* deals with only disputes arising between and among members of a co-operative society which must be forwarded to

the Co-operative Tribunal as matter of first recourse. The applicant not being a member of the 1st respondent, means that it could not present its dispute with the 1st respondent to the Co-operatives Tribunal because this falls outside the ambit of Section 76 of the *Co-operative Societies Act*. This position was stated by the Court of Appeal in the case of *James Mwangi Kariuki vs. Nanasi Housing Co-Operative Society Limited* [2015] eKLR where it was held that a dispute between a non-member of a co-operative society and the co-operative society was not within the exclusive jurisdiction of the Co-operative Tribunal.

23. Section 66 of the *Co-operative Societies Act* provides for the powers of a liquidator and more specifically Section 66(h) provides one of the powers which is:

“to sell the movable and immovable property and rights of action of the society, by public auction or private contract with power to transfer the whole thereof to any person or company or to transfer the same in parcels.”

24. Section 69 of the *Co-operative Societies Act* goes on to state that:

“69. Appeal against order of liquidator or Commissioner

(1) A person aggrieved by any order or decision of the Commissioner or the liquidator under section 66 or section 68, as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision.”

(2) A person aggrieved by a decision of the Tribunal under subsection (1) may appeal to the High Court within thirty days of the decision.”

25. The applicant appears to be aggrieved by the decision of the liquidators of the 1st respondent to sell the subject property by way of auction. The wordings of Section 69 of the *Co-operative Societies Act* are couched in discretionary rather than mandatory terms in respect of appealing the decision or order of a liquidator to the Tribunal. It was not mandatory for the applicant to go through the Tribunal first before moving to this court on appeal. I find that there was nothing in law that precluded the applicant from moving to this court in respect of the liquidators' decision.

26. It is thus my overall finding and conclusion that the applicant, being a non-member of the 1st respondent, could not present its dispute to the Co-operatives Tribunal under section 76 of the *Co-operative Societies Act*. Furthermore, it is my finding and conclusion that there was nothing under section 69(1) of the *Co-operative Societies Act* that precluded the applicant from moving to this court first and not the Co-operatives Tribunal as the said provision is discretionary rather than mandatory. Therefore, I find that this court has jurisdiction to entertain the application dated 15th March 2019 and I am in agreement with the applicant the provisions cited by the respondents are inapplicable to it.

27. The issue of whether the applicant was a creditor to the 1st respondent is a question of fact that can only be determined once the matter proceeds to full trial.

28. In the premises, I find that the respondent's notice of preliminary objection dated 18th April 2019 lacks merit and ought to be and is hereby dismissed with costs to the applicant.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE