



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 2 OF 2019

BETWEEN

HON. RASHID MOHAMMED ECHESA.....1ST PETITIONER

ALI OMONDI MALIJI.....2ND PETITIONER

AND

NITUNZE SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED

(IN LIQUIDATION).....1ST RESPONDENT

THE COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....2ND RESPONDENT

VALLEY AUCTIONEERS.....3RD RESPONDENT

RULING

1. The petitioners herein filed a petition dated 15th March 2019, together with an application evenly dated, citing alleged illegalities on the part of the respondents and sought that the court declares so. The respondents replied to the petition 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, dated 18th April 2019, founded on the following grounds:

a) that the court lacks jurisdiction to entertain the matter;

b) that 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) that there was no appeal against the cancellation or 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, Laws of Kenya;

d) that 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 on presentation of the creditors' claims within sixty(60) days or as required under that law was not complied with;

e) that the matter is an abuse of court process and ought to have been filed in the correct forum; and

f) that the 1st petitioner was not a member of the 1st respondent and had no capacity or locus standi to sue or be sued in the matter .

2. The notice of preliminary objection was canvassed by way of written submissions, which were filed by both the petitioners and the respondents.

3. I have gone through the pleadings filed by both sides, and I have identified the following as the issues for determination with respect to the

notice of preliminary objection:

- (a) whether the court lacks the requisite jurisdiction to hear and determine this matter and whether the respondents ought to have exhausted the dispute resolution mechanism provided for by the Sacco Societies Act and the Co-operatives Societies Act before moving to this court ;
- (b) whether the 1st petitioner lacks the requisite *locus standi* in this matter ;
- (c) whether the court lacks the requisite jurisdiction to hear and determine this matter; and
- (d) whether the respondents ought to have exhausted the dispute resolution mechanism provided for by the Sacco Societies Act and the Co-operatives Societies Act before moving to this court.

4. 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.

5. In *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, the Court of Appeal addressed itself to the matter of jurisdiction, where Nyarangi JA stated that jurisdiction is everything, and a court without jurisdiction should not go any further. The exact words of the Judge of Appeal were:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

5. The Court of Appeal went on, in that matter to say:

"...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..."

6. It was the respondents' submission that after the 1st respondent's Deposit-Taking Sacco Business License was revoked vide Gazette Notice No. 6391 of 29th June 2018, pursuant to section 27(3) of the Sacco Societies Act, No. 14 of 2008. It was averred that there was no appeal was filed 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 of 29th June 2019 pursuant to Section 61(1) of the Co-operatives Societies Act was not challenged by way of an appeal pursuant to section 61(2) of the Co-operatives 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. The respondents stated that the Sacco Societies Act and the Co-operatives Societies Act prescribed alternative remedies and procedures of dispute resolution which were to be followed first and that the court can only be moved by way of appeal.

7. On their part, the petitioners submitted that the present petition was filed on behalf of all the people of Western Kenya and not just members of the 1st respondent by dint of Article 22 of the Constitution of Kenya. The petitioners added that none of them is a member of the 1st respondent and thus could not present their claim to the Co-operatives Tribunal.

8. 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."

9. 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."

10. 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.”

11. 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 decision of the Court of Appeal in *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.”

12. 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...”

13. 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.”

14. The question is whether the dispute herein is one that falls within the ambit of Section 27(5) of the Sacco Societies Act and 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. A summation of the petitioners’ petition and application, appears to be that they are aggrieved by the manner in which the 1st respondent was placed under receivership. Section 61(1) and (2) of the Co-operatives Societies Act above is clear that any member who is aggrieved by the decision of the 2nd respondent to dissolve the co-operative society may appeal to the Minister concerned and if still dissatisfied with the Minister’s decision, then sub-section (2) gives a further option of appeal to this court. The petitioners are further aggrieved by the decision of the liquidators to put up for sale by way of public auction the property known as Mumias Block LR 8056/322, MOSACCO Plaza. Section 66 of the Co-operatives 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.”

15. Section 69 of the Co-operatives 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.

16. From the above, it is clear that all the issues that the petitioner has with the respondents are meant to be heard and determined by the Co-operatives Tribunal first, before the same is brought before this court by way of a final appeal. Additionally, I do not find that this is a matter that warrants invocation of the court's constitutional jurisdiction on fundamental rights and freedoms. In the case of *Benard Murage vs. Fine serve Africa Limited & 3 others* [2015] eKLR the Court stated:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.” (emphasis added)

17. I agree. The allegations by the petitioners relate to alleged breaches of the Sacco Societies Act and the Co-operative Societies Act rather than rights and fundamental freedoms under the Bill of Rights. The Court's jurisdiction is ousted by the statutory remedies provided for in the two acts. The court has to down its tools at this point and go no further. There is no point of discussing the other issue of the 1st petitioner's *locus standi*.

18. It is my, therefore, that I lack jurisdiction to hear and determine this matter as the issues raised by the petitioners fall within the jurisdiction of the Co-operative Tribunal. I find no constitutional issue in respect of any breaches of fundamental rights and freedoms that would this court's intervention.

19. In the foregoing, I find that the respondent's notice of preliminary objection dated 18th April 2019 merited and the same ought to be and is hereby sustained. It is so ordered.

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

W. MUSYOKA

JUDGE