



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 200 OF 2011
CORAM: D.S. MAJANJA J.

BETWEEN

EUNICE AUMA ODERA.....1ST APPELLANT

PETER ODERA WADEYA.....2ND APPELLANT

JAIRUS OGOLA OWITI.....3RD APPELLANT

EVANS OMONDI ODHIAMBO.....4TH APPELLANT

PAUL MISEH.....5TH APPELLANT

AND

MIGORI TEACHERS SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the Award of the Co-operative Tribunal

dated 13th September 2011 in Nairobi Co-operative

Tribunal Appeal No. 7 of 2010)

JUDGMENT

1. The subject of this appeal is the decision of the Co-operative Tribunal (“Tribunal”) established under the *Co-operative Societies Act (Chapter 490 of the Laws of Kenya)* (“the CSA”). The appellants appealed to the Tribunal under **section 74(1)** of the CSA seeking to quash surcharge orders issued by Commissioner of for Co-operative Development (“the Commissioner”). The Tribunal heard the appeal and entered summary judgment against each appellant for the amount of the surcharge. It is this decision that has precipitated this appeal.

2. These proceedings arise from an order of the Commissioner dated 5th October 2009 directing an inquiry into the affairs of Migori Teacher Co-operative Society Limited (“the Society”). The officers directed to conduct the inquiry handed over a preliminary report to the Commissioner on 23rd October 2009 and a final report dated 28th October 2009. The final Inquiry Report was adopted by the Society at a Special General Meeting on 8th November 2009. Thereafter the Commissioner issued Notice of Intention to Surcharge dated 13th November 2009 to the appellants surcharging them the amount indicated against their names the Inquiry Report. When the appellants did not show cause, he directed one Suleiman Wandati to issue a surcharge orders dated 12th January 2010.

3. The appellants, being aggrieved by the surcharge orders, appealed to the Tribunal on several grounds. The Tribunal heard the matter by way of written submissions. In the course of the proceedings two affidavits, one by the Commissioner, F. F. Odhiambo and another by Frankinson M. Maina, one of the officers appointed by the Commissioner to conduct the inquiry, were filed on behalf of the respondent.

4. The appellants argued before the Tribunal that the affidavits were filed without leave and ought to be expunged. They pointed out that this was contrary to **Order 42 rule 27(1)** and **(2)** of the *Civil Procedure Rules* which applies to the Tribunal by virtue of **rule 6** of the *Co-*

operative Tribunal (Practice and Procedure) Rules, 2009 (“the **Rules**”) which provides that:

The Provisions of the Civil Procedure Rules shall apply in respect of proceedings of the Tribunal.

Order 42 rule 27(1) of the **Civil Procedure Rules** provides that:

27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred: but if-

(a).....

(b).....

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.

5. Counsel for the appellants submitted that the affidavits raised several issues. He pointed out that the officers directed to do the inquiry forwarded a preliminary and final report contrary to the law that does not contemplate two reports hence it was not clear which of the two reports was relied on to surcharge the appellants.

6. On the issue of the affidavits, counsel for the respondent submitted that the two affidavits were not new evidence for the reason that **Order 42** of the **Civil Procedure Rules** did not apply to proceedings before the Tribunal as the procedure before it is governed by **rule 8** of the **Rules** and that **Order 42** applies to the High Court hearing appeals from the Tribunal. He further urged that the affidavits had the following documents attached; a copy of the inquiry report, the Notice of intention to surcharge, surcharge order and Inquiry order, acknowledgement of being interviewed and minutes of the Society’s meeting where the Inquiry Report was adopted which were in fact documents required to be filed under **rule 8** of the **Rules**. Counsel pointed out that since the appellant had not provided these documents to the Tribunal, the Commissioner filed them before the Tribunal as they were necessary for determination of the appeal. The respondent also submitted that the preliminary report contained errors which were corrected in the final Inquiry Report.

7. The Tribunal award dated 13th September 2011 dealt with several issues. It expunged the affidavits filed on behalf of the respondents from the record. The appellants had also raised the issue that the surcharge orders against them were the subject of pending suits for recovery. On this issue the Tribunal found that the cases had been withdrawn. It accepted that the **CSA** did not contemplate a preliminary report but found as a fact that the Commissioner followed the proper procedure in issuing the orders of surcharge after giving the appellants and opportunity to be heard. The Tribunal entered summary judgment for the surcharged amount against the appellants after holding that the appellants had not raised any triable issues. It is this decision that precipitated this appeal.

8. Although the appellants raised several issues in the memorandum of appeal before this court dated 22nd September 2011, I think the only issue necessary to dispose of this matter is the main point urged by the appellants. It is that the Tribunal wrongly admitted documents in the appeal without leave as required by **Order 42** of the **Civil Procedure Rules** which applies to appeal proceedings in the Tribunal by reason of **rule 8** of the **Rules**.

9. The Tribunal considered this issue and observed as follows;

In the present instant, the only lacking mandatory document which should have been attached to the memorandum of appeal is the inquiry order. Likewise, affidavits by the CCD and one of the Inquiry officer are not mandatory documents attached to the memorandum of appeal. In as far as the affidavits are being relied upon to explain some facts that amounts to introduction of new evidence without leave of the Tribunal and therefore offends the provisions of the Civil Procedure Rules, i.e., order XLI rule 22, which is applicable to these proceedings. In any event, the affidavits raise more questions than they help answer. In the circumstances, the affidavits are expunged.

10. The documents required to accompany the memorandum of appeal before the Tribunal are provided for in **Rule 8** of the **Rules** as follows;

8 (1) Every appeal to the Tribunal shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) Every appeal to the Tribunal shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(3) At the time of filing the memorandum of appeal or before setting down the appeal for hearing, the Appellant shall file a record of appeal in five sets and serve all parties. The record of appeal, properly indexed and paginated, shall contain—

(a) the memorandum of appeal;

(b) the inquiry order;

(c) the inquiry and/or inspection report;

(d) the minutes of the general meeting whose decision is appealed against;

(e) the notice of intention to surcharge;

(f) the surcharge order; and

(g) any other relevant documents.

11. The respondent before the Tribunal justified the filing of the affidavits without leave on the ground that the essential documents in **Rule 8(3)(c), (d), (e) and (f)** aforesaid were not provided by the appellants. I also note that the appellant did not file a record of appeal required before the Tribunal as part of the record before this court. Since the Tribunal expunged the affidavits, the question that arises is having expunged the affidavits which set out the essential documents, on what basis did the Tribunal proceed to decide the appeal? I therefore find and hold that Tribunal, in the absence of necessary documents required to form the basis of the appeal, could not adjudicate on the procedure taken by the Commissioner and make a finding thereon.

12. I also note a further misdirection on the part of the Tribunal that goes to its jurisdiction. In its memorandum of appeal before the Tribunal, the appellants sought to quash the surcharge orders made by the Commissioner. The respondent did not seek any orders for summary judgment in the appeal but prayed that the appeal be dismissed in its written submissions. I therefore find that the Tribunal erred in converting the appeal seeking to quash the surcharge orders into an application for summary judgment without a claim lodged by the respondent.

13. For the reasons I have set out above, I allow the appeal and direct that the appeal before the Tribunal be heard afresh. I however decline to award costs because the appellants had failed to file all the necessary documents before the Tribunal. These proceedings have taken a long time to resolve and in order to ensure that the matter is completed without delay, I now order as follows;

(a) This appeal be and is hereby allowed.

(b) The Tribunal is directed to re-hear that appeal afresh.

(c) The appellants shall file their record of appeal together with all the necessary documents in accordance with **rule 8(3) of Co-operative Tribunal Practice and Procedure Rules, 2009** the within **fourteen (14) days** from the date hereof in default the appeal before the Tribunal shall stand dismissed with costs to the respondent.

(d) The Tribunal shall issue directions for hearing of the appeal with deliberate dispatch and shall ensure that the matter is heard and finalised within a period of **three (3) months** from the date of filing the record of appeal.

DATED and DELIVERED at KISII this 8th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellants.

Mr Getange instructed by Bw'ingara, Getange and Company Advocates for the respondent.