



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
HIGH COURT CIVIL APPEAL NO. 6 OF 2017
(APPEAL ARISING FROM THE RULING OF THE
CHIEF MAGISTRATE AT KERUGOYA BY HON. ANDAYI W.F
IN CHIEF MAGISTRATE'S CIVIL CASE NO.191 OF 2016
DELIVERED ON 30TH JANUARY, 2017)

SAMUEL NJAGI MWANGIAPPELLANT

V E R S U S

JAMES KAMAU WAINAINA.....RESPONDENT

JUDGMENT

The appellant Samuel Njagi Mwangi (to be referred to herein as “**the appellant**”) filed this appeal against the ruling in Kerugoya CMCC No. 191/2016 raising the following grounds:-

1. That the learned trial Magistrate erred in law and fact in disregarding the appellant’s Preliminary Objection on the issue of jurisdiction.
2. That the learned trial Magistrate erred in law and in fact in finding that the action taken by the appellant was a disciplinary one without hearing the parties.
3. That the learned trial Magistrate erred in law and in fact in disregarding the documents that had been annexed to the replying affidavit by the Appellant.
4. That the learned Magistrate erred in law and in fact in granting a mandatory injunction which can only be granted in very exceptional circumstances.
5. That the learned Magistrate erred in law and in fact in failing to consider the demerits of the respondent’s application.
6. That the learned Magistrate erred in law and in fact in granting orders that are incapable of being executed.

He prays that the appeal be allowed, the order of the trial court be set aside and the appellant’s pre-liminary objection be upheld. He also asks for costs.

The backgrounds of this appeal are that James Kamau Wainaina owns motor vehicles KCC 640 Y and KBP 241F which he operates as matatus and is licensed to operate along Nairobi – Embu – Chuka – Mery route. On 21/9/2016 the appellant for no justifiable reason lucked out the plaintiffs original Transport Licensing Board licences from the two motor vehicles as a result of which the vehicles were grounded. The respondent suffered loss, damage, economic and financial distress as the vehicles were unable to operate without the licenses.

The respondent James Kamau Wainaina moved to court and filed Civil Suit No. 191/2016 in the Chief Magistrate’s Court Kerugoya seeking general damages, an injunction restraining the appellant from interfering with the said vehicles and costs of the suit.

The appellant filed a defence and raised a preliminary objection based on the ground that the court lacked jurisdiction to entertain the suit as it touched on the dispute between a member and the Co-operative Society.

It was the appellants defence that the respondent was a member of Memba Travellers Sacco a duly registered Co-operative Society under which the two vehicles of the respondent were operating. The appellant faulted the respondent for suing him in his individual capacity whereas the respondent was a member of Memba Travellers Sacco.

In a ruling by the trial Magistrate dated 2/3/2017 the court held that it had jurisdiction to entertain the suit. The appellant filed this appeal challenging the ruling of the trial Magistrate.

The counsel for the appellant submits that the issue raised before the trial Magistrate was that the dispute appellant and the respondent had between member of the Sacco and involving business of a Sacco and ought to have been referred to the Co-operative Tribunal for hearing.

For the respondent, it is submitted that the appellant was sued in his personal capacity for his own actions which are not sanctioned by the By-laws and his conduct amounted to a simple tort of trespass to property which is actionable in the ordinary courts of law. The issue which arises is whether the trial Magistrate had jurisdiction to entertain the suit. This would determine the other issues raised in the Memorandum of Appeal as it is a trite law that the trial Magistrate could only entertain the matter if he had jurisdiction and if he had no jurisdiction he could not move an inch, he had to lay down his tools and pen off. The definition of a pre-liminary Objection was well set out in the case of **Mukisa Biscuits Manufacturing Company Limited –v- West End Distributors Ltd(1969)E.A 696** where the Court of Appeal stated:

“a preliminary objection consists of a point of law which has been pleaded or which arises from clear implication and which if argued as a pre-liminary point may dispose off the suit.”

The Court further Stated:-

“A pre-liminary objection is in the nature of what used to a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or what is sought is the exercise of Judicial discretion.”

The point of law which was raised by the appellant was that the court lacked jurisdiction to entertain the suit as the respondent ought to have referred the dispute to the Tribunal which is established under **Section 76 of the Co-operative Society’s Act Cap 490 Laws of Kenya.**

The Section provides:

“If any dispute concerning the business of a Co-operative Society arises:-

a) Among members, past members and person claiming through members, past members and deceased members,

Or,

b) Between members, past members, past members or deceased members and the Society, its Committee or any Officer of the Society, its Committee, or

c) Between the Society and any other Co-operative Society it shall be referred to the Tribunal.”

The Section further provides for other disputes to be referred to the tribunal.

Sub-Section (2) states:-

“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 a 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 provision sets out the disputes to be referred to the tribunal. These disputes are categorized under section 76(1)(a)(b)&(c) which the Act states that they shall be referred to the tribunal. These are disputes between members, past members and deceased members and the Society. Others are between the Society and other Co-operative Society. The Act provides in mandatory terms that disputes shall be referred to the Society. In my view Section 76(2) provides for other disputes which shall be referred to the tribunal which is why the wording is **shall include** emphasis mine. The section provides for different categories of disputes with the first one being under Sub-section (1) and Subsection (2) creates other disputes of the Society which are included in the disputes to be referred to the tribunal.

Section 67(3) of the Sacco Societies Act No. 14/2008

“All disputes arising out of Sacco Business under this Act shall be referred to the Tribunal.”

There are several decisions on the jurisdiction of the Co-operative Tribunal. I will look at a few.

Ernest Muiruri Njoroge & 28 Others v Kabiru Karanja & 4 others [1997] eKLR

The Court of Appeal stated;

There were no serious efforts made by the appellants to disprove that the ownership of the property No Gilgil/Karunga/Block 6 out of which the plots the subject-matter of the dispute between them and the respondents were allotted to them still remained with their co-operative society. That being so, and the appellants being members of that society, then their dispute with the officers of the said society over the plots allotted to them (appellants) as is mentioned above must have concerned the business of that society. The appellants cannot therefore be permitted to shed their status as members of their society in connection with those plots so as to deny their society the protection conferred upon it by section 80 of the Act in relation to the determination of such dispute. In the result, we think that the relevant provisions of the aforesaid section are applicable to the dispute in question and uphold the decision of the superior court that it has no jurisdiction to adjudicate upon that dispute.

Further in the case of *Kieni Farmers Co-operative Society Limited v Rose Wanjiru Mwangi [2016] eKLR*.

The court in holding that the trial Court had no jurisdiction to hear and determine the matter stated;

The point for determination in this appeal therefore is whether the dispute between the parties is a dispute concerning the business of a cooperative society, which should have been referred to the Co-operative Societies Tribunal as provided for under Section 76 cited above.

The expression “*business of the society*” has not been defined in the Act or elsewhere. The expression has fallen for interpretation by the courts in this country and elsewhere with commendable frequency. Pronouncements from different Courts in this country and elsewhere have even led to a cleavage in judicial opinions as to the true meaning and scope of that expression said appearing in the co-operative Societies Act.

As we search for the meaning of the expression “*business of a society*,” it is important to bear in mind that Tribunals are established under an Act of Parliament to deal with disputes that arise as stipulated in the particular Act.

In the case of *Gatanga Coffee Growers Co-operative Society Ltd vs Gitau* the High Court of Kenya interpreted the meaning of the term ‘*business of the society*’ in the Co-operative Societies Act. The court refused to adopt a restricted interpretation and cited the Ugandan case of *Wakiro and Another v Committee of Bugisu Co-operative Union*, at p 527 where Russell J, considering the expression “*business of the society*” under the Ugandan Co-operative Societies Act which provision is similar to our Section 76 cited above stated as follows:-

“.....The expression “*business of the society*” is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by laws and rules.”

A similar position was arrived at by T. Mbaluto J in *Murata Farmers Sacco Society Ltd v Co-operative Bank of Kenya Ltd. In Bernard Mugo & others v Kagaari South Farmers Co-operative Society & 4 others Muchemi J* held that:-

“It is imperative to note that decisions of the Co-operatives Tribunal are appealable to the High Court which is the court of final resort on that category. Matters in which the court has jurisdiction other than those included in the Act may be heard in the High court and follow the laid down process for appeal. The need to seek justice in the right forum cannot therefore be overemphasized. The provisions of Section 76 (1) and (2) are very clear.....”.

In the case of *Kirinyaga Farmers Society –vs- Kirinyaga Co-operative Union*, the court observed that the exercise of determining whether a dispute is one involving the business of the society is a novel one. It then proceeded to examine past decisions with a view of capturing the matters considered by the courts. However, the court held that since the High court is the final court in Co-operative matters; it is not right for the High court to assume both appellate and original jurisdictions.

Universal Traders Sacco v Margaret Mwikali Mbithi [2015] eKLR

In a similar case where the Appellant instructed its agents, KANDE AUCTIONEERS, to proclaim the Respondent’s business items with respect to a loan it had advanced the Respondent, the court stated;

Therefore, it is evident that the dispute revolves around the business of the Appellant in terms of a claim for repayment of a debt or demand due to it. Further it is admitted by the Respondent in her Amended Plaintiff and that the 2nd Defendant was acting in the capacity of agent and/or servant of the Appellant, and is therefore within the rubric and category of persons who can be described as officers of a co-operative society under section 76 (1) (b) of the Co-operative Societies Act. I accordingly find that the dispute in the trial Court was one which fell squarely under section 76 of the Cooperative societies Act, and the trial Court, ought to have deferred to the jurisdiction of the said Tribunal.

Tobias Ogwen Rachuonyo v Francis Omondi Japaso & 2 others [2016] eKLR

The court held that the appellant was not a member of the Society and stated;

In this case, the Respondents did not prove that the Appellant was a member of the Society. But is this a dispute concerning the business of the Co-operatives Society in the context of Section 76 (1) and (2)?

Section 4 defines the business of the society as that which has the object of promoting the welfare and economic interest of its members. The court has had occasion to define the ‘business of the Society’ in the case of GATANGA COFFEE GROWERS VS GITAU [1970] EA 361 thus -

“...business of the society is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by-laws and rules.”

While the dispute revolved around the business of the Society in terms of a claim for repayment of a debt or demand due from it, and the respondents are within the rubric and category of persons who can be described as officers of a co-operative society under Section 76 (1) (b) of the Co-operative Societies Act, it was not proved by the party that sought to rely on it that the Appellant was a member of the society.

The jurisdiction conferred on the Cooperatives Tribunal is limited to the disputes shown in **Section 76 of the Cooperatives Societies Act**. Courts as a general rule should follow the procedures laid down in a statute, unless there is a good reason not to do so.

The dispute involved a co-operative Society and a member. It is the Tribunal which had jurisdiction to entertain the dispute. The trial Magistrate erred in holding that he had jurisdiction to entertain the dispute.

The trial Magistrate addressed the role of the Co-operative Societies with respect to operations of public service vehicles. This is as required under National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations, 2014, legal Notice 23/2014 and Legal Notice 75/2014 which governs the operations of P.S.V's of which Regulations states:-

“1) A person desirous of operating Public Service Vehicles shall be a member of a body corporate which shall –

a) Be licensed to operate if the body corporate owns a minimum of thirty serviceable vehicles registered as public service vehicles in respect to which an application for a license has been or is to be lodged with the authority.”

The body corporate as defined under Section -2- of the **Act** means a limited liability company under the **Companies Act Cap 486** and includes a Co-operative Society registered under the **Co-operative Societies Act, Cap 490** and Society Registered under Societies Act.

It was not in dispute that the appellant and the respondent were members of the same Society by name Memba Travellers Sacco Society. The dispute arose between the respondent and the Co-operative Society. The trial Magistrate found as a fact that the appellant had produced correspondence between the Sacco and N.T.S.A showing that he had taken action against the applicant as a member of the Sacco. The trial Magistrate in no uncertain term found that the contention by the respondent that he had sued the appellant in his private capacity as an individual and not an official of member of the Sacco as misplaced.

The trial Magistrate stated:-

“I therefore find the applicant’s contention that he sued the respondent in his private capacity as an individual and not as an official or member of a Sacco to be misplaced. Although he has not stated so in his pleadings and he infact categorically states that he did not sue the respondent as a member or official of the Sacco. I find that infact he ought to have done so and not otherwise.

However, since this is an error that can be cured by amendment of pleadings, I do not find it to be fatal to the applicants claim herein. I will proceed to consider the pre-liminary objection and the application on the understanding that the suit is against the respondent as the Chairman of the Memba Travellers Sacco Society LTD.”

It must be construed that the trial Magistrate found that the appellant was not properly sued. The trial Magistrate did the unthinkable by amending the pleading in his ruling. That in effect changed the nature of the claim and the contention by the claimant who stated that he had sued him in his individual capacity and not otherwise. This was a grave error by the trial Magistrate and went against the trite principle that a party is bound by his pleadings. The party had not amended the pleadings and so the trial Magistrate ought not to have issued any orders before the pleadings were amended by the party himself.

The trial Magistrate further failed to consider the annexures SNM-1- which showed that the appellant was the Chairman of the Management Committee and the respondent was the Chairman of the supervisory Committee. This in effect shows that they were both members of the Sacco Society. The trial Magistrate erred by arriving at his own finding which was not pleaded that is to say the actions were disciplinary in nature.

The trial Magistrate erred in basing his finding on matters which were not pleaded and relying on the same matters to dismiss the pre-liminary objection. I find that having found that the dispute involved members of the same Sacco, the next consideration was whether he had jurisdiction to entertain the matter.

The appellant had filed annexures SNM-2- which were correspondences between the Sacco Society and the National Transport and Safety

Authority (N.T.S.A) which was stating that the respondent had failed to comply with the rules and regulations of the Sacco. This was clearly a dispute between the Society and its member concerning the business of the Society. **Section 76(b) of the Co-operative Societies Act** has clearly stated that a dispute between member and the Society shall be referred to the tribunal. I am of the view that this is a matter where the tribunal and not the Magistrate's Court was clothed with the jurisdiction to entertain. The trial Magistrate had no jurisdiction and ought to have sustained the preliminary objection.

The appellant submits that the trial Magistrate granted a mandatory injunction and orders which were incapable of being executed. The impugned order was that the appellant to return the TLB licences for the applicant's motor vehicles KBP 241F and KCC 640Y. This order was granted despite the fact that the trial Magistrate found that the appellant was not properly sued and the respondent needed to amend his pleadings. It is clear that it cannot be stated that the case was one where the facts were clear for the grant of a mandatory injunction.

In ***Kenya Airports Authority –v- Paul Njogu & 2 Others (1997) eKLR***. The Court stated:

“ We would point out that the principles governing grant of mandatory as well as prohibitory (restrictive) orders pending hearing and determination of a suit in the High Court are the self made ones enunciated in the celebrated case of Giella-v-Cassman Brown & Co. Ltd 1973 E. A 358 save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.”

The Judges further stated –

“ ----- an order which results in granting a major relief in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage.”

The trial Magistrate having found that the appellant was not properly sued could not have issued orders and directing him to comply. This was clearly wrong. It was not a clear case as the trial court found that the suit had errors and required amendments. There were no special circumstances to warrant the granting of the orders. In any event my view is that the orders were granted without jurisdiction.

In conclusion I find that the appeal has merits.

I order that –

1. The appeal is allowed.
2. The ruling of the trial Magistrate is set aside and substituted with an order upholding the appellants preliminary objection.
3. The trial Magistrate had no jurisdiction to entertain the dispute.
4. Costs to the appellant.

Dated at Kerugoya this 11th Day of October 2018.

L. W. GITARI

JUDGE