



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 23 OF 2014

TESCOM SACCO SOCIETY.....APPELLANT

VERSUS

MARY NYAGUTHII NGIGI.....RESPONDENT

*Being an appeal from the ruling of the Senior Principal Magistrate's Court (K. K. Cheruiyot) Kerugoya
Civil Case Number 222 of 2012 delivered on*

17th June, 2014)

JUDGMENT

1. This is an appeal that arose from a ruling of a subordinate court vide Kerugoya Senior Principal Magistrate's Court Civil Case No. 222 of 2012. The ruling was in respect to a preliminary objection raised by Mary Nyaguthii the respondent herein, that the Appellant's suit could not be entertained in that court for want of jurisdiction by virtue of the provisions of **Section 76** of the **Cooperative Societies Act (Cap. 490 Laws of Kenya)**. The trial court below sustained the preliminary objection hence this appeal.

2. **Tescom Society Limited**, the appellant in this appeal has raised the following four grounds in its petition:-

i. That the learned magistrate erred in law and fact in failing to find that there was no agreement on the relationship between the appellant and the respondent and as such the matter needed to go for full hearing.

ii. That the learned magistrate erred in law in failing to find that the court had jurisdiction to hear and determine the suit before him since the respondent was not a member to the appellant.

iii. That the learned magistrate erred in law in failing to find that cooperatives tribunal does not have jurisdiction to hear disputes between a cooperative society and a non member of the cooperative society.

iv. That the learned magistrate erred in law in failing to dismiss the preliminary objection raised by the respondent.

3. In its written submissions made through Magee Wa Magee Advocate learned counsels for the Appellant, the Appellant has contended that the main issue at the lower court was whether or not the Respondent was its member or merely a customer. It is contended that the Respondent is not a member and therefore **Section 76** of the **Cooperative Societies Act** does not apply. The Appellant's counsel has further added that the issue was a contested fact which should not have been raised as a point of law and

cited the decision in **MUKISA BISCUITS -VS- WEST END DISTRIBUTORS (1969) E.A.** where the Court of Appeal discouraged raising of points of law on facts that are contested. The Appellant has submitted that it was improper for the trial court to base its decision on disputed facts. In its view a determination of facts can only be done after a full trial and it was wrong for the subordinate court to prematurely make a finding of fact.

4. The Appellant has pointed out that the trial court did not analyse the facts presented well as it could have noted from the Respondent's written statement that she was not a member of the Appellant but a mere account holder with no shares in the society to qualify to be a member.

5. On the other hand, the Respondent has contested the Appellant's contention submitting that there was no way the Appellant could lend money to non members. In her submissions made through G. O. Ombachi & Company Advocates, Respondent's counsels in this appeal, the respondent contended that the provisions of **Section 76** of the **Cooperative Societies Act** and **Section 67 (3)** of the Sacco Act took away the jurisdiction of entertaining disputes between a member and the society from the court in the first instance to the cooperative tribunal. She pointed out that she was a member No. 1056 whose account No. was 11194-02-1056 as per the documents presented to court. The dispute in her view fell within the defined dispute between a cooperative society and its members. She has therefore supported the subordinate court for sustaining her preliminary objection to the jurisdiction of that court to entertain the dispute.

6. I have considered this appeal and submissions of both counsels. The main issues of controversy in this appeal are:-

- i. Whether the Respondent was a member of the Appellant.
- ii. And if so whether the dispute arising between the parties could be ventilated in court or before a tribunal as provided under **Section 76** of the **Cooperative Societies Act (Cap 490 Laws of Kenya)**.

7. (i) Whether the Respondent was a member of the Appellant.

I have looked at the pleadings filed and have noted that the issue of membership is quite a contested one. While the Respondent insisted that she was a member of the Appellant as per the documents filed together with the plaint, the Appellant denied the same insisting that the Respondent was a mere customer and pointed to the Respondent's statement of defence where she denied being a member of the Appellant. The preliminary objection raised by the Respondent at the lower court was based on the fact that the Respondent being a member of the Appellant could not be sued at a court of law as **Section 76 (1)** of the **Cooperative Societies Act**, which gave jurisdiction to determine disputes between registered cooperative societies and its members to Cooperative Tribunal – a quasi judicial body created by that Act to settle such disputes. **Section 76 (1)** of the Act provides as follows:-

“if any dispute concerning the business of a cooperative society arises –

a. Among members, past members or deceased 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 cooperative society, it shall be referred to the Tribunal.”

So it is clear that the jurisdiction to entertain disputes between the society and its members is donated to the cooperative tribunal. To determine whether the dispute fell within the definition provided by the above Act, the subordinate court had to first make a determination whether or not the Respondent was actually a member and that in my view is the crux of the matter in this appeal.

8. The bigger and broader question in the light of the of the above is whether a preliminary objection could be raised on a contested fact. To help us answer this important question, is to interrogate what facts informed the subordinate court's decision to determine or conclude that the Respondent was a member of the Appellant. The learned trial magistrate's conclusion was based on this observation he made;

“I did peruse the documents filed alongside the plaint particularly the membership specimen signature card which shows that the defendant is member number 1056 whose account number is 11194-02-1056”

The document referred to by the learned magistrate had not been tendered as evidence and subjected to interrogation by way of cross-examination for the court to make a conclusion on the question of fact. The conclusion by the trial magistrate was premature and erroneous particularly when viewed in the context of the Respondent's own statement filed on 1st April, 2014 where as pointed out by the Appellant she claimed that she;

“had not borrowed any money from Tescom Sacco neither was I a member thereof.....I continued paying money to the group at the rate of Kshs.200/- per week and I did not know anything about Tescom Sacco until I was sued in court.

The above statement in my view should not have been overlooked by the learned magistrate and it was erroneous to disregard because it does show that the issue of membership was not a clear and an undisputed fact to warrant a basis upon which the trial court could entertain the preliminary objection. A preliminary objection on a point of law should purely rest on the point of law to be urged and on the basis of facts that are not in dispute. Where facts are uncontested, a court is in a proper position to make a determination of the legal position on the objection raised but where facts are contested then certainly the issue goes out of the ambit of a preliminary objection and it would be improper for a court to make a determination of a contested fact within a preliminary objection (See **LEMITEI OLE KOROS & ANOR –VS- ATTORNEY GENERAL & 3 OTHERS [2016] eKLR.**

9. While addressing the same issue Hon. Justice G. U. Odunga **Republic -Vs- Attorney General & 2 Others Exparte South and Central (Thika) Investments Ltd & Anor [2016] eKLR** also made the following relevant observations;

“In my view, preliminary objections which have the effect of inviting the court to make a determination on conflicting factual averments ought not to be entertained. Where a party intends to rely on certain documents, he can only be permitted to do so in arguing the preliminary objection where the factual contents of the said documents are not in dispute. However where the same are disputed, the application or the suit ought to be allowed to proceed in the usual manner as to raise a preliminary objection based thereon not only leads to confusion but unnecessarily prolongs proceedings.”

The above decisions are in tandem with the decision cited by the Respondent in the case of **MUKISA BISCUITS -VS- WEST END DISTRIBUTORS (1969) E.A. 696.**

10. This Court finds that the subordinate court fell into error by entertaining a preliminary objection raised by the Respondent when the objection was based on a contested fact. I have looked at the provisions of **Section 33 (5) of Sacco Societies Act No. 14 of 2008** cited by the Respondent herein and I agree that the provision provides that no Sacco society shall grant a loan or credit facility to a person who is a non member of that society but whether an assumption can be made that because a loan facility was extended to the Respondent she was a member is a matter which in my view should go for full trial. This is because of the definition of who a member is as provided under **Section 2 of the Cooperative Societies Act** and **rule 9 by-laws of Tescom Sacco Society** which appears to imply that it is mandatory that before one becomes a member he or she must sign the application for registration and is admitted as a member in accordance with the by-law and have his/her name in the register of members. It is also ordinarily expected that for one to be a member of any cooperative society, he or she must make some membership subscription or must acquire some interest or some shares in the society either as prescribed under the Act

or under the by-laws of the society where he/she wants to be a member or to be treated as a member or shareholder. The above in my considered view necessitated a full trial before the court could make a determination from an informed position. The trial court clearly fell into error to entertain the preliminary objection based on facts requiring further substantiation only possible through adducing of evidence.

11. Having determined the issue in this appeal in the negative, the second issue is clearly spent and therefore I do not see the necessity to go into it at this moment. In the premises, I allow this appeal and set aside the ruling of the court dated 17th June, 2014. The preliminary objection raised by the respondent is overruled. The suit at the subordinate court shall proceed for trial before another magistrate with competent jurisdiction to try the same. The order of costs in this appeal shall abide by the outcome of the suit at the lower court. It is so ordered.

Dated and delivered at Kerugoya this 10th day of October, 2016.

R. K. LIMO

JUDGE

10.10.2016

Before Hon. Justice R. K. Limo J.,

Court Assistant Naomi Murage

Magee for Appellant present.

Respondent is absent.

Ombachi for Respondent present.

COURT: Judgment dated, signed and delivered in the presence of Magee for the Appellant and Ombachi for the Respondent.

R. K. LIMO

JUDGE

10.10.2016