REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 56 OF 2004

FRANCIS GICHOBI……..……..……APPELLANT

VERSUS

BARAGWI FARMERS' CO-OPERATIVE SOCIETY LIMITED….……...……. …….RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO 55 OF 2004

SAMUEL NDEGE…….…....…….……APPELLANT

VERSUS

BARAGWI FARMERS' CO-OPERATIVE SOCIETY LIMITED….……. …….RESPONDENT

JUDGEMENT

This appeal arises from the decision of the Co-operative Tribunal passed on 28th May 2004. The appeal has been instituted pursuant to the provisions of Section 81 of the Co-operative Societies Act.[1]

The background history is that the Respondent in this appeal sued the Appellants herein at the Co-operative Tribunal in Tribunal Case number **48** of 2004 and 45 of 2004 seeking judgement for the sum of **Ksh. 1,088,774.80** against the appellant in Civil appeal number **56** of **2004** and **Ksh. 1,686,370.80** against the appellant in Civil appeal number **55 of 2004.** In both cases, the Respondent had also claimed compound interests, costs of the suit and any other relief that they court deemed fit to grant.

In the statement of claim filed in the said cases, the Respondent herein averred that at all material times relevant to the said case the Appellants herein were committee members of the Respondent, that sometimes in October 2001 an inquiry was conducted in accordance with the Co-operative Societies Act and the inquiry adopted by the Annual General Meeting of the Respondent found that the first Appellant had misappropriated **Ksh. 1,088,784.80,** the while the second Appellant was alleged to have misappropriated **Ksh. 1,686,370.80.**

The Respondents filed written statements of defence in the said suits and averred that prior to the October

2001 inquiry, there as yet another inquiry which was approved as required by the Society's membership on 15th June 2002 and no appeal was ever preferred, hence the October 2001 inquiry was *res judicata*, superfluous, malicious and instituted in bad faith. The Appellants also averred that they appealed to the Minister but the said appeal was dismissed for non-attendance without due notice to them.

On 28.05.2004, the following Tribunal cases came up for hearing at the Co-operative Tribunal, namely; Case No. 45 of 2004, case No. 46 of 2004, 47 of 2004, 48 of 2004 and 50 of 2004. The proceedings were recorded in file number 45 of 2004 and counsel then acting for the Appellants in the Tribunal informed the Tribunal that the Appellants had filed an appeal to the Minister and that the said appeal was dismissed for want of prosecution. Counsel informed the court that their attempt to reinstate the said appeal was encountering some administrative difficulties and on that basis he applied for an adjournment to enable him apply for stay.

The adjournment was opposed by counsel for the Respondent and the tribunal dismissed the adjournment and directed that the orders applied in case Nos. 46 of 2004, 47 of 2004, 48 of 2004 and 50 of 2004.

At that point counsel for the Respondent urged the court to look at the statement of claim and stated that it is not denied that the inquiry as done and urged the court to *enter summary judgement* and award compound interest under Section 35 of the Act and requested that all that she had stated applies to the other files mentioned above.

Counsel for the Appellants submitted that the issue of summary judgement could not apply because there was no application for summary judgement and pointed out that they had filed a defence challenging the inquiry and referred to an earlier inquiry and pleaded that they were ready to submit evidence.

Without pointing out any specific Section of the Act, the counsel for the Respondent herein objected stating that the Co-operative Societies Act is clear on cases that summary judgement can be awarded.

In a brief judgement the Tribunal stated inter alia as follows:-

> *"……In our view the only remedy an aggrieved party has against a surcharge order issued pursuant to Section 73 of the Co-operative Societies Act is to appeal against such an order to the Minister under Section 74. In this case an appeal was filed and the same was dismissed. Under section 75 of the Act, this Tribunal is enjoined to act summarily in orders falling under section 73.*
>
> *Whether the Respondent has a valid defence or not and whether he has issues against the surcharge order, under Section 73, these can only be dealt with in appeal to the Minister. Furthermore, the issues raised in the Respondent's defence should have been raised in the appeal to the Minister and further in appeal to this Tribunal.*
>
> *The Respondent's appeal having been dismissed by the Minister and no further appeal having been filed to the Tribunal, the Tribunal can only enter summary judgement once satisfied that the procedures under Section 73 and 74 have been complied with. <u>This Tribunal is not bound by rules of procedure and as such does not need to be moved by a formal application in exercise of its powers under Section 75 of this Act.</u>*
>
> *We find and hold that the claimant has complied with provisions of Section 73 of the Act……..We accordingly strike out the Respondent's defence and enter judgement for the claimant as prayed in the claim with interests at 1% per month from the date of filing suit together with costs. This order/award applies to CTC Nos. 46 of 2004, 47 of 2004, 48 of 2004 and 50 of 2004."*

The award/order by the Tribunal triggered these two appeals which were consolidated. Both appeals have cited identical grounds.

The parties filed written submissions. Counsel for the Appellants faulted the Tribunal for striking out the

Appellants defence and entering summary judgement while there was a defence on record and without affording the appellants an opportunity to be heard and urged this court to allow the appeal with costs.

The Respondents counsel maintained that the appellants appeal has no merits and called for its dismissal with costs.

The key issues for determination in this appeal are:-

i. *Whether the Tribunal was wrong in holding that that the Tribunal is not bound by rules of procedure.*

ii. *Whether the Tribunal erred in dismissing the appellants defence and entering summary judgment against them without formal application before it.*

iii. *Whether the Tribunal erred in striking out the Appellants defence and entering judgement against them without affording them an opportunity of being heard.*
iv. *Whether the Tribunal violated the Rules of Natural Justice.*

v. *Whether the Tribunal misconstrued the provisions of Sections 75 (1) of the Co-operative Societies Act.*

Section **73** of the Act provides for power to surcharge officers of co-operative society while Section **74** provides the right of appeal by any person aggrieved by an order of the Commissioner under Section **73 (1).** Section **75 (1)** of the Act which the tribunal invoked to enter summary judgement against the appellants provides as follows:-

1. *Subject to section 74, an order made pursuant to section 73 for any moneys to be repaid or contributed to a Co-operative Society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.*

The Tribunal stated that *"the Tribunal is not bound by rules of Procedure."* Section **78** of the Act clearly states that the Tribunal shall not be bound by rules of evidence. Clearly, this section refers to rules of evidence. In my view these are the rules governing presentation of evidence, admissibility of evidence or otherwise as prescribed under the evidence Act.[2] Rule 7 of the Co-operative Tribunal (Practice and Procedure) Rules,[3] provides for the application of Civil Procedure Rules.[4] It provides that *"the provisions of the Civil Procedure Rules shall apply in respect of the proceedings of the Tribunal."*

The Tribunal invoked Section **75 (1)** reproduced above and entered judgement against the appellants without a formal application to that effect and secondly without affording the Appellants the opportunity to defend themselves and worse still totally disregarding the defences on record. I am not persuaded that the intention of Section **75 (1)** cited above was to create such a draconian procedure whereby a party would be denied the opportunity to be heard, a fundamental tenet of justice nor was it intended to grant the Tribunal such immense powers to enter judgement without a formal application submitted by the claimant and properly argued in court.

In my view, applications for summary judgement ought to me made formally by way of a notice of motion supported by an affidavit sworn by the applicant or a person who can swear positively to the facts verifying the cause of action. It must be served upon the defendant and the defendant has a right to respond to that application and show that he/she has a right to defend the suit. The defendant is required to show by affidavit or oral evidence th leave to defend should be given. I find nothing in Section **75 (1)** cited above or in the Co-operative Societies Rules to suggest that the said procedure does not apply.

Summary judgment has become recognized not only as a procedure for avoiding unnecessary trials on insufficient claims or defences but also as an effective case management device to identify and narrow issues. The U.S. Supreme Court had it right more than 100 years ago in the case of *Fidelity & Deposit Co. v. U.S.**[5]* when it said summary judgment *"prescribes the means of making an issue."* Properly used,

summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties. It can offer a fast track to a decision or at least substantially shorten the track. But proper use of the rule is the *sine qua non* of its utility.

When evidentiary facts are in dispute, when the credibility of witnesses may be in issue, when conflicting evidence must be weighed, a full trial is clearly necessary. Such disputes are not appropriately resolved on the basis of affidavits or worse still cannot be resolved by simply invoking section **75 (1)** cited above without even a formal application as happened in this case.

The principles which guide courts and Tribunal exercising judicial or *qusi-judicial* proceedings in determining applications for summary judgement are not in dispute. In *Industrial & Commercial Development Corporation vs Daber Enterprises Ltd**[6]*** the court stated that the purpose of the proceedings in an application for summary judgement is to enable a plaintiff to obtain a quick judgement where there is pliantly no defence to the claims. In the present case there was a defence on record which clearly stated and inquiry was conducted prior to the 2001 inquiry and the members approved the inquiry report and no appeal was preferred, and that the subsequent inquiry which made the surcharge orders was superfluous, malicious and instituted in bad faith. That averment raised serious triable issues which could only be determined by a full trial.

To justify summary judgement, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial, if necessary there has to be discovery and oral evidence subject to cross-examination. Witnesses should be heard and observed, on direct and cross-examination. But, when the question for decision concerns drawing inferences from undisputed evidence or interpreting and evaluating evidence to derive legal conclusions, a trial may not add to the judge's ability to decide. Thus, when the disputed issue is one of ultimate fact, a trial is often unnecessary; the considerations that militate in favor of trial do not apply.

In *Dhanjal Investments Ltd vs Shabaha Investments Ltd*,[7]the Court of Appeal had this to say:-

> *"The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandalal Restaurant vs Devshi & Company**[8]**and followed by the Court of Appeal for Eastern Africa in the case of Sousa Fiquerido & Co Ltd vs Mooring Hotel Ltd**[9]**that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions…"*

In *Kenya Trade Combine Ltd vs Shah*[10]a triable issue was defined as here below:-

> *"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."*

In *Job Kilach vs Nation Media Group Ltd & Others* the court of Appeal put it more clearer when it held that *"summary judgement has far reaching consequences. It must therefore be granted only in the clearest of cases…."*

The Appellants had in their defence disclosed that their appeal to the minister on the surcharge order was dismissed for non-attendance without any notice being served upon them and were taking steps to reinstate it and counsel said in court they were encountering administrative challenges in filing the relevant application. Even if no appeal had been filed, my view is that **(a)** it was wrong to strike out the appellants defences without a formal application filed and argued as required, **(b)** the section relied upon by the tribunal does not vest powers upon the tribunal to condemn a party unheard and failure to afford the Appellants the opportunity to be heard resulted in a gross miscarriage of justice.

Case law has crystalized the parameters within which a relief of summary Judgement can either be granted or withheld. In the case of *Osodo vs Barclays Bank International Ltd*[11] it was held *inter alia* that:-

"Where there are triable issues raised in an application for summary judgement, there is no room for discretion and the court must grant leave to defend unconditionally"

As observed earlier, the Appellants were not given the opportunity to be heard. The courts have been consistent on the importance of observing the rules of natural justice and the need to grant each party the opportunity to canvass his day in court. In *Onyango vs Attorney General*[12] Nyarangi J asserted that:-

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at"

I reiterate that Parliament could not have intended that the provisions of Section **75 (1)** were to be interpreted in a manner that would oust the need to abide by the rules of natural justice and clothe the tribunal with vast powers to enter judgement without hearing the affected party or for the Tribunal to enter judgement without a formal application filed by the party seeking to have the judgement entered.

In *Crescent Construction Co Ltd vs Delphis Bank Ltd*[13] the court observed that:-

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured principle……."

Procedural fairness is an implied common law duty to act fairly in decision making by the exercise of statutory and judicial powers which may affect an individual's rights, interests and legitimate expectations. The law has now developed to a point where it must be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in making administrative and judicial decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[14] My understanding of Section **85 (1)** of the Co-operative Societies and indeed the entire Act and the Rules is that there is no clear provision showing that the right to be heard in a claim for summary recovery of a debt has been expressly taken away, and even if such a provision existed, the same would be a gross violation of the constitutionally guaranteed right to a free and fair hearing.

There are three recognized rules of procedural fairness:-

i. The Hearing Rule- that is the right to a fair hearing.
ii. The Bias Rule- a requirement that the decision-maker is impartial.
iii. The No evidence rule-the requirement for decisions to be based on logically probative evidence, not on mere speculation or suspicion.

The appellants appeal to the minister was not determined on merit, so it cannot be said that the issue had been conclusively determined, and even if it was, then the Appellants were entitled to be heard and explain why they ought to have been granted leave to defend the case.

Breach of the hearing rule will usually, amount to jurisdictional error and void the decision

I have carefully examined the grounds of appeal, the submissions by the counsel for both parties and I have also evaluated the law and authorities cited above and I find that the answer to all the issues I framed above are in the affirmative, hence the decision of the Tribunal cannot be allowed to stand. The up-shot is that I find this appeal has merits and I hereby allow it.

Accordingly, I uphold the appeal and order that the orders/award of the Tribunal made on 28th day of May 2004 be and is hereby set aside. Each party shall bear its costs of this appeal and the proceedings at the Tribunal.

Right of appeal 28 days

Dated at Nyeri this **6th** day of **November** 2015

John M. Mativo

Judge

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[1] Cap 490, Laws of Kenya

[2] Cap 80, Laws of Kenya

[3] L.N. 59/2009.

[4] Cap 21, Laws of Kenya

[5] 187 U.S. 315, 320 (1902).

[6] {2000} 1EA 75

[7] Civil Appeal No. 232 of 1997

[8] {1952} E.A.C.A 77

[9] {1959}E.A. 425

[10] Civil Appeal No. 193 of 1999

[11] {1981} KLR 30

[12] {1986-1989} EA 456, at 459

[13] Civil Appeal No 146 of 2001 or {2007} eKLR

[14] See Mason J in Kioa vs West {1985} CLR 550 at 582