



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 12 OF 2017

PETER WANJOHI

(OFFICIAL LIQUIDATOR DRUMVELE F.C.S LTD).....APPELLANT

VERSUS

PIUS MUSIMBA MUASYA1ST RESPONDENT

NORMAN MUTUA KIMATU.....2ND RESPONDENT

JOHN NZOMO KIOKO.....3RD RESPONDENT

(Being an Appeal from the Ruling and Order of the Co-operative Tribunal delivered against

the Appellant on 17th March, 2017 in Co-operative Tribunal Case No 720 of 2016)

JUDGMENT

1. This interlocutory appeal arises from a ruling delivered by the Co-operative Tribunal at Nairobi in **Co-operative Tribunal Case No 720 of 2016; Pius Musimba Muasya and 2 Others v Peter Wanjohi**. A brief summary of the background to the impugned interlocutory decision is necessary.

2. On 3/11/2016, the respondents in this appeal filed a statement of claim in the Tribunal. They simultaneously filed a notice of motion dated 2/11/2016 seeking interim injunctive orders. The application came up for interpartes hearing on 11/11/2016. Satisfied that the appellant had been served but was absent, the Tribunal heard the application and on 24/11/2016, it delivered a ruling granting the interim injunctive orders sought in the application. Subsequently, on 28/11/2016, the appellant filed a notice of motion of even date seeking an order setting aside the interim injunctive orders.

3. The said application dated 28/11/2016 was premised upon the following verbatim grounds:

- a) That this tribunal proceeded ex parte to make conclusive findings of law and fact without evidence;***
- b) That the applicants were condemned unheard;***
- c) That the orders made ex parte are punitive, may cause serious losses and damages to the conclusion of the liquidation process.***
- d) That the orders are unenforceable in law as the liquidation process is concluded and properties have since been transferred to 3rd parties.***
- e) That the applicants herein lack sufficient locus in the matter as they have since relinquished their interests in the subject matter and or they are not members of Drumvale Farmers Co-operative Society Limited (In Liquidation). In any case, genuine members and creditors had an opportunity to lodge objection to the liquidation process within thirty days after cancellation of the society as required by law.***
- f) That the application is entirely unmeritorious as the 1st respondent dutifully through a Kenya Gazette Notice No 963 of 22nd January 2010 invited the society's shareholders and creditors who had pending claims to submit by 30th April, 2010 and hence their claim is time-barred.***

g) That the orders sought are not treble, are bad in law and unsustainable unenforceable in law as the liquidation process has since been concluded and the liquidator is winding up and dealing with pending court cases as there is no property pending for sale or subdivision.

4. The Tribunal heard the application and rendered a ruling on 17/3/2017 dismissing the application. That ruling is what provoked the present appeal.

5. Through a memorandum of appeal dated 23/3/2017, the appellant has raised the following five verbatim grounds of appeal:

a) That the Learned trial Tribunal made a fundamental error of fact and law upholding and confirming conclusive findings of law and fact which were made ex parte and without evidence on 2nd November 2016.

b) That the Learned Trial Tribunal was wrong in failing to find that the 1st, 2nd and 3rd respondents are not members of the society hence lacks locus in instituting this claim

c) That the learned trial Tribunal made a fundamental error of law in making permanent injunctive orders against the appellant notwithstanding the mere fact that the liquidation process is in the final stage of conclusion and properties in issue have since been sold and transferred to third parties who are not parties to the claim

d) That the learned trial Tribunal was wrong and made a fundamental error of law in failing to take cognizance of the Kenya Gazette Notice No 963 of 22nd January 2010 that invited all the society's creditors and shareholders who had pending claims to submit by 30th April, 2010.

e) That the learned trial Tribunal acted against the law and was arbitrary in suspending the liquidation process ex parte and concluding the entire claim without a fair hearing and thus exposing the members of the society to massive losses and damages.

6. The appellant prays that the ruling and orders of the Tribunal made on 17/3/2017 and the injunctive orders made on 2/11/2016 (sic) be set aside forthwith and the entire claim be dismissed.

7. The appeal was canvassed through written submissions dated 18/10/2017. The respondents opposed the appeal through written submissions dated 28/2/2018. I have considered the entire record before the Tribunal together with the impugned ruling. I have also considered the grounds set out in the memorandum of appeal and the rival submissions of the parties. I have similarly considered the relevant legal framework and guiding jurisprudence.

8. The application giving rise to the present appeal sought the setting aside of injunctive orders which were issued at an interpartes hearing of an interlocutory application. In essence, the Tribunal was invited to exercise discretionary jurisdiction. The broad issue in the present appeal therefore is whether the Tribunal misdirected itself in the exercise of that discretionary jurisdiction. This broad issue will be borne in mind when discussing each of the five grounds of appeal.

9. The key principles governing the exercise of the judicial discretion to set aside an ex parte order or judgment obtained in default of either party to attend the hearing were spelt out by the Court of Appeal in **Maina v Mugiria (1983) KLR 78**. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, the discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, and it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Thirdly, the court has no discretion where it appears to the court that there has been no proper service. Fourthly, when exercising this power, the court is required to consider prior and subsequent facts and circumstances and respective merits of the parties' respective cases which informed the grant of the order or judgment and consider whether or not it would be just and reasonable to set aside or vary the order or judgment. Fifthly, the court is required to consider the nature of the action and the defence put forth by the defendant.

10. The first ground of appeal is that the Tribunal made a fundamental error of fact and law in upholding and confirming conclusive findings of law and fact which were made ex parte and without evidence on 2/11/2016 (sic). The present appeal challenges the ruling delivered on 17/3/2017. The issues which were considered by the Tribunal in the application seeking the setting aside of the orders of 24/11/2016 were set out in paragraph 7 of the impugned ruling as follows: (a) whether the respondent was served with the application dated 2/11/2016; (b) whether the ruling delivered on 24/11/2016 was legal and procedural; (c) whether the respondent was condemned unheard; and (d) whether the orders made on 24/11/2016 should be set aside. Based on the above issues, the Tribunal found that the appellant had been properly served and no reason had been given by the appellant to explain his failure to attend court or to respond to the application. It held that the appellant had been afforded the opportunity to be heard but had kept himself away from the seat of justice. The Tribunal further found that nothing had been raised by the appellant to impugn the procedure followed by the Tribunal in granting the orders of 24/11/2016. On my part, I have not found any fundamental error of fact or law which the Tribunal made in arriving at the above findings. There is no element of misdirection on part of the Tribunal.

11. The 2nd ground of appeal is that the Tribunal was wrong in failing to find that the 1st, 2nd and 3rd respondents were not members of the society hence lacked *locus standi*. I have scrutinized the application before the Tribunal and the ruling made thereon. The Tribunal did not make a finding on the *locus standi* of the respondents. In my view, the Tribunal rightly focused on the key issues in the application before it at that stage. The issue of membership of the respondents was one to be deeply delved into only after the appellant had tendered an explanation as to why he elected not to respond to the application and not to attend court. No attempt was made to present any form of explanation for the failure to respond to the application and to attend court.

12. I have similarly evaluated the 3rd, 4th and 5th grounds of appeal. They do not focus on the application which the Tribunal was invited to

determine and the issues which were determined in the application. They focus on the merits of the respondents' claim. In my view, these are issues which the appellant will have the opportunity to raise at the substantive hearing of the claim in the Tribunal. For this reason, I do not think they are proper grounds for faulting the way the Tribunal exercised its discretionary jurisdiction.

13. Lastly, besides setting aside the orders of 17/3/2017, the present appeal seeks to set aside the orders of 2/11/2016 (sic). This second limb of the appeal is similarly untenable. Firstly, the application giving rise to the present appeal did not seek the setting aside of the order made on 2/11/2016. Secondly, the record of appeal does not bear any order made on 2/11/2016. For these two reasons, the second limb of prayer (a) of the appeal cannot be granted.

14. The net result is that this court does not find merit in any of the grounds set out in the Memorandum of Appeal dated 23/3/2017. Consequently, the appeal herein is dismissed.

15. Because the appellant is a statutory liquidator, each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mrs Kingoo Advocate for the Respondent

June Nafula - Court Clerk