



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 47 OF 2016

BETWEEN

MEK SACCO LIMITEDAPPELLANT

-VS-

THE COUNTY CO-OPERATIVE

OFFICER- KISUMU1ST RESPONDENT

THE SUB-COMMISSIONER OF

CO-OPERATIVES2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

EDWIN KISIA

METABEL OPIYO

JOSEPHAT KOLA

PETER OLUOCH BENTER4TH RESPONDENT

(An appeal arising from the Order of the of the High Court of Kenya at Kisumu (Chemitei, J) dated 20th April, 2016)

in

HC Misc. Civil Application (JR) No. 11 of 2015)

JUDGMENT OF THE COURT

Background

[1] This is an appeal by **Mek Sacco Limited** (the appellant) against the order of the High Court (**Chemitei, J**) dated 20th April, 2016 which allowed the application dated 5th February, 2016 filed by **Edwin Kisia, Metabel Opiyo, Josephat Kola** and **Peter Oluoch Benter**, (the 4th respondents) as interested parties seeking to be enjoined in the suit filed by the appellant in Misc. Civil Application (JR) No. 11 of 2015 and vacated consent orders of 8th December, 2015.

[2] A brief background to the appeal is that **Samson Chilo Omondi (Samson), Chrispine Otieno Pudo (Chrispine), Margaret Awuor Odhiambo (Margaret)** and **Francis Ochieng Osure (Francis)** were the officials of the appellant until 11th July, 2015 when the 4th

respondent with the assistance of the **County Co-operative Officer, Kisumu** (the 1st respondent) convened a Special General Meeting. The appellant is established under the Co-operative Societies Act. **The Sub Commissioner of Co-operatives** is the 2nd respondent herein while the **Attorney General** is the 3rd respondent.

[3] On 11th July, 2015, a Special General Meeting of the appellant was convened in which **Edwin Kisia, Metabel Opiyo, Josephat Kola and Peter Oluoch Benter** (the 4th respondent) were elected as interim officials of the appellant. **Samson, Chrispine, Margaret and Francis** did not attend the Special General Meeting and claimed that they were not given notice to attend. Consequently, **Samson, Chrispine, Margaret and Francis**, filed HCCC No. 29 of 2015 by way of a Notice of Motion dated 14th July, 2015 in the High Court seeking a temporary injunction to restrain the respondents jointly and severally, whether by themselves, agents, workers, servants or anyone acting on their behalf, from interfering in any way with the running/operations/businesses of the appellant and further from removing **Samson, Chrispine, Margaret and Francis**, from office as officers of the appellant. **Samson, Chrispine, Margaret and Francis** also prayed that they be allowed to continue as the signatories of the appellant's accounts and that the respondents be restrained from operating those accounts. The High Court (**Maina, J.**) in a ruling dated 8th October, 2015 dismissed the suit for want of jurisdiction. The learned Judge stated that the proper forum to ventilate the grievance was the Co-operative Tribunal in compliance with the appellant's By-Law 82 which provides that:-

“Any dispute arising out of these By-laws concerning the business of the society shall be referred to the Co-operative Tribunal established under the Act.”

[4] Subsequently, **Samson, Chrispine, Margaret and Francis** filed a Claim in the Co-operative Disputes Tribunal being **Nairobi Co-operative Dispute Tribunal Case No. 587 of 2015** dated 12th October, 2015 suing as officials of the appellant and on their own behalf as members of the appellant seeking; a declaration that the 4th respondent's conduct of issuing a notice to hold a Special General Meeting was illegal, unlawful, unprocedural, null and void; and a permanent injunction restraining the 4th respondents from interfering with the running of the appellant. The 4th respondents filed a Memorandum of Response dated 17th November, 2015 on the ground that **Samson, Chrispine, Margaret and Francis** were issued with a notice to attend the Special General Meeting and were removed from office for, *inter alia*, failing to convene meetings and to account for members' finances.

[5] On 14th September, 2015, The Commissioner for Co-operative Development on his own accord, caused an inquiry to be held into the appellant's by-laws, working and financial conditions and the conduct of the management committee and past or present members or officers in accordance with **section 58** as read together with section 73 of the Co-operative Societies Act.

Vide Gazette Notice No. 7595 of 9th October, 2015 the inquiry order dated 14th September, 2015 was gazetted authorizing two (2) named Co-operative officers to hold an inquiry into the affairs of the appellant within eighteen (18) days at such place and time as may be expedient and duly notified by them.

[6] The appellant and the 1st, 2nd and 3rd respondents filed a consent order dated 8th December, 2015 (the consent order) as follows:-

“that the presentation of the inquiry report on the 15th December, 2015 or on any other date by the 1st and 2nd respondents herein be stopped pending the hearing and determination of the ex-parte applicant's substantive application dated the 28th October, 2015.”

[7] By way of a Notice of Motion dated 28th October, 2015, the appellant sought orders in the nature of *certiorari* quashing the decision/order of the 1st and 2nd respondents made on the 14th day of September, 2015, ordering for an unfair, illegal, unlawful and unprocedural inquiry of the *ex parte* applicant's (the appellant herein) books of accounts; that in the alternative, the Court be pleased to issue an order in the nature of *certiorari* quashing the inquiry report prepared on the basis of the decision of the 1st and 2nd respondents made on 14th September, 2015 ordering that the 1st and 2nd respondents be compelled to produce and to hand over *inter alia* all the books of account, banks statements and cheque books forcefully taken from the appellant's offices by the respondents back to the *ex-parte* applicant's central management committee and an inventory of the same be taken.

The appellant also sought an order in the nature of prohibition against the 1st and 2nd respondents from conducting or causing to be conducted an inquiry/inspection of the appellant's accounts. The 4th respondents filed an application dated 5th February, 2016 seeking *inter alia* to be enjoined to HC Misc. Application (JR) No. 11 of 2015 as interested parties and that the Consent Order of 8th December, 2015 be vacated.

[8] The application dated 5th February, 2016 was opposed by the appellant by grounds of opposition dated 14th February, 2016 and a verifying affidavit sworn by **Simon Otieno Adede** filed on 14th March, 2016. When the application dated 5th February, 2016 came up for hearing on 20th April, 2016, it was allowed by the High Court (**Chemitei, J.**), with no order as to costs. The effect of the order was that the 4th respondents were enjoined to HC Misc. Application (JR) No. 11 of 2015 and the consent orders of 8th December, 2015 were vacated.

[9] Aggrieved by this decision the appellant filed this appeal. The memorandum of appeal raises the following grounds: the learned judge erred in allowing the 4th respondents' application as he lacked the jurisdiction to hear the matter as there was already filed Co-operative Disputes Tribunal case No. 587 of 2015 at the Co-operative Disputes Tribunal; that the learned judge erred in failing to consider the appellant's grounds of opposition and replying affidavit, and that the learned Judge failed to consider oral or written submissions of the parties in arriving at his decision.

The appellant seeks the following orders:-

“a) That this appeal be allowed.

b) The decision/order/ruling of the superior court/High Court be quashed and set aside respectively.”

Submissions

[10] When the matter came up for hearing, **Mr. Francis Ochieng Osure** who had filed a Notice to act in person on 16th October, 2017 represented the appellant and relied on the appellant’s written submissions filed in the High Court. He submitted that the dispute before the court in the Kisumu Misc. Civil Application (JR) No. 11 of 2015 was between the appellant and the Commissioner of Co-operatives and the 4th respondents were therefore not parties in the dispute; that the grounds of opposition filed by the appellant in the High Court on 24th February, 2016 should have been considered; that the High Court lacked jurisdiction to hear the matter before it; that the impugned ruling was in contravention of section 76 of the Co-operative Societies Act and any dispute concerning the business of the appellant should have been referred to the Co-operative Disputes Tribunal in the first instance and the High Court had therefore no jurisdiction to hear and determine the dispute; that the parties and issues in the Co-operative Disputes Tribunal Case No. 587 of 2015 which was still pending were the same as in High Court Civil Suit No. 29 of 2015 before the High Court; and was therefore *sub judice*; that the doctrine of *sub-judice* bars any court from hearing and determining any matter pending before another court; that the learned Judge erred when he made his determination on 20th April, 2016 without hearing the parties; and that this was a contravention of the parties’ right to fair hearing.

[11] **Mr. Rodi**, learned counsel for the 4th respondents opposed the appeal and relied on his written submissions, list of authorities and the replying affidavit of **Duncun Otieno Ogango**. Counsel urged that the appeal lacks merit, amounts to an abuse of the court process and should be struck out with costs; that the appellant failed to raise the issue of jurisdiction in the High Court which is in contravention to section 16 of the Civil Procedure Act and further that it is the appellant who filed the suit in the High Court and should therefore be estopped from raising issues of jurisdiction at this stage; that the High Court has jurisdiction to hear and determine matters concerning election of officials, holding of office and not all matters fall within the jurisdiction of the Co-operative Disputes Tribunal; and that the High Court did not therefore err in determining the matter as there is no clear provision under section 76 of the Co-operative Societies Act that ousts the High Court’s jurisdiction.

[12] It was Counsel’s further submission that the 4th respondents were elected interim officials of the appellant to protect the interests of the appellant’s members and are interested parties as defined by **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules)** as persons with identifiable interests. With reference to Order 1 Rule 10 (2) of the Civil Procedure Rules, it was submitted that the learned Judge did not err in finding that the 4th respondents were interested parties and thereby enjoined them to the suit. Counsel referred this Court to the suits filed by the appellant High Court Misc. Civil Application (JR) No. 11 of 2015 and Co-operative Disputes Tribunal Case No. 587 of 2015 which were both still pending hearing and final determination and contended that it was a deliberate move by the appellants to exclude the 4th respondents in the Judicial Review application with a view to stopping an inquiry into the appellant’s books of accounts and that the appellants did not therefore come to court with clean hands.

[13] Counsel further submitted that the learned Judge exercised his discretion judicially; that when the matter came up for hearing on 20th April, 2016, the appellant’s counsel was not in court and the counsel holding his brief had no clear instructions; and that equity aids the vigilant not the indolent.

[14] **Mr Que**, learned counsel for the 1st, 2nd and 3rd respondents opposed the appeal. Counsel submitted that the impugned order of 20th April, 2016 vacated the consent order of 8th December, 2015; that by the time the impugned ruling was delivered, the inquiry report on the appellant’s books of account had been submitted to the 1st and 2nd respondents. Counsel urged us to dismiss the appeal.

Determination

[15] This being a first appeal, it is settled law that the duty of the first appellate court is to re-evaluate the evidence in the superior court both on points of law and facts and come up with its findings and conclusions. We refer to the case of **Kamau v. Mungai (2006) 1 KLR 15** where the court stated:-

“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”

[16] We have considered the record, the submissions, the authorities cited and the law. The issues that fall for our determination are:

- a) Whether the High Court had jurisdiction to hear and determine the application dated 5th February, 2016.
- b) Whether High Court Misc. Civil application No. 11 (JR) of 2015 is *res judicata* and whether the doctrine of *sub-judice* applies.
- c) Whether the appellant was denied the right to be heard.

[17] On the question of jurisdiction as was stated by **Nyarangi JA** in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to

whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

[18] It is well settled law that jurisdiction is everything. A Court of law cannot confer jurisdiction upon itself where that jurisdiction has been ousted by Statute. In **Samuel Kamau Macharia v. Kenya Commercial Bank Limited & 2 Others**, Civil Application No. 2 of 2011, the Supreme Court stated;

“A court’s jurisdiction flows from either the Constitution or statute or both. Thus, a court of law can only exercise jurisdiction conferred by the Constitution or any other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law.”

[19] Section 76(1) of the Co-operative Societies Act provides that:-

1. If any dispute concerning the business of a co-operative society arises-

(a) among members, past 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 co-operative society, it shall be referred to the Tribunal.

Section 76(2) of the Co-operative Societies Act provides that:-

2. 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 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.

[20] It is notable that the appellant failed to raise the issue of jurisdiction in the High Court. It is also notable that the appellant’s filed the suit before the High Court (Misc. Civil Application No. 11 of 2015 (JR) which was heard and determined by Chemitei, J. on 20th April, 2016. The appellants are therefore estopped from challenging the jurisdiction of the High Court at this stage. It is clear that the High Court and not the Co-operative Disputes Tribunal had the exclusive jurisdiction to determine the judicial review application.

[21] Regarding *re judicata*, Section 7 of the Civil Procedure Act provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

[22] In the case of **William Koross V Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** this Court laid down the essence of the doctrine of *res judicata* as follows:-

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go...”

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

The Court went on to state:

“Therefore, for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

a. The suit or issue was directly and substantially in issue in the former suit.

- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”

[23] Further, in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR**, this Court stated:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

[24] Co-operative Dispute Tribunal Case No. 587 of 2015 sought *inter alia* interim orders restraining the 4th respondents from interfering with the operations of the appellant and restraining the 4th respondents from removing **Samson, Chrispine, Margaret and Francis** as signatories of the appellant’s accounts. On the other hand, High Court Misc. Civil application (JR) No. 11 of 2015 *inter alia*, sought an order of **certiorari** quashing the decision of the 1st and 2nd respondents made on 14th April, 2015 ordering for an inquiry into the appellant’s accounts. Accordingly, the issues raised in Co-operative Dispute Tribunal Case No. 587 of 2015 and in the High Court Misc. Civil Application (JR) No. 11 of 2015 were different and High Court Misc. Civil application (JR) No. 11 of 2015 is therefore not *res judicata*.

[25] On the issue of *sub judice*, **section 6** of the Civil Procedure Act provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

[26] It was the appellant’s submission that the parties and issues raised in Co-operative Disputes Tribunal Case No. 587 of 2015 were the same as in Kisumu Civil Suit No. 29 of 2015 and therefore *sub judice*. We find that in the circumstances of this case the doctrine of *sub judice* does not apply as High Court Civil Suit No. 29 of 2015 was dismissed by Maina, J for want of jurisdiction. The learned Judge found that the High Court was not the proper forum to ventilate the issues raised before her. Subsequently, the appellant filed Co-operative Dispute Tribunal Case No. 587 of 2015 in the Co-operative Disputes Tribunal.

[27] On the question whether the trial court denied the appellant its right to be heard, we reiterate the words of this Court in the recent case of **Lubna Ali Sheikh Abdalla Bajaber & another V. The Chief Magistrate’s Court, Mombasa & 2 Others Civil Appeal No. 51 of 2017** which stated that:-

“At the heart of this appeal are two sacrosanct principles: Audi alteram partem- the person, who has to be affected by a decision has a right to be heard; (no one should be condemned unheard); and nemo judex in resua – the authority deciding the matter should be free from bias. These two principles are embodied in the broader principle of natural justice which is the sine qua non of a democratic society and a fair and impartial judiciary. These are principles that are cherished universally in all democracies where the Rule of Law reigns. In our country, the right to be heard, or right to a fair trial is one of the non derogable human rights under Article 25 (c) of the Constitution.”

[28] It was the appellant’s claim that their grounds of opposition and the replying affidavit both dated 14th February, 2016 were not considered and that the court denied their right to be heard.

From the evidence on record, counsel holding brief for the appellant was present during the hearing but was unable to proceed as he had no clear instructions from the appellant. He stated as follows;-“My instructions are not clear.”

Accordingly, we find that the appellant was given the right to be heard, but did not take advantage of it.

[29] For the foregoing reasons, we find no merit in the appeal and dismiss it with costs to the respondents.

DATED and delivered at Kisumu this 28th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR