



**THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME J.J.A)**

**CIVIL APPEAL NO. 75 OF 2018**

**BETWEEN**

HARRISON OTIENDE.....1<sup>ST</sup> APPELLANT

JAMES MAINA.....2<sup>ND</sup> APPELLANT

MOHAMMED MWINYI.....3<sup>RD</sup> APPELLANT

ABDI M. SHEIKH.....4<sup>TH</sup> APPELLANT

ABDI RAHMAN NASSIR.....5<sup>TH</sup> APPELLANT

JOSEPH N. CHWEYA.....6<sup>TH</sup> APPELLANT

**AND**

BADARI SACCO LIMITED.....1<sup>ST</sup> RESPONDENT

SECRETARY GENERAL, DOCK WORKERS UNION.....2<sup>ND</sup> RESPONDENT

BARCLAYS BANK OF KENYA LIMITED.....3<sup>RD</sup> RESPONDENT

DOCK WORKERS UNION (K) LIMITED.....4<sup>TH</sup> RESPONDENT

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Mombasa (Rika. J.) delivered on 20<sup>th</sup> March, 2018*

*in*

*Employment and Labour Relations Cause No. 616 of 2017)*

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**JUDGMENT OF THE COURT**

1. By a Statement of Claim filed on 31<sup>st</sup> July, 2017 the appellants moved court as members of the Dock Workers Union (4<sup>th</sup> Respondent). The appellants are also employees of the Kenya Ports Authority (KPA) who have been remitting monthly trade union subscription dues to the said Union. The dues so remitted were invested with Bandari Sacco Limited, the (1<sup>st</sup> Respondent) in the said suit, the appellants alleged that they had reason to believe that there was imminent misappropriation of their funds and accordingly moved court seeking pre-emptive injunctive relief against the respondents.
2. Contemporaneously with the suit, the appellants filed an application dated 31<sup>st</sup> July, 2017 seeking interim injunctive orders in a bid to ensure the protection of the said funds, pending hearing and determination of the Claim. The Court issued interim orders on 3<sup>rd</sup> August, 2017. In response to that application, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 14<sup>th</sup> September, 2017 together with a notice of

preliminary objection of even date; while the 2<sup>nd</sup> respondent filed a replying affidavit sworn on 23<sup>rd</sup> August, 2017 on his behalf and on behalf of the 4<sup>th</sup> respondent. Meanwhile, the 4<sup>th</sup> respondent also filed a motion on notice dated 23<sup>rd</sup> August, 2017 seeking the vacation of the interim orders on the basis that the same were adversely affecting the operations of the union. However, for purposes of this appeal, the Court's attention is primarily drawn to the preliminary objection and the outcome thereof.

3. The preliminary objection raised by the 1<sup>st</sup> respondent was on the grounds that:

a) *'The cause of action revealed and as disclosed if any in the pleadings relates to a dispute between two groups of members of the 1<sup>st</sup> respondent who are disagreeing on whether the dock workers union shares held by the 1<sup>st</sup> respondent should or should not be used as security to secure a loan facility by one of the members (Dock workers union)*

b) *The claimants are members of the 1<sup>st</sup> respondent (herein referred to as SACCO), the dock workers union is a member of the SACCO and the 4<sup>th</sup> respondent is the Chief Executive Officer of the union.*

c) *That this court under the law is devoid of jurisdiction to hear and determine a dispute between members of a cooperative society and the society, as disputes of such nature are the four corners (sic) of the cooperative Act cap 490 of the Laws of Kenya*

d) *That the claimants' suit is thus not duly incompetent (sic) at law for having been filed in a court without jurisdiction, but the entire suit as conceived and framed does not disclose any cause of action as against the 1<sup>st</sup> respondent and the same ought to be struck out with costs for being an abuse of due process of court.'*

Though the matter came up before court severally, hearing on the preliminary objection only took off on 14<sup>th</sup> February, 2018 when it came up for mention for further directions.

4. On the said date, the trial court proceeded to hear the parties' respective submissions as regards the preliminary objection. Appearing for the respondents, learned counsel **Mr. Ochieng** submitted that the claim touches on loans given by the 1<sup>st</sup> respondent as a SACCO; that given that the union is also a member of the said SACCO, the loans in question are not public loans and are thus advanced within the confines of the Cooperative Societies Act. Consequently, counsel contended the dispute before court is between two members of the SACCO, whose resolution lies with the Tribunal established under Section 76 (1) (b) of the Act. He thus asserted that the jurisdiction of the Employment and Labour Relations Court (ELRC) was improperly invoked. Further, that under Section 41 of the Labour Relations Act, there has to be 5 members or more instituting the claim before the court but in this case, only 3 members gave their authority for the institution of claim as evidenced by the verifying affidavit on record; that since a verifying affidavit forms the very foundation of a claim, a verifying affidavit that lacks the requisite authority from the other claimants is fatally defective and by extension, the entire suit is a non-starter and should be struck out with costs.

5. Mr. Ochieng's sentiments aforesaid received support from Mr. Ndubi, learned counsel for the 4<sup>th</sup> respondent; who adopted those submissions and added that the claim was not ripe for the trial court. That given the fact that the relief being sought is in the nature of financial audit, the claim can be entertained before the Cooperatives Tribunal. Moreover, the claim could also be ventilated through the internal dispute resolution mechanism within the union; wherein there is an audit mechanism. Counsel argued that since there are no allegations of blame or blameworthiness, the court was being presented with a moot case based on conjecture; as the appellants kept pleading and contesting the likelihood of a future loan to be advanced to an unidentified third party. On the whole, it was submitted, the court indeed lacks the jurisdiction to entertain the matter as filed

6. In opposition to the preliminary objection **Mr. Magiya**, learned counsel for the appellants submitted that the appellants came to court as *bona fide* members of the union and that under Section 41 of the Labour Relations Act, the trial court has jurisdiction over the matter; that the SACCO is a mere custodian of members' funds and that the dispute revolved around the mismanagement of the members' funds which is a specific issue and not conjecture. As such it was submitted that the preliminary objection is misguided as all elements required under the Labour Relations Act have been satisfied. While conceding that the respondent indeed had an internal dispute resolution mechanism, counsel submitted that the appellants had given the same a chance but the respondents proved unwilling to apply it.

7. In a brief rejoinder, **Mr. Ndubi** disputed that the appellants ever engaged the internal dispute resolution mechanisms as claimed by Mr. Magiya and said that in cases where mismanagement of funds has been alleged, the officials of the union are to be held accountable in which case, the dispute ceases to be a labour dispute. He added that the want of authority to sue is not an error curable under Article 159 of the Constitution or any provision of law; and that the fate of the suit lies in its being struck out.

8. Mr. Ochieng in further rejoinder submitted that in order for one to bring a claim on behalf of the members of a union, one has to be an official of the union; and if bringing such claim as a member, the person must operate within the confines of the Constitution and the law. In this case, he contended, the Registrar of Trade Unions should have been approached first, prior to the appellants heading to court.

9. By a ruling delivered on 20<sup>th</sup> March, 2018 the learned trial Judge (*Rika J*) sustained the 1<sup>st</sup> respondent's preliminary objection and struck out the suit with costs. That ruling has precipitated this appeal; in which the appellants contend that the learned trial Judge erred by; allowing the respondents to introduce and argue oral points of objection otherwise not contained in the Notice of Preliminary Objection that was on record and further, by proceeding to hear the matter on a date when the same was only scheduled for mention; failing to dismiss the novel grounds of objection notwithstanding the fact that the appellants were never given any notice thereto; misdirecting himself as to the legal consequences of an authority to appear, thereby striking out an otherwise competent claim even though the same could have been salvaged through an amendment; failing to find that the appellants should not be turned away from the seat of justice without an effective remedy.

10. Highlighting the submissions, Ms. Mohammed, learned counsel who held brief for Mr. Magiya for the appellants submitted that at the time of trial, there was only one Notice of Preliminary Objection on record. Consequently, the learned Judge erred when he found that there

were additional valid objections by the respondents and the interested parties. In addition, counsel contended that even if such objections were held to have been duly raised, the germane issue for determination was whether the authority to appear was properly signed or not; which itself was an issue of fact, not of law and hence not capable of determination at a preliminary stage.

11. Counsel also added that it was erroneous for the learned Judge to convert a mention of the matter into a hearing of the hitherto non-existent objections. She submitted that even if the matter were to be deemed to have been rightly heard, the learned Judge nonetheless erred when he struck out the entire suit based on Rule 9 of the Employment and Labour Relations Court Act, yet that provision is concerned with representative suits and this was no such suit. She added that the claimants, having been represented by counsel, did not need to sign any consent or authority. As per counsel, in such a case, only the verifying affidavits were defective; but such defects were easily curable by way of amendment. The appellants relied on the authority in the case of **Luke Cheruiyot & 37 others v. National Oil Corporation of Kenya [2015] eKLR** in support of the proposition that a defective authority to plead can be amended by way of filing compliant affidavits. On that basis, counsel urged this court to allow the appeal, and reinstate the appellants' suit, to allow them an opportunity to regularize their pleadings and be heard on merit.

12. Opposing the appeal, Mr. Ochieng learned counsel for the 4<sup>th</sup> respondent, reiterated that under Section 41 of the Labour Relations Act, such a claim must be instituted by at least 5 members of the union complained against. Consequently, the claim as filed was fatally defective as the authorized appellants were less than 5 and the consent/authority filed was thus irregular and incurable. As regards the hearing of the matter on a date when the same was slated for mention, he submitted that the appellants never raised any objection in that regard at the time of trial and should not be heard to complain now.

13. This being a first appeal our duty is as succinctly set out in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where this Court stated as follows :-

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-***

***“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”***

The issues for determination in this appeal are firstly, whether the trial court erred by hearing the preliminary objection on a date when the matter was scheduled for mention; and secondly, whether want of authority on the appellants' part called for the striking out of the entire suit as held by the trial Judge.

14. At the hearing of the preliminary objection, no issue was ever raised by the appellants to the effect that the matter was only scheduled for mention. If anything, their counsel on record proceeded to submit on the preliminary objection at hand. We are aware that this Court has in some instances frowned upon courts giving substantive orders that affect parties on mention dates. The reason for this is mainly because a party is unprepared for hearing on a mention date, or a party is absent and orders given on the mention date turn out to be prejudicial to the party in question. There is however nothing wrong with the court hearing the parties and issuing orders on a mention date in the presence of all the parties, where as in this case, none of the parties objected to the hearing of the preliminary objection and all of them were heard on the issue. In our view, the claim that the impugned ruling should be set aside on the ground that the matter proceeded on a date when it was only slated for mention, does not lie.

15. As to whether the defective consent and/or authority to act vitiated the entire claim; the appellants conceded that their authority and Consent filed on 31<sup>st</sup> July, 2017 was indeed defective and an affront to Rule 9(3) of the Employment & Labour Relations Court's rules. They however assert that this was a rectifiable defect that could be remedied by amendment of the pleadings and did not call for the striking out of the entire suit. As per rule 9 aforesaid, a representative claim before the ELRC is to be filed on the following terms:

*(1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.*

*(2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:*

*Provided that in appropriate circumstances, the Court may dispense with this requirement.*

*(3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.*

Given the proviso to sub rule (2) aforesaid, the ELRC reserves the discretion to dispense with the letter of authority. It has not been demonstrated that such dispensation was sought and wrongly denied by the court, nor has it been demonstrated that the discretion was wrongly exercised. It is to be remembered that this Court can only interfere with a trial court's exercise of discretion in cases where it is shown to have been wrongly exercised. See **Mbogo v. Shah [1968] EA 93**. Where the court stated:-

***“Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in exercise of his discretion and that as a***

*result there has been injustice.”*

We are not persuaded that the learned Judge erred in upholding the preliminary objection with the result that the appellant’s suit was struck out. We find this appeal devoid of merit and dismiss the same with costs to the respondent.

**Dated and delivered at Mombasa this 4<sup>th</sup> day of April, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**