



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 197 OF 2005

BETWEEN

NANYUKI EQUATOR SACCO

CO-OPERATIVE SOCIETY LTD. APPELLANT

AND

NYERI SACCO SOCIETY 1ST RESPONDENT

THE CHAIRMAN,

THE CO-OPERATIVE TRIBUNAL 2ND RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Nairobi (Mohammed Ibrahim J) dated 22nd February 2005

in

H.C.C.C. MISC. APPL. NO. 886 OF 2003)

JUDGMENT OF THE COURT

The dispute between the appellant and the 1st respondent, both farmers co-operative societies, was referred to Co-operative Tribunal (The Tribunal) as required by **Section 80** of the Co-operative Societies Act (the Act) 1997. Simultaneous with the Statement of Claim, the 1st respondent filed a Notice of Motion for interim orders;

“1. That the respondent by themselves, their agents, servants and/or employees be ordered and/or directed by an order of this Honourable Tribunal from continuing to operate “Banking Services” or frontal office on Plot Number 2787/83/V within Nanyuki Municipality, Laikipia District, Rift Valley Province.

2. That the respondent by themselves, their servants, agents and/or employees be restrained by an order of injunction from this Honourable Court from recruiting members within Laikipia District which is the claimant’s area of operation until the

hearing and determination of this suit.

3. That the respondent by themselves, their servants, agents and/or employees be restrained by an order of this Honorable Tribunal from recruiting members in form of accepting deposits or advancing or giving any loans to the members of the claimant society.

4. That the Honourable Tribunal be pleased to issue any other order that it may deem just and fit for the end of justice.”

That application was heard by the Chairman of the Tribunal, Mr. C.G. Mbogo (the Chairman) sitting with two members, Mrs. W. E. Mureithi and Mr. S. N. Mbugi. Subsequently, the Tribunal in its ruling rendered on 8th August 2003 allowed the application in terms of prayers 1, 2 and 3 set out above, the effect of which was to restrain the appellant from expanding its activities from Nyeri District to Nanyuki Municipality.

Being aggrieved by that decision, the appellant moved to the High Court to have it quashed by an order of *certiorari*. They also sought an order of prohibition:-

“.....prohibiting the Chairman, the Co-operative Tribunal from continuing with the hearing of the Co-operative Tribunal Case No. 16 of 2003, Nanyuki Equator Co-operative Society V. Nyeri Farmers Sacco Society Limited.”

The application was premised on the grounds that the Chairman violated the provisions of **Section 80 (4)** of the Act by sitting with two members of the Tribunal when the application for an interlocutory injunction was argued; that the Chairman sat with one member (*Mrs. W.E. Mureithi*) when he delivered the ruling; and that the ruling effectively determined with finality the dispute at an interlocutory stage. The learned Judge (*Ibrahim, J. as he then was*) considered the arguments by both sides and found that indeed the Chairman, in sitting with two members violated **Section 80 (4)** of the Act and proceeded to prohibit the Chairman,

“...from continuing with the hearing of the Co-operative Tribunal Case No. 16 of 2003, Nanyuki Equator (sic) V. Nyeri Farmers Sacco Society Ltd.”

The Court also quashed, by an order of *certiorari*,

“.....all the proceedings, ruling and order of 8th August 2003 in the Co-operative Tribunal Case No. 16 of 2003 – Nanyuki Equator (sic) V. Nyeri Farmers Sacco Society Ltd.”

It is the two orders that have given rise to the appeal, the subject of this judgment. The appellant contends that-

- i. *The learned judge failed to consider that the prayer for prohibition was not argued.*
- ii. *The principles for the grant of the order of prohibition were not considered by the learned judge; and*
- iii. *The learned judge erred in finding that the Chairman ought to have heard the application sitting alone.*

Although the hearing notice was served on 16th April 2013 on the firm of Sichangi & Co. Advocates that had acted for the 1st respondent in both the Tribunal and the High Court, they were not in attendance to canvass the appeal. Similarly, the Attorney General for the 2nd respondent was not represented when the appeal came up for hearing before us on 11th June 2013.

In our assessment of the arguments and pleadings before the High Court, it is clear that the broad issue being raised in this appeal is whether the learned judge erred in granting the orders of prohibition and *certiorari*. Put differently, we are being asked to determine whether or not it is mandatory under **Section 80 (4)** of the Act for the Chairman to sit alone when hearing interlocutory applications and whether by sitting with two members of the Tribunal, the whole proceedings and decision would be vitiated.

Section 80 (4) aforesaid provides as follows:-

“80(4). Notwithstanding any other provisions of this Act, the Chairman of the Tribunal acting alone shall have jurisdiction to deal with all interlocutory applications which are not of such a nature as to effect in a decision any matter which is in issue between parties.”

The learned judge of the High Court held that the above provision is mandatory and that only the Chairman had the jurisdiction to deal with the interlocutory application. By sitting with two members, that the Chairman therefore acted in excess of that jurisdiction. In terms of **Section 80 (1)** of the Act, the normal quorum of the Tribunal for the purposes of hearing and determining any dispute under the Act is the Chairman and two members, save that the Chairman in the absence of either or both members may sit with one member or alone.

But where a matter is considered by a Tribunal constituted by the Chairman and more members, its decision shall be by the votes of the majority of the members, with the Chairman having both a casting as well as a derivative vote.

We have set out these provisions to demonstrate that so long as the Chairman himself or his deputy, as provided for in **Section 80 (5)** of the Act, is presiding over an interlocutory application, the presence of other members who are qualified under the provisions of **Section 77 (1) (b)** and **(c)** of the Act, should not elicit any objection. The Chairman in hearing interlocutory applications alone does so on behalf of the full quorum of the Tribunal. What we think is not permissible is any other member, not being the Deputy Chairman, hearing an interlocutory application or where the Chairman or his deputy is flanked by non-member(s) of the Tribunal.

We have come to the conclusion that the learned judge was in error in quashing the decision of the Chairman. After quashing the aforesaid decision, it was not open to the learned judge to issue an order prohibiting the Chairman from continuing with the hearing of the dispute as the question that was before the judge was whether it was proper for the Chairman to hear the Notice of Motion dated 8th July 2003 for restraining orders with other members in attendance and not the Statement of Claim itself. The order of prohibition has had the effect of determining the dispute before it is heard on merit.

In the result we allow this appeal and set aside the orders of the High Court issued on 22nd February 2005 in Nbi. H.C.C.C. Misc. Application No. 886 of 2003. Costs to the appellant.

Dated and delivered at Nairobi this 20th day of September, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

DEPUTY REGISTRAR