



**Thogo v Commissioner for Co-operative Development and Marketing;
Wanandegge Housing Co-op Society Ltd (Interested Party) (Civil Appeal
E424 of 2023) [2025] KEHC 642 (KLR) (Civ) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E424 OF 2023

LP KASSAN, J

JANUARY 30, 2025

BETWEEN

PURITY THOGO APPELLANT

AND

**THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT AND
MARKETING RESPONDENT**

AND

WANANDEGE HOUSING CO-OP SOCIETY LTD INTERESTED PARTY

*(Being an appeal from the ruling and order of the Co-operative Tribunal
delivered on 27th April, 2023 in Co-operative Tribunal Appeal No. 5 of 2018)*

JUDGMENT

1. Purity Thogo (hereafter the Appellant) lodged the present appeal seeking to challenge the ruling delivered by the Co-operative Tribunal (the Tribunal) on 27th April, 2023 in Co-operative Tribunal Appeal No. 5 of 2018 (the Tribunal Appeal) vide the memorandum of appeal dated 26th May, 2023 and amended on 24th May, 2024 (the amended appeal).
2. The background facts are that the Commissioner for Co-Operative Development and Marketing (hereafter the Respondent) issued a surcharge order against the Appellant vide a decision rendered on 4th July, 2018 thereby ordering the Appellant to pay a sum of Kshs. 2,541,232/-. The surcharge order was founded on an Inquiry Report dated November, 2015 (the Report) and prepared concerning the affairs of Wanandegge Housing Co-Op Society Ltd (hereafter the Interested Party).



3. Being dissatisfied with the aforesaid surcharge order, the Appellant lodged the Tribunal Appeal, by way of the memorandum of appeal dated 15th August, 2018 challenging it on the basis of being allegedly tainted with bias and irregularities. The Appellant set out a total of 15 grounds in the aforesaid memorandum of appeal and consequently sought various orders, including an order quashing the surcharge order plus costs of the Tribunal Appeal against the Respondent.
4. The Tribunal record shows that the Respondent did not participate in the Tribunal Appeal, while the Interested Party relied on replying and further affidavits sworn on its behalf and with leave of the Tribunal.
5. Upon close of submissions, the Tribunal by way of the ruling delivered on 27th April, 2023 declined to consider the merits of the Tribunal Appeal for the reason that it was filed out of time by dint of Section 74 of the *Co-operative Societies Act* Cap. 490 Laws of Kenya (the Act) and therefore dismissed the Appeal with costs to the Interested Party, thus provoking the instant appeal which was brought through the amended appeal, based on the following grounds:
 1. The Co-operative Tribunal erred in law by misinterpreting provisions of Section 74(1) of the *Co-operative Societies Act*.
 2. The Co-operative Tribunal erred in law by misinterpreting provisions of Rules 3, 7 and 11 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009.
 3. The Co-operative Tribunal erred in law in relying on an Inquiry Report completed way after its mandated period had expired.
 4. The Co-operative Tribunal erred in law in declining to enter judgment as sought by the appellants in an unopposed.” (sic)
6. The appeal was canvassed by way of written submissions. The Respondent however did not at all participate in the appeal proceedings.
7. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
8. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.
9. To be determined in the present appeal is the fundamental question whether the Tribunal acted correctly by dismissing the Appellant’s Appeal before it, in the manner set out hereinabove. Consequently, the court will address the four (4) grounds of appeal contemporaneously under that sole head.



10. Turning to the Tribunal record, as earlier mentioned, the same shows that the Appellant lodged the Tribunal Appeal to challenge the surcharge order made by the Respondent on 4th July, 2018 in essence surcharging the Appellant for monies expended in relation to the Interested Party, to the tune of Kshs. 2,541,232/-. From the Tribunal record, it is apparent that the Appellant was surcharged alongside various other persons who are not currently before this court. The Tribunal record further shows that while the Respondent did not participate in the proceedings before it, the Interested Party on its part relied on affidavits sworn on its behalf to oppose the Tribunal Appeal.
11. In the end, the Tribunal reasoned that while the impugned surcharge order was made on 4th July, 2018 the Appeal before it was lodged on 18th August, 2018 which date fell outside the statutory timelines stipulated under Section 74(1) of the Act. Consequently, the Tribunal dismissed the Appeal.
12. Section 74(1) (supra) provides as follows:
 - (1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.
 - (2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.
13. Section 73 which has been referenced in the above provision, stipulates that:
 - (1) Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society
 - (a) has misapplied or retained or become liable or accountable for any money or property of the society; or
 - (b) has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.
 - (2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.
 - (3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.
14. Upon considering the just-cited provisions and more particularly Sections 73(2) and 74(1), the court is of the view that the same are silent as to when exactly the timelines for lodging an appeal would begin to run. In the present instance, while it is apparent that the surcharge order following the Inquiry was made by the Respondent on 4th July, 2018, the Appellant made mention that she was only served with the said order on 20th July, 2018. It is the court's view therefore that the time would reasonably begin to run from the date on which the Appellant received notice of the order, as it is only then that she became aware of the existence of the surcharge order made against her. Consequently, the court finds that the Appellant was required by law to lodge the appeal within 30 days thereof.



15. Flowing from the foregoing, the court is of the view that the Tribunal Appeal ought to have been filed on or before 20th/21st August, 2018. The said Appeal having been lodged on 15th August, 2018, the court is satisfied that the same was lodged in good time.
16. Consequently, the court finds that the Tribunal erred in finding that the Appeal before it was lodged outside the stipulated timelines and was therefore time barred. The Tribunal ought to have taken into account the sentiments conveyed by the Appellant, regarding service of the surcharge order on 20th July, 2018 notwithstanding the fact that the said order was made on 4th July, 2018.
17. Be that as it may, Section 74(2) sets the timelines for filing an appeal to the High Court against a decision rendered by the Tribunal at 30 days from the date thereof. In the present instance and as earlier mentioned, the impugned decision was rendered by the Tribunal on 27th April, 2023 and yet the Appellant moved this court on 26th May, 2023 by way of the original memorandum of appeal, as seen from the CTS records. It is therefore apparent that the appeal was equally filed within the statutory timelines, therefore causing it to be properly before this court. Resultantly, the arguments raised by the Interested Party that the appeal is time barred, cannot be sustained.
18. Separately, the court observed that the Appellant by way of her written submissions in the present appeal, argued that the Tribunal ought to have equally considered the provisions of Rules 3, 7 and 11 of the Co-Operative Tribunal (Practice and Procedure) Rules [Legal Notice 59 of 2009](#) (the Practice Rules).
19. The Interested Party on its part essentially supported the decision arrived at by the Tribunal.
20. Rule 3 on its part expresses that:

Nothing contained in these Rules shall limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Tribunal.
21. Rules 7 and 11 make provision for the directive powers of the Chairman and Deputy Chairman of the Tribunal; and for the procedure of filing interlocutory applications, respectively. The Appellant however did not clearly demonstrate the manner in which the afore-cited Rules would become applicable in the present instance, particularly the latter Rules 7 and 11.
22. Separately and on the issue whether the Tribunal erred in relying on an Inquiry Report which had purportedly expired, upon its re-examination of the record, the court observed that the Tribunal did not delve into the merits of the Appeal before it, but merely dismissed it for having been filed out of time. It therefore follows that the issue of validity of the Inquiry Report was not deliberated by the Tribunal and would therefore not arise here.
23. That notwithstanding; upon its finding that the Tribunal Appeal was filed within the stipulated timelines; the court concludes that the Tribunal erred in determining otherwise and in dismissing the Appeal for allegedly being time barred. In the circumstances, it is in the interest of justice for this court to disturb the dismissal order made by the Tribunal, accordingly.
24. The upshot therefore is that the appeal is hereby allowed on merit. Resultantly, the ruling delivered by the Co-operative Tribunal on 27th April, 2023 in Co-operative Tribunal Appeal No. 5 of 2018 is hereby set aside. Resultantly, the Tribunal Appeal be and is hereby reinstated for hearing and determination on its merits. In the circumstances, a fair order on costs is to order each party to bear its own costs of the present appeal.



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for Respondent

Mango for Interested Party

Guyo - Court Assistant

