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Case Action:	Judgment
Judge:	Richard Mururu Mwongo
Citation:	Paul Kanja Kamau v Stima Sacco Society Limited[2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. Z. Abdul (RM)
County:	Nakuru
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Case Outcome:	-
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Representation By Advocates:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 65 OF 2018

PAUL KANJA KAMAU.....APPELLANT

-VS-

STIMA SACCO SOCIETY LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the Hon. Z. Abdul (RM) delivered on the 30th October, 2018 in Naivasha CMCC No.39 of 2017)

JUDGMENT

The Appeal

1. The appellant appeals against the judgment of Hon. Z. Abdul delivered on 30th October, 2018 in CMCC 39 of 2017 on the following grounds:

- 1. The learned Magistrate misdirected herself on the law, pleadings and evidence by dismissing the Appellant's claim with costs.*
- 2. The learned Magistrate erred in law and fact in holding that the Appellant could not benefit from an illegality without evidence at all.*
- 3. The learned Magistrate erred in and fact by ignoring her own finding that the Respondent's agents were negligent in the discharge of their duties.*
- 4. The learned Magistrate erred in law and fact in allowing the Respondent's Counter Claim without evidence at all.*
- 5. The learned Magistrate erred in law and fact in holding that the Respondent was entitled to the balance of the overdrawn amount to the tune of Kshs 436,322.79 and that the Appellant's salary be attached to the tune of 1/3 to settle the same.*
- 6. The learned Magistrate erred in law and fact in failing to consider and take into account the authorities placed before her touching on pertinent and substantial points of law and fact so as to arrive at a just and fair decision.*

2. In that judgment the trial magistrate made orders as follows:

- "1) The defendant is entitled to the balance of the overdrawn amount to the tune of Kshs 436,322.79.*
- 2) The plaintiff's salary to be attached to the tune of 1/3 to settle the amount in No. 1 above until a full.*
- 3) Costs to the defendant."*

3. The appellant seeks that the judgment be set aside and that he be awarded costs of and incidental to the appeal. Further, he prays

that the court does issue such further, incidental, alternative and/or consequential orders or reliefs as the Court deems just and expedient.

Background

4. The background facts in this matter are as follows. There is no dispute that the plaintiff is a member of the defendant Savings and Credit Co-operative Society (Sacco). To become a member, the plaintiff signed into the By-laws of the Sacco, as he affirmed in his testimony, and was bound by those By-Laws.

5. On or around 9th September, 2016 the plaintiff/appellant sold his vehicle – registration number KBH 349D – to one Paul Gachoro. According to the appellant, the price was Kshs 530,000/=, although the agreement produced by him discloses a figure of Kshs 420,000/-. Under the arrangement, the purchaser was required to pay the purchase price to the plaintiff/appellant's salary account with the defendant.

6. The purchase amount was deposited by the purchaser in the plaintiff's salary account with the defendant by banker's cheque No. 000078 for Kshs 530,000/= dated 7th September, 2016. According to the cheque deposit voucher exhibited by the plaintiff, the deposit of the cheque into the said account was made and received on the same day.

7. The defendant apparently cleared the cheque on 9th September, 2016. As such the plaintiff drew Kshs 300,000/= from his said account, and on 24th September, 2016 a Standing Order for Kshs 10,000/= was also reflected in his account. It is clear from the plaintiff's account statement with the defendant, exhibited by him at the trial, that the plaintiff had a credit balance of Kshs 500/= only in his account immediately prior to the deposit of the said cheque into the account.

8. On around 1st November, the defendant's clearing bank, Cooperative Bank, notified the defendant that the cheque was fraudulent and a forgery, and reversed the clearance. On 9th November, 2016, sixty-four (64) days after the cheque had been banked, the defendant called the plaintiff and informed him that a lien had been placed on his account. Its object was to recover the drawn proceeds of the cheque. From then onwards, the plaintiff was unable to make withdrawals from the said account. The Plaintiff alleged that the defendant's action was due to its own negligence.

9. The particulars of negligence in the plaint are stated as follows:

a) clearing the bankers cheque No. 000078 for Kshs 530,000/=, and

b) allowing the plaintiff to make a withdrawal from his account innocently as a result of the defendant's negligence, and the plaintiff suffered loss and damages.

10. Following the plaintiff/applicant's motion seeking to restrain the respondent/ defendant from debiting and/or withholding monies in his account, the trial court issued a temporary injunction on 4th July, 2017 and directed the expeditious hearing of the substantive suit.

11. On 16th November, 2017, the defendant filed its defence. In essence the defence asserts that: the cheque deposited in plaintiff's account was fraudulent and that criminality thereof was discovered after it had been cleared by the defendant's banker; that it was impossible to notice the fraud immediately; and the defendant withdrew the funds immediately knowing that they were fraudulently obtained; that the standing order was charged as a result of or in pursuance of the plaintiff's instructions; that no lien had been placed on the account as the plaintiff's said account had been overdrawn; and that the defendant relies on information from its bankers Co-operative Bank of Kenya, as to what cheque is cleared or otherwise.

12. The defendant also filed a counterclaim asserting that the plaintiff overdraw his account as a result of an uncleared and forged cheque fraudulently drawn in his favour; that the fraud was discovered after the cheque had been erroneously cleared by the defendant's banker Co-operative Bank; that the Plaintiff had knowledge or reason to believe the cheque to be fraudulent; that the plaintiff acted in breach of his obligation on a member of the defendant to act with integrity and to report and refund erroneous payments and to desist from any corrupt practices, as a result of which it suffered loss.

13. The defendant's counterclaim seeks a declaration that: the plaintiff's deposit of the forged cheque amounted to a fraudulent activity the loss for which he is liable; the balance of the overdrawn funds amounting to Kshs 436,322.79; a court order to attach 1/3rd of the plaintiff's salary towards settlement of the overdrawn balance; general damages for loss and inconvenience; and interest.

14. The role of this court on a first appeal is as follows in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally" (Abdul Hammed Saif – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

I have therefore carefully evaluated the evidence and other material on record for purposes of arriving at my own conclusions on this matter.

The Hearing

15. At the hearing, the plaintiff presented his evidence as PW1. The defence evidence was given by Milka Bosire, DW1, the Manager of the Defendant society. Each witness adopted their witness statements and gave brief highlights of their testimony before being cross-examined.

16. PW1 Paul Kanja Kamau's testimony reconfirmed the evidence in his statement, most of which is not disputed, that he sold his vehicle; he showed the sale agreement; the banker's cheque for the sale was paid into the bank; he exhibited the deposit voucher and demand letter. After two months he was told by the Defendant that the banker's cheque had been reversed and his account overdrawn.

17. In cross-examination he stated that he had banked with the defendant since June, 2014; he was bound by its by-laws; that he was told the cheque was bad after three days; that he reported the cheque to CID; that the police did not investigate the issue although the vehicle was detained by police.

18. He stated that the purchase price when he bought the vehicle was Kshs 420,000/=; that he withdrew Kshs 30,000/= at an ATM, then Kshs 40,000/= and Kshs 50,000/= that he did not produce the vehicle log book; that he was not concealing fraud.

19. In re-examination he said he was not the author of the cheque; that he would hand over the vehicle after the cheque cleared; that it matured after 3 days that he released the vehicle after clearance; that he does not have the log book that he acted in good faith; and finally that there is no provision in the by-laws stating that if the Sacco is negligent he should bear the burden.

20. DW1 Milka Bosire is the Branch Manager of the Defendant based at Olkaria. She testified that she had worked there since 2015. She said that on 7th September, 2017, the Sacco was credited with a cheque into the plaintiff's salary account number 5-02-42100-00 for Kshs 530,000/=. As is usual, in the course of business, it was forwarded to their clearing bank, Co-operative Bank Limited, which clears their cheque. Banker's cheque amounts are normally credited to the drawer's account within three days. In this case, it was cleared on 7th September, 2017.

21. If a cheque has errors their bank notifies them and they take appropriate action. In this case on or around 1st November 2019, their bank informed them that the cheque presented by the plaintiff was fraudulent. This was confirmed by a letter from their bankers received on 22nd November, 2017, which indicated the cheque was shared with critical activity.

22. On 1st November, 2017 when the defendant did their reconciliation and audit they discovered that the cheque was fraudulent.

However, as the Sacco could credit money before the cheque is in fact cleared that occurred. By the time the defendants were notified of the problem, the plaintiff had already quickly withdrawn the funds.

23. Accordingly, she stated, the Defendant did a reversal of the cheque about 60 days after clearance and a lien was put on the members account to recover the overdrawn money. She testified that the person who deposits the cheque is liable to reimburse the Sacco, she produced the Customer Service Charter, Member Policy Suit and By-laws as D. Exhibits 2, 3 and 4.

24. Further, she stated that the case was not reported to the Banking Anti-Fraud Unit because the plaintiff had filed the present litigation. She said the Defendant has about 120,000 member countrywide.

The issues for determination

25. Upon consideration of all the material before me and the representations of the parties, including the issues which the parties raised as being for determination, I find that the issues I must determine to properly resolve the dispute herein are as follows:

- a. What is the nature of the relationship and the dispute between the parties in respect of the business conducted between them relative to the plaintiff's account and cheque;
- b. Whether the defendant was negligent and to blame for the plaintiff's predicament and whether it acted in good faith in this instance;
- c. Whether the plaintiff is entitled to the proceeds of the money paid through the forged /fraudulent cheque;
- d. Whether the plaintiff is entitled to damages for the defendant's negligence, if any, and if so, how much;
- e. Whether the defendant is entitled to the balance of the overdrawn amount arising from the drawdown on the forged/fraudulent cheque;
- f. Whether the defendant is entitled to damages for loss, inconvenience and damage suffered as a result of the banking of the forged/fraudulent cheque;

The Nature of the Relationship between the Parties and the Dispute between them

26. As already pointed out, there is clear undisputed evidence that the plaintiff is an admitted member of the defendant. He stated in cross-examination that he signed the By- Laws of the defendant. The defendant is itself a Savings and Credit Co-operative Society (Sacco). It also asserted, and there was no dispute, that the plaintiff was a member of the Sacco and that he operated a salary account No 5-02-42100-00 with the defendant.

27. The defendant's By Laws shows that it is a Sacco Society. The statute enacted by Parliament for the licensing, regulation, supervision and promotion of Sacco Societies is the **Sacco Societies Act No 14 of 2008** (revised 2012). Under **Section 2** of the **Sacco Societies Act**:

“ ‘Sacco society’ means a savings and credit co-operative society registered under the Co-operative Societies Act (Cap. 490)”;

The defendant is therefore a co-operative society, and the plaintiff is a member of the Sacco.

28. Under **Section 2** of the **Co-operative Societies Act**: a member is defined as follows:

“ ‘Member’ includes a person or a co-operative society joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws;

29. This is in tandem with By-law 3 of the defendant under which a “**Member**” is defined to mean:

“a person admitted to membership in accordance with these By-Laws and the Society’s Membership Policy”

30. Under By-law 7 the defendant’s objects are achieved through the practice of the co-operative principles of:

- a) *Voluntary and open membership;*
- b) *Democratic member control;*
- c) *Economic participation by members;*
- d) *Autonomy and independence;*
- e) *Education, training and information;*
- f) *Co-operation among co-operatives; and*
- g) *Concern for community good.*

The importance of highlighting this is to point out that co-operative societies have a special place in in the social and economic societal tradition, and are thus treated by the law in a special manner specific to co-operatives given, inter alia, their control by their members and their object of concern for community good. This is reflected in its objects, specifically **By-law 6(f)** which requires the Sacco to:

“Perform the functions and exercise the power designated for savings and credit co-operative societies under the applicable law for the benefit of the members”

31. Under **By-laws 14** and **16** the defendant was entitled to operate member personal accounts, including withdrawable deposit accounts (**By-law 28**). Further, **By-law 2** defines “**Deposits**” to mean:

“...a sum of money received or paid on terms under which it shall be repaid with or without a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the member making the payment and the society”

In this case, the evidence adduced suggests that the salary account was a deposit or current account in which deposits paced there could be repaid to – or withdrawn by – the member on demand.

32. Sacco Societies under the Act are entitled to carry on deposit taking business under **section 23** of the **Sacco Societies Act** once they are registered. This business is amongst the businesses described in the Act as “**Sacco business**” which is defined in **section 2 Sacco Societies Act** as follows:

“ ‘Sacco business’ means financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with this Act, by way of— (a) receipt of withdrawable deposits, domestic money transfer services, loans, advances and credit facilities; or (b) receipt of non-withdrawable deposits from members and which deposits are not available for withdrawal for the duration of the membership of a member in a Sacco society and may be used as collateral against borrowings and domestic money transfer services”

33. Financial intermediation, according to **Arthur Sullivan & Steven M. Sheffrin** in **Economics: Principles in Action** Upper Saddle River, New Jersey 07458: Pearson Prentice Hall (2003), pp. 272 is defined as follows:

“Financial intermediation can be described as the process performed by financial intermediaries of collecting savings and deposits from savers and depositors and lending out the same to borrowers.”

In essence, this means that for co-operatives involved in financial intermediation the co-operative institution will engage in financial transactions on behalf of its lending members and savers in a specialised market and perform the functions of pooling those resources of many savers and borrowers.

34. So that, despite both parties loosely using language to the effect that the defendant – like a banker – “cleared” the disputed cheque, the defendant does not in fact operate as a bank but instead statutorily provides financial intermediation services for the stated objects of the greatest benefit of its members. To that extent, the evidence of DW1 in her written statement poignantly captured the role of the defendant when a cheque is deposited, as follows:

“Once a cheque is presented to the Sacco, we forward it to our Bank, Co-operative Bank Ltd, which undertakes the process of clearance. However, under normal circumstances, once the Cheque is presented, the Sacco’s system credits the drawee’s account within three days which was the case in this instance.

In case a cheque has errors, our banker will normally inform us following which we will take action. In this case, on or around 1st November, 2016 a deficit was discovered during an audit and the same was traced back to the Plaintiff’s cheque. We were informed, on inquiry, by our Banker that the cheque presented by the plaintiff was fraudulent”

35. The defendant thus went ahead to debit the plaintiff’s account as the cheque, having been already credited to the member in accordance with the co-operative theory of achieving the best benefit for the member, had to reverse the credit entry and treat the amount as an overdrawn amount in the account, and effected a lien on the plaintiff’s account.

36. In so doing, though the defendant did not expressly state so, it was presumably acting in accordance with the provisions of **Section 36** of the **Sacco Societies Act** which provides that a Sacco can make a Charge against shares and savings deposits as follows:

“36. (1) A Sacco society shall have a first charge against deposits and share capital and upon any dividend or interest payable to a member for any debt due to the society from the member, either as a guarantor or endorser of a loan or credit facility or for any other obligation.

(2) A Sacco society may refuse to allow withdrawals from any deposit account operated by a member where the member is in arrears on a debt owed to the society.”

37. This action triggered the plaintiff’s dissatisfaction, and he raised the issue with the defendant. The matter quickly degenerated into a dispute resulting in the commencement of the litigation in the lower court, leading to the present appeal.

38. According to **By-law 91** of the **Stima Sacco By-laws**, the proper avenue for resolving a dispute between a member and the Society is indicated in the following mandatory terms:

“Any disputes arising out of these By-laws or concerning the business of the Society and its members shall be referred to the Tribunal”

“Tribunal” is described in the definitions **By-law 3** to mean:

“the Co-operative Tribunal established under the Section 77 of the Co-operative Act”

Further, a “Dispute” is defined in **By-law 3** to mean:

“ a dispute within the meaning of Section 76 of the Co-operatives Act”

39. In support of this position under the By-laws, the Sacco Societies Act also makes it mandatory to resolve appropriate disputes under the Act through application of the Co-operative Societies Act provisions under **Section 67** of the **Sacco Act** which provides as follows:

“ 67(1) For greater certainty, the provisions of the Co-operative Societies Act, (Cap. 490) shall apply to a Sacco society carrying out deposit-taking business under this Act with respect to any matter, to the extent that the matter in question is not dealt with in this Act.

(2) In the case of a conflict between the provisions of this Act and the provisions of the Co-operative Societies Act (Cap. 490) with respect to Sacco societies to which this Act applies, the provisions of this Act shall take precedence.

(3) All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.” (Emphasis added).

40. It is to be noted that these provisions all make it mandatory for disputes to be referred to the Co-operative Tribunal. What sort of disputes are referable? Recourse must be had to **Section 76** of the **Co-operative Societies Act** to determine what sorts of disputes are referable to the Tribunal.

41. **Section 76 Co-operative Societies Act** provides:

“76. (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.

(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.”

42. In **Gatanga Coffee Growers Co-operative Society Ltd vs Gitau (1970) EA 361** the court interpreted the meaning of the term ‘*business of the society*’ in the Co-operative Societies Act, in an extremely broad rather than restricted manner. It cited the Ugandan case of **Wakiro and Another v Committee of Bugisu Co-operative Union (1968) EA 523** at p 527. There, Russell J, considering the expression “*business of the society*” under the Ugandan Co-operative Societies Act which provision is similar to our **Section 76** of the Co-operative Societies Act cited above, stated that:

“...the expression ‘business of the society’ is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by laws and rules.

43. A similar finding was arrived at in **Murata Farmers Sacco Society Ltd v Co-operative Bank of Kenya Ltd. (2001) eKLR** where Mbaluto, J held:

“In my opinion, the words ‘the business of the society’ appearing in section 76 is as aforesaid wide enough to include the

business of banking and the provision of financial services. By the plaintiff's own admission as contained in the plaint, the plaintiff's basic business is the provision of financial services while that of the defendant again according to the plaintiff's own description in paragraph 2 of the plaint, is 'the carrying on the business of a bank and financial institution'. The functions of the two institutions are therefore similar and they fall within the ambit of "the business of a Co-operative Society". In any case the registration of the defendant under the Cooperative Societies Act and not under the Banking Act clearly indicates that the intention of the Legislature was to bring the defendant within the provisions of the Co-operative Societies Act and more particularly section 76 thereof."

44. Accordingly, any dispute between a Society and its member(s) if it concerns the business of a society, is referable to the Tribunal. Was the business of the society in issue here" The plaintiff stated in re-examination that e told the purchaser to deposit the cheque and when it clears he would give him the vehicle. Thus the cheque was deposited by the purchaser as agent for or on behalf of the plaintiff in the normal course of operation of his account as a member of the defendant Sacco. The Defendant also received it and sent it to its bank for clearing in the normal course of business as a financial intermediary. The dispute concerning its clearance and non-payment was therefore a dispute concerning the business of the Society and the disputants are the Society and the plaintiff, its member. This was an appropriate dispute for obligatory referral to the Tribunal.

45. In light of the foregoing, I do not think that either this court or the trial court had initial jurisdiction to entertain a dispute arising out of Sacco business as provided under **section 67(3)** of the **Sacco Societies Act**, or a dispute concerning the business of a Co-operative Society as provided in **section 76** of the **Co-operative Societies Act**. Parliament intended that the initial jurisdiction in such cases be exercised by the Tribunal.

46. This is not to say the court has no jurisdiction in disputes between a Sacco and its members. Its jurisdiction is, however, set out as appellate jurisdiction under the Cooperative Societies Act. The High Court can interfere with the Tribunal's award on appeal as expressly stated in **Section 81** of the **Co-operative Societies Act**. That provision is as follows:

"81. (1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court: Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) Upon the hearing of an appeal under this section, the High Court may—

(a) confirm, set aside or vary the order in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(3) The decision of the High Court on any appeal shall be final."

47. The Tribunal itself is created under the provisions of **Section 77(1)** of the **Cooperative Societies Act**, and its membership comprises:

"(a) chairman and deputy chairman appointed by the Minister on the nomination of the Judicial Service Commission;

(b) an advocate of the High Court of Kenya appointed by the Minister on the nomination of the Law Society of Kenya;

(c) a lawyer with experience in co-operative law appointed by the Minister; and

(d) three persons with at least ten years' experience in the field of cooperative management and practice appointed by the Minister in consultation with the apex society”

In effect the composition of the tribunal indicates a strong blend of persons that are legally oriented and others well experienced in co-operative principles.

48. The upshot is that the parties, despite each stating in their pleadings that the Courts had jurisdiction in the matter, failed to recognize and abide by the doctrine of exhaustion of statutorily mandated dispute resolution mechanisms. In **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** a three Judge bench of the High Court had the following to say in respect of the doctrine of exhaustion:

“42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

49. What emerges from the consideration of the principles on exhaustion of alternative remedies or where Parliament has provided a statutory appeal process, is that they are in tandem with the constitutional paradigm in **Article 159(2)(d)** that obligates the court to exercise judicial authority must be guided by the principle that:

“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted”

It can indeed be argued that in the case of co-operatives, a statutory alternative form of dispute resolution via a tribunal is fully justified in light of the fact that co-operatives are specialized forms of business associations that practice principles of cooperativism. The legislature thus provided that disputes occurring in the business of co-operatives be subjected first to resolution through a specialized tribunal, and the courts get involved only at an appellate level.

50. I should point out that the parties did not raise this matter as an issue for determination. However, it is trite that the court, when faced with a glaring issue which the parties have not raised but which has an effect on jurisdiction, has the inherent jurisdiction and discretion to deal with the matter.

Conclusion and disposition

51. In light of all the foregoing, I am of the view that the trial court was not properly seised with jurisdiction to deal with the dispute herein at first instance. Equally, the High Court has only an appellate mandate to interrogate the award of the Co-operative Tribunal.

52. Having reached the above position, there is no basis to deal with the remaining issues as that would be a moot exercise, and of no consequence. The parties' remedies are in the Co-operative Tribunal.

53. Accordingly, I must set aside the judgment and orders of the trial court as being without the appropriate jurisdiction. Similarly, the appeal herein cannot stand, the decision in the lower court having been found to be without jurisdiction, and thereby invalidated.

54. Given the outcome herein, each party shall bear its own costs.

Administrative directions

55. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

56. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

57. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 8th Day of December, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Karanja for the Appellant
2. Mr. Alekeen for the Respondent
3. Court Clerk - Quinter Ogutu



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