

REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CRAM: MANYINDO, AG., D.C.J., PLATT, J.S.C., TSEKOOKO, J.S.C.,)

CIVIL APPEAL NO. 8 OF 1994

B E T W E E N

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|----|----------------|--------------------------|---|
| 1. | KAMEKE GROWERS | CO-OPERATIVE SOCIETY LTD | X |
| 2. | OPWATETA | " | X |
| 3. | MORUKOKUME | " | X |
| 4. | EDEKEKORI | " | X |
| 5. | KUPUWAI | " | X |
| 6. | POGONO | " | X |
| 7. | KAKUSI | " | X |
| 8. | KAGOLI | " | X |
- APPELLANTS

A N D

NORTH BUKEDI CO-OPERATIVE UNION LTD RESPONDENT.

(Appeal from Ruling and Order of the
High Court of Uganda (Kato J) dated
11/3/94

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CIVIL SUIT NO. 23 OF 1993)

JUDGMENT OF TSEKOOKO J.S.C.

This appeal arises from the ruling and Order of the High Court dated 11/3/1994 whereby the appellant's suit was dismissed by the trial judge under Order 6 Rule 28 of the Civil Procedure Rules.

The appellants are Co-operative Societies registered under the Co-operative Societies Statute, 1991 ^{or its predecessor} The Respondent is a Co-operative Union to which, as the pleadings and the record of

the Court below shows, the appellants are affiliated under the provisions of the same statute. Because of such relationship, the appellants were individually obliged to sell and did sell Cotton to the respondent for which the respondent failed to pay. The appellants instituted action in the High Court to enforce payment of the money by the respondent. When the Case came up for hearing in the High Court, Counsel for the respondent raised a preliminary objection to the effect that in view of the provisions of S.72 of the Co-operative Societies Statute 1991, the suit was premature as the subject matter of the suit should have been referred to arbitration in the first instance. The learned trial judge upheld the preliminary objection and dismissed the suit. Hence this appeal.

The ground of appeal state that:-

"The learned trial judge erred in law in holding that the suit was incurably irregular as not conforming with the provisions of S.72 of the Co-operative Societies Act, 1991."

Counsel for the respondents did not appear during the hearing of this appeal and therefore the appeal was heard *ex parte*.

In that regard the Court has not had the benefit of the views of the respondents ^{counsel} on the provisions of the relevant law.

Before us Mr. Okalanga, Counsel for the appellant (who represented the same party in the Court below) virtually repeated the arguments he put forward in that Court.

The gist of the arguments is that by virtue of Article 83 of the Constitution of Uganda and S.31 of the Judicature Act, 1967, the High Court of Uganda had not been divested of its original Jurisdiction to ^{try} disputes referred to in section 72(1) of the Statute. According to learned Counsel, as I understand him, arbitration

proceedings are alternative to a trial by the High Court. Learned Counsel cited David Kayondo Vs. The Co-operative Bank (U) Ltd (Supreme Court Civil Appeal No. 10 of 1991) (1992)2 V.L.R. 119 and PYX Gramite Co. Ltd Vs Ministry of Housing and Local Government and others (1959) 3 All E.R.I. to support his arguments on ouster of jurisdiction.

I do not accept the view that arbitration proceedings are just an alternative method of dispute resolution to a trial by High Court of disputes mentioned in section 72 (1) of the Statute. In my considered view, the Co-operative Societies Statute 1991 like its predecessor Acts, is a special law which governs the relationship between individual ^{members} or group members of Co-operative Societies. The institution of Co-operatives is peculiar institution in our Societies. The Co-operative Societies Statute 1991, is supposed to deal with peculiarities of the Co-operators and one of such peculiarities is to promote resolution of disputes as cheaply as possible. This is obvious from the provisions of section 75 which states:-

"A party to a dispute under section 72 of this Statute shall not engage a legal representative before arbitrator(s) save on a reference to the Court on a point of law or on appeal from a decision of the Board under Section 74 or at the filing of the award to the Court."

The exclusion of lawyers in arbitrations under the Statute is intended to minimize costs as well as to exclude technicalities attendant to High Court litigations. In that regard I think the original jurisdiction of the High Court was deliberately precluded by section 72(1). I think that some aspects of the case of Lukanyanya Ranching Vs. Kavoloto (1970) E.A. 414, itself a Kenyan case dealing with a similar Kenyan Co-operative Societies Act provision, support my view. (see page 417 paragraphs A to B, page 419 paragraph G and page 420 paragraphs H). *With respect I think that the decision in Kayondo case is supportable on the*

the same ground as in Lukemanya case⁴ namely that the dispute between Kayondo and the Coop. Bank was between employee and employer. That is not the case before us.

Section 72(1) is under the heading "Settlement of Dispute." The ~~section~~ ^{subsection} which is relevant states:-

- 72 "(1) If any dispute touching the business of a registered society arises,
- (a) among the members, past members and persons claiming through members, past members and deceased members; or
 - (b) between a member, past member or person claiming through a member, past member or deceased member, and the society, its committee or any officer or past officer of the society; or
 - (c) - - - - -
 - (d) between the society and any other registered society,

Such dispute shall be referred to an arbitrator^{or} or arbitrators for decision."

In this case paragraph (d) is pertinent. I think that the tenor of the provisions of the whole of section 72 shows that disputes such as the one in ^{the} present appeal should be primarily a ~~subject~~ ^{subsec} of arbitration. If that were not so the provisions of ~~sec 72~~ (15) which states that:-

"Notwithstanding the provisions of this section, any debt arising out of embezzlement, loss of cash or misappropriation of a Co-operative Society's funds, shall not be the subject of settlement by ^{arbitration} but shall be referred by the arbitrator(s) to a competent Court for settlement"

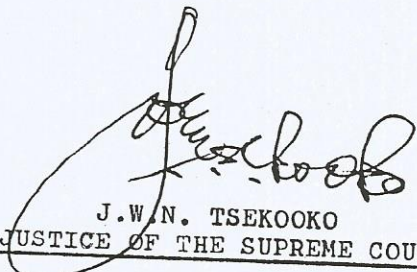
would be meaningless. In my view the existence of subs. 15 shows that all other disputes stipulated in sub section (1) of Sec. 72 should ^{first} be settled through arbitration but that cases of embezzlement, loss of cash or misappropriation should be tried by ordinary Courts.

In my view, the High Court exercises only appellate jurisdiction in disputes under S.72 (1) except where arbitrators refer a point to the High Court under S. 72(10) (c) or S.72 (13). Therefore S.72 does not diminish the import of the provisions of Article 83 of the Constitution or S.3 of the Judicature Act, 1967.

Again I think that the learned judge should have struck out the plaint as prayed by Mr. Natsomi rather than dismissing it.

For the reasons I have endeavoured to give, I would dismiss this appeal. I would however, substitute the dismissal order with an order that the plaint be struck out. I would award to the respondent the costs of this appeal.

Dated at Mengo this 14th day of December 1994.


J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGGO

CIVIL APPEAL NO. 8/94

B E T W E E N

KAMEKE GROWERS COOP. SOCIETY LTD. ::::::::::::::: APPELLANTS
AND SEVEN OTHERS

VERSUS

NORTH BUKEDI COOP. UNION ::::::::::::::: RESPONDENT

JUDGMENT OF PLATT, J.S.C.

This is an interlocutory appeal, concerning the question whether section 72 of the Cooperative Societies Statute(NO. 8 of 1991) ousted the jurisdiction of the Court in favour of arbitration. The relevant words of the section are that the parties "shall" refer their disputes to arbitration. The disputes concerned, are described in that section, and this case falls under section 72 (1) (d) of the Statute of 1991.

Section 72 follows section 73 of the previous Cooperative Societies Act NO. 30 of 1970, ^{re} when exactly the same provision may be found: the parties "shall" refer disputes described therein to arbitration. Section 73 was the subject of a considered opinion of this Court in DAVID KAYONDO Vs THE COOPERATIVE BANK (1992) Civil Appeal NO. 10 of 1991 (unreported), in which it was very clearly held that the word "shall", though apparently mandatory, was not sufficient to oust the jurisdiction of the Court. Further express

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provisions were required to make it mandatory, for the parties to refer their disputes to arbitration, as against the Constitutional unlimited powers of the High Court.

The learned Judge was quite aware that the vital provisions of sections 72 and 73 were similar; but he thought there was a distinction. The Appellants argued that there was no such distinction, and that DAVID KAYONDO's case still governed the matter. I entirely agree with the Appellants.

The learned Judge delivered himself of the following reasoning:-

"Although the new section is materially similar to the old section, there is one basic difference with regard to settlement of disputes, in the old law disputes were to be referred to the Registrar for settlement and he had discretion to appoint an arbitrator or arbitrators, but the new law makes it mandatory to have the matters directly referred to arbitrators.".....

The learned Judge had pointed out that the dispute in this matter fell within section 72 (1) (d) as being a dispute between two societies. I would, with respect, agree. But the "mandatory" provision, as the learned Judge thought, in section 72 - namely, the word "shall", - is the same as in section 73. The methods of coming before arbitrators are merely machinery. The question solely relates to the provision "shall." That is the operative word which brings into play the machinery provided, or which does not

necessarily bring that machinery into play.

In the result, it is clear that the opinion of this Court in DAVID KAYONDO's case applied with full force. The machinery is not a ground for distinction. The learned Judge was bound by DAVID KAYONDO's case, and should have held that section 72 had not ousted the jurisdiction of the Court.

Now that the matter, has been raised again, we have paused to reflect upon the decision in DAVID KAYONDO's case. The Cooperative Union concerned did not appear to argue in opposition to the Appeal. It has not asked this Court to review that decision. It follows that this Court should follow its previous decision. I am indeed happy to do so. Had the legislature wished to cause the parties to go to arbitration in the first place, it could easily have said so. The authorities such as PYX GRANITE CO. LTD Vs MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS (1959) 3 All. E.R. 1; LONDON HOSPITAL vs JACOBS (1956) 2 All. E.R. 603; show that with special provisions arbitration can be made mandatory. But the Courts must jealously guard against provisions, which require resort to a procedure, which the parties might think oppressive ~~and~~ or unsatisfactory, in the circumstances of their case. They may wish to test a point of law directly in Court. Reviewing the matter, it seems to me that, whilst the Act encourages arbitration, it does not make it mandatory, and the party who wishes still to go to Court, may do so.

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Accordingly, I would allow the Appeal, and I would set aside the ruling of the learned Judge, whereby he dismissed the suit under Order 6 Rule 28 of the Civil Procedure Rules, I would return the record to the High Court to continue with the hearing of the suit. The costs of the appeal, and such costs as were incurred in the High Court, relating to the preliminary point, which has now been overruled, I would award to the Appellants in any event.

Delivered at Mengo, this ^{15th}.....day ofDecember,..... 1994.



H. G. PLATT

JUSTICE OF THE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA

AT MENGO

CIVIL APPEAL NO. 8/94

B E T W E E N

KAMEKE GROWERS COOP. SOCIETY LTD. ::::::::::::::: APPELLANTS
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VERSUS

NORTH BUKEDI COOP. UNION ::::::::::::::: RESPONDENT

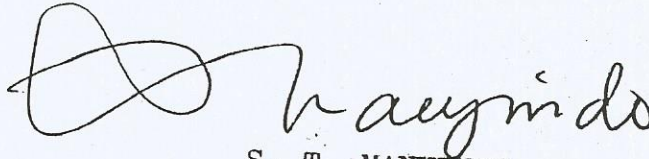
JUDGMENT OF MANYINDO, D.C.J.

I have read the judgment of Platt, Justice of the Supreme Court, in draft and I agree that the appeal must succeed for the reasons stated in his judgment. The real question is whether section 72 of the Cooperative Societies Act has ousted the original jurisdiction of the High Court. The law on ouster of jurisdiction seems to me to be settled. It is, as this Court pointed out in Kayondo Vs The Cooperative Bank (U) Limited, Civil Appeal No. 10 of 1991, that for a statute to oust the jurisdiction of the High Court it must say so expressly.

Section 72 referred to above has not expressly excluded the jurisdiction of the High Court and so the provision in Article 83 (1) of the Constitutions and section 3 of the judicature Act giving the High Court unlimited jurisdiction in civil and criminal matters, subject to any written law must prevail.

In the result the appeal is allowed with costs.
The case is remitted to the trial Judge to determine
it on the merits.

Dated at Mengo, this 14th day of December, 1994.



S. T. MANYINDO.

DEPUTY CHIEF JUSTICE