



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 151 OF 2020

VIPINGO SACCO SOCIETY LTD.....APPLICANT

-VERSUS-

MOHAMED A. SHEIKHDINI & 7 OTHERS.....RESPONDENT

-AND-

KILIFI KARISA KALAMA & 24 OTHERS.....INTERESTED PARTIES

RULING

1. On **19th January, 2021**, this court delivered a Ruling and directed that the unpaid dividends for the sum of Kshs.553,125/= be paid by the Applicant, **Vipingo Sacco Society** to its **112 shareholders** according to their share capacity.

2. The Applicant now avers that it has undertaken meetings with an aim of exploring a possible way of paying the dividends to each shareholder in his/her individual capacity. However, it avers that the Respondents have made the entire effort difficult if not impossible by initiating execution process to realize the total sum for the unpaid dividends only for themselves but not for all shareholders.

3. In that connection, the Applicant has moved this court vide a **Notice of Motion** application dated **12th February, 2021** seeking for the following orders;

a) Spent;

b) Spent;

c) The proclamation by the co-operative tribunal at Mombasa dated 8th February, 2021 against the Applicant's property be set aside.

d) Costs of this Application be provided for.

4. The key grounds adduced in support of the application are that the Eight (8) Respondents have no legal capacity to receive the amounts awarded as dividends on behalf of all the other **112 shareholders** hence the proclamation is illegal. That the proclamation has made it difficult for them to comply with the court orders and if not set aside, the execution may proceed to the detriment of the other shareholders.

5. That application is further supported by the **affidavit** of **Weston Banda** sworn on **12th February, 2021** and his **Supplementary Affidavit** sworn on **30th April, 2021**. In those affidavits, he accuses the Respondents for their uncooperative behavior especially by failing to attend meetings organized by the management committee to deliberate on the disbursement of the dividends but have instead undertaken execution process for their own benefit and not all the shareholders. He further reiterates that the Respondents had no legal capacity to receive the sum proclaimed on behalf of the **112 shareholders**.

6. The Respondents opposed the application through the **affidavit** of the 1st Respondent, **Mohamed A. Sheikhdini** sworn on **29th March, 2021**. His view is that, by virtue of the **Ruling** delivered on **19th January, 2021**, the proceedings were concluded and the court is now *functus officio*. He adds that the application under consideration has been made in a vacuum and the Applicant is simply not interested in satisfying the decree in this matter hence underserving of the orders sought.

7. In addition to that, he terms the application as an abuse of court process for the reason that the decree complained of was issued by the Co-operative Tribunal hence the tribunal should have been the first center of call but not this court.

8. Lastly, the deponent avers that the ongoing execution is for the benefit of the **112 shareholders** as evidenced in the minutes of the Shareholding Meeting held on **30th January, 2021** and **14th March, 2021**.

9. The parties agreed to canvass the applications vide written submissions.

The record shows that the parties dutifully complied with the Applicant filing its submissions on **7th May, 2021** whilst those of the Respondents were filed on **20th May, 2021**.

10. I have read through the said submissions and they reflect the averments made in the parties' respective affidavits as summarised above and I see no need to reproduce the same here.

Analysis and Determination

11. At the conclusion of the arguments by the parties herein, I have considered the entire Application in light of all the materials placed before the Court and find that the following issues arise for consideration:-

a) Whether the court is functus officio;

b) Whether the Application has merit and/or whether the prayers sought can be granted; and

c) Who should bear the costs?

12. As regards the first issue, it was raised by the Respondents and their view is that the court has rendered its final decision, hence is *functus officio* and thus the instant application was made in a vacuum. The Applicant on the other hand was quiet on this issue.

13. Nonetheless, it is important to note that the *functus officio* doctrine is one of the mechanism by means of which the law gives expression to the principle of finality. It connotes that the court should exercise its judicial powers only once in relation to the same matter. Therefore, the general principle is that, after passing a Judgment, the court becomes *functus officio* and cannot revisit the Judgment on merits or purport to exercise a judicial power over the same matter, save as provided by law. See the supreme court of Kenya decision in the case of **Menginya Salim Murgani –vs- Kenya Revenue Authority [2014] eKLR**.

14. However, the rule of *functus officio* has exceptions. **Section 99** of the **Civil Procedure Act** establishes the slip rule it provides that:

“Clerical or arithmetical mistakes in Judgments, Decrees or Orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

15. Similarly, the Court of Appeal in the case of **Telkom Kenya Limited –vs- John Ochanda (Suing On His Own Behalf And On Behalf Of 996 Former Employees Of Telkom Kenya Limited) [2014] eKLR** thus stated;

“...The rule applied only after the formal Judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court.

16. Therefore, the doctrine of *functus officio* is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on as the Respondent herein intimated. What it does bar is a merit-based decisional re-engagement with the case once final Judgment has been entered and a Decree thereon issued.

17. In the instant **Motion**, the court is being asked to set aside the proclamation issued because the Respondents lack the capacity to receive the monies proclaimed on behalf of the 112 shareholders. It is also averred that the proclamation has made it impossible to comply with the **Ruling** of the court.

18. In my view, the prayers sought in the present **Motion** are not inviting the court to reconsider the merit of the **Ruling** delivered on **19th January, 2021** but seeks the court to re-affirm the intention in the said **Ruling** which is that the dividends be paid individually to each shareholder and not only the **8 shareholders**.

19. The ancillary question which also arises is whether it would be legal for the Respondents to execute for the entire sum expected to be divided among the **112 shareholders**. I am therefore not persuaded that the court *functus officio* to determine the present

application.

20. The next issue for consideration is whether the orders sought can be granted. In that connection, the only pending prayer is whether or not the Proclamation by the Co-operative Tribunal dated **8th February, 2021** should be set aside. It is argued that the eight (8) Respondents initiated the execution process with the intention of realizing the entire sum awarded as dividends while on the contrary they do not have the capacity to receive the dividends on behalf of the entire **112 shareholders**. The Applicant has further submitted that the Proclamation on its properties has made it difficult for them to comply with the **Ruling** of the court. The Respondents on the other hand maintained that the Applicant is not at all interested in satisfying the decree awarded in the primary suit.

21. However, it is a common ground that the sum of Kshs.553,125/= was awarded as dividends to be shared among **112 shareholders** but not only the 8 Respondents. That position is not contested by either of the parties and in any event, that was expressly stated in the **Ruling** delivered by this court.

22. It is also my view that, it is a task of the Applicant's management committee to pay the dividends to each individual shareholder in the manner stipulated by the Applicant's relevant governing documents but not for the Respondents to execute for the entire sum. It would lead to seemingly absurd result if the entire sum for the dividends was to be paid to the eight Respondents through the execution process. I say so because before the dividends are paid, the amount of payable to each individual shareholder has to be calculated according to their shareholding capacity and the payment has to be made in the manner described in the respective governing documents.

23. The Respondents have not explained whether they can comply with that protocol and it is also not clear how the Respondent would distribute the amount in dividends to each of the **112 Shareholders** once the execution is concluded. It is therefore clear that the intended execution would exacerbate the already existing controversy and so would the proclamation on the Applicant's properties.

24. In my view, it would be proper for the Applicant's management committee to calculate the amount each individual shareholder is entitled to out of the Kshs.553,125/= awarded as dividends and then communicate the same to all its members so that in the event of default, each member may either individually or collectively take up execution for a specific amount.

25. Lastly, this court under its supervisory as well as inherent jurisdiction could address the present Motion notwithstanding that the proclamation orders being sought to be set aside were issued by the Co-operative Tribunal.

26. Following the foregone discussion, I am persuaded that the Applicant's **Notice of Motion** application is merited and is hereby allowed subject to the following orders:

a) That the proclamation by the Co-operative Tribunal at Mombasa dated 8th February, 2021 against the Applicant's property be and is hereby set aside.

b) The Applicant is directed to calculate the amount payable to each of the 112 shareholder out of the Kshs.553,125/= awarded as dividends according to their shareholding capacity within thirty (30) days from the date hereof.

c) The Applicant is further directed to communicate to every shareholder of the dividends awardable to each one of them within the timeline set in (b) above.

d) The Applicant is to pay the dividends to each individual shareholder within sixty (60) days thereafter and in event of default, each individual shareholder be at liberty to follow –up execution for his/her stated dividends.

e) Each party to bear their own costs for the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 28TH DAY OF JANUARY, 2022.

D. O. CHEPKWONY

JUDGE

Mr. Mangale counsel for Applicant

Respondents in person – present