



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E165 OF 2020

JOE KARANJAAPPELLANT

VERSUS

DANIEL GITHIORA GATUHA.....RESPONDENT

BONAVENTURE FONDO NZOVU (Acting as Liquidator of

Kagaa Farmers' Co-operative

Society Ltd).....THE LIQUIDATOR

RULING

On 10th August 2020, the appellant herein filed an application by way of Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act, for orders that there be a stay of execution of the order and ruling of the Co-operative Tribunal dated 30th July, 2020 pending the hearing and determination of the application and the appeal. There was also a prayer that one Bonaventure Fondo Nzovu be prevented from taking over as the liquidator of Kagaa Farmers Co-operative Society Limited.

The application is supported by grounds set out on the face of the application and the supporting affidavit sworn by the appellant. Following service of the application, the liquidator Mr. Bonventure Fondo Nzovu filed a Notice of Preliminary Objection under Order 42 Rule 13 (2) and Order 51 Rule 14 (1) (a) of the Civil Procedure Rules stating that, this court does not have jurisdiction to hear the intended appeal which is a gross abuse of the legal process, and whose sole intent is to embarrass the court.

That notice has set out the provisions of law relied upon by the liquidator which include, inter alia that, the order allegedly being appealed does not exist; that the intended appeal is *res judicata* as it had already been dealt with fully and finally in Civil Appeal No. 327 of 2017 and Judicial Review Application No. 68 of 2015; the appellant did not seek the leave of the court before instituting the appeal; the decree or order to be appealed has not been attached; the ruling quoted in the memorandum of appeal does not exist and finally that, the appellant has not provided security for costs. Both parties have filed submissions which I have considered.

The dispute in this matter has a long history spanning ten years and above. Several of the issues that have been raised in the appellant's affidavit have been addressed in the decisions of High Court cited above. Section 7 of the Civil Procedure Act provides as follows,

“7. Res judicata No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. “

Going by the record before me, the complaint by the appellant is not the first time to find its way before the Co-operative Tribunal. Indeed the two decisions of the High Court by C. Kariuki J in Civil Appeal No. 327 of 2017 and the other by Odunga J in JR Application No. 68 of 2015 had their genesis in the Co-operative Tribunal. In fact in both decisions the issue of liquidation stands out prominently.

Once the issue of jurisdiction has been raised by any party and the court is persuaded that it has no jurisdiction, then it shall not go beyond that point.

In the celebrated decision of Nyarangi JA in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] Eklr** the learned Judge had this to say,

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the earlier decision of the East African Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696* as per Sir Charles Newbold, stated,

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit e.g. an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration. Therefore where a preliminary point of law is raised either on the basis of disputed facts which would require extrinsic evidence to be led by parties at a full trial, or where even if allowed, it cannot dispose of the whole suit then it cannot be disposed of as such.”

The liquidator has taken the first opportunity to raise the issue of jurisdiction as required in the above cited cases. The record confirms that the issues raised in the intended appeal have been sufficiently addressed in the previous cases and that revisiting the same would offend the doctrine of *res judicata* as provided in Section 7 of the Civil Procedure Act aforesaid.

I am not persuaded that the orders sought by the appellant are merited. In any case, the appellant has not provided any proof of substantial loss that may be visited upon him in the event the appeal succeeds. That is the cornerstone of any application for stay of execution.

Having said so, the order that commends itself is that the application should be and is hereby dismissed with costs to the respondents. It follows that the orders of stay given on 10th August, 2020 are also vacated in their entirety.

Dated and delivered at Nairobi this 25th day of February, 2021.

A.MBOGHOLI MSAGHA

JUDGE