



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 327 OF 2017

KAGAA FARMERS CO-OPERATIVE SOCIETY.....APPELLANT

VERSUS

DANIEL GITHIORA GARUHA.....1ST RESPONDENT

JOE KARANJA NJOROGI.....2ND RESPONDENT

(Being an appeal from the ruling and order in Co-operative Tribunal Case No. 234 of 2011

delivered on 20th June 2017 by Honourable Chairperson Alex Ithuku)

JUDGEMENT

1. The Appellant lodged application dated 8/1/2016 before the Co-operative Tribunal for orders to be enjoined as interested party in a dispute –namely;

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set aside and in fact up to date no liquidator has ever moved to commence the process of liquidation owing to the same orders of status quo.

4. The application was canvassed before the Tribunal by both sides:

The Applicant/Appellant's Case:

5. The application is based on the five (5) grounds stated on the face of it and supported by the affidavit of John Gitau Mburu who describes himself as a member of the Applicant who has the authority of like-minded members.

6. The application is opposed vide a replying affidavit sworn by the claimant on 14/9/2016.

7. The applicant is Kagaa Farmers' Co-operative Society. The gist of the application is that the orders of the Tribunal of 14/3/2014 in effect set off the process of liquidation of the application. The suit was a private dispute involving two leadership factions and not the wider membership of the society.

8. The wider membership is not interested in the applicant being liquidated and was not involved in the proceedings in this matter. They are craving to be heard. The process was started and the liquidator gazetted.

9. The Tribunal's order has been appealed against but no orders have issued yet. The High Court has also ruled in a Judicial Review Application that the Applicant needs to challenge the Tribunal's decision with the tribunal.

The Claimant/Respondent's Case:

10. The Claimant opposes the Application on the grounds that; the application is defective, fatally and incurable and the Applicant a stranger to the suit. The Claimant is the Chairman to the Society with mandate to protect and safeguard the rights, property and interest of the members. The liquidation is in order and does not require members validation as it is sanctioned by the Tribunal.

11. Directions were taken to file written submissions. The Applicant filed theirs on 7/4/2017.

12. The tribunal findings and holdings was that:-

“We have considered the record, the application as well as rival submissions. We note on record the orders/directions the subject of this application and various rulings on various matters on applications by the Tribunal.

We take special note of Gazette Notice No. 6199 of 5th September 2014. A copy is annexed to the application. By this gazette notice the Commissioner for Co-operative Development appoints liquidators in respect of the Applicant. The gazette further notes that the registration of the society is cancelled and the order takes effect immediately. It notifies every member aggrieved by the gazette notice to appeal to the Minister within 30 days of the notice. An appeal appears to have been made vide letter of 29/9/2014. Subsequent Judicial Review proceedings failed as the decision of the Tribunal implemented in the gazette notice remained unchallenged.

These sets of facts lead us to the consideration as to whether the Applicant can be joined in these proceedings as a party.

We note that the proceedings were instituted by the then chairman in his name and the persons sued are one of the factors involved in a dispute over the society. The directions of the Tribunal have already taken their course pursuant to section 62, 63, 65 and so on of the Co-operative Societies Act. Decisions of the Tribunal, the Commissioners for Co-operatives and relevant Ministers are appealable within 30 days.

In addition the effect of the cancellation of registration and appointment of the liquidator means that the society ceased to exist as a body corporate meaning that it can neither defend nor institute suits in its own. Section 63 of the Co-operative Societies Act provides that:-

“Where the registration of a co-operative society is cancelled, the society shall cease to exist as a body corporate from the date the order takes effect.”

The cancellation goes hand in hand with the appointment of a liquidator.

No proceedings can be taken against the society as it does not exist. Proceedings are taken against the liquidator or by the liquidator with leave. The others implication is that the management committee ceases to function as such. Members can only sue as such, that is, as such member.

We are guided on these issues by the decision in *Kenton Kijabe Co-operative Society vs Commissioner of Co-operative Development and 5 Others (2012) eKLR*.

The upshot of this is that the Claimant cannot purport to be Chairman and/or vested with any duties or responsibility in respect of the former society and that the interested party is not capable of being joined having ceased to exist as such.

The liquidator was appointed for a period of one year. That was back in September 2014. Over two and a half years later we are not informed what is the position. We would thus not be in a position to inquire into the ends of justice.

Our other finding is that in the circumstances of this case, the orders sought to be stayed and set aside have been overtaken by events. A simultaneous appeal to the Minister and application to the Tribunal within the specified time would have been capable of consideration. It is later in the day. We are inclined to belief that the cause of action in this matter has evolved further.

In addition once affected as did the commissioner, the Tribunal can no longer deal. The Tribunal lacks powers to recall its decision at this juncture. The orders sought cannot thus issue.”

13. The directions were given the appeal be canvassed via submissions:

Appellant’s Submissions:

14. The Appellant submitted that, not being a party to the suit and Tribunal issuing directions affecting the Appellant/Applicant directly was unjust and unfair. The Tribunal should have enjoined the Applicant in the suit, hear the suit fully on merit and make proper judgment with all parties participating and being heard as it is a fundamental principal of nature justice enshrined in the Constitution.

15. The tribunal had jurisdiction to entertain application and enjoin Applicant because it issued status quo orders to its directions which were never set aside and ignored the same *status quo* meant that the Applicant who is a registered co-operative society never ceased to exist.

16. The Tribunal could not then go ahead and allege to be *functus officio* after giving directions yet it issued status quo order after the said directions.

17. It is a legal absurdity for directions to terminate or conclude a suit. The parties in the suits herein had claims that were not resolved by the directions and instead the directions ended up affecting third parties.

18. Without a final judgment/consent order or a withdrawal, the suits before the Tribunal still subsisted. The Tribunal should have only joined the Appellant/Applicant and given fresh directions.

19. Law practice and procedure expects that the Tribunal should have allowed the Applicant to be enjoined in the suit and all parties be head and make a judgment judiciously and fairly. It was not the case herein.

20. They submitted that indeed the Tribunal had jurisdiction to grant prayers by the Applicant to be enjoined in the suit Co-operative Tribunal Case No. 234 of 2011.

21. For a party to be enjoined in a suit, the law is clear in Article 50 of the Constitution, “*...that a party who demonstrates interest in a mater should be allowed in. Also in the Constitution of Kenya (Protection of Rights and Fundamental Freedom Practice and Procedure Rules 2013, LN 117/2013 an interested party is defined as “...a person or entity that has an identifiable state or legal interest in the proceedings before court...”*

22. Having stated above and also **Article 48 of the Constitution** that states that “*...the state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.*”

23. They submitted that the Tribunal had jurisdiction to grant prayers sought by the Applicant.

24. They further submitted that none of the parties in Co-operative Tribunal Case No. 234 of 2011 had sought liquidation.

25. It is therefore unjust and onerous to grant prayers not sought by parties.

26. The Co-operative Society Act is clear in section 65 that, “*where a Co-operative is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators...*”

27. The above sections are very clear that would lead to the appointment of a liquidator and due process follows.

28. At no point was the same done to the Applicant. The Tribunal issued directions to the Commissioner to proceed with liquidation. There is no law mandating the Tribunal to issue such directions affecting a society with 2000 members without them being heard at any stage in a suit between two individuals.

29. Such directions led to an illegality that cannot be cured by any subsequent act. That also means that said gazettelement; a fruit of illegality cannot then be termed as any legal act.

30. They contend that to state that the Appellant has never been liquidated by preservative orders of status quo of the Co-operative Tribunal granted on 26th January 2016.

31. No liquidator has ever moved to the offices of the Appellant pursuant to the preservative orders. Not a single item has been sold pursuant

to the purported liquidation. The gazette notice the Tribunal refers expired.

32. It is their submission that it is well within the mandate of this court to set aside the orders delivered on 20th June 2017 with an order allowing the Appellant to be enjoined as an interested party in Co-operative Tribunal dated 234 of 2011 and further set aside the impugned directions by the Tribunal dated 14th March 2014 and have the Tribunal Case No. 234 of 2011 heard on merit in full and determined.

Respondents' Submissions:

33. The appellant submitted that he filed an appeal against the decision of the Chairman of the Co-operative Tribunal based at Nairobi. The appellant had in their application applied to be enjoined to the proceedings as an interested party. The said application was dismissed by the Co-operative Tribunal.

34. It is this dismissal of the application to be enjoined to the proceedings that the appellant has now appealed the decision of the Co-operative Tribunal. Their humble submission is that this appeal is not merited and the same should of necessity fail. The same should be dismissed with costs.

35. The appellant was placed under liquidation on the 14th day of March 2014. An application for Judicial Review against the said order of liquidation was dismissed on **4th December 2015** by **Hon. Mbogholi J in Judicial Review No. 68 of 2015**. It is therefore clear that the appellant is engaging in a game of musical chairs and justice by trial and error whereby they expect a different outcome from the same set of facts. This behavior should be castigated and frowned upon.

36. The appellant was placed under liquidation on the 14th day of March 2014. No leave has ever been sought before filing the present appeal. A body under liquidation has no capacity to sue or be sued unless with the express leave and permission of the court. No such leave has been exhibited by the appellant. As such the appeal is **avoid ab initio**. The same has no legal basis and the entity appealing is a total stranger to the court. As such, the appeal should be dismissed with costs.

37. The Co-operative Tribunal acted within its mandate and jurisdiction. No party has ever raised the issue of the jurisdiction before the tribunal at any time of the proceedings. The issue of whether the tribunal had the jurisdiction has only arisen in the appeal. This is an issue which should always be raised before the court of the first instance.

38. It is its humble submission that the appellant could and did not raise the issue of jurisdiction for they knew that it was never an issue in the first place. This is the classic case of locking the gate after the horse has bolted.

ISSUES:

39. After going through the pleadings the record and parties' submissions, I find the issues are; **whether the appeal has merit? What is the order as to costs?**

ANALYSIS AND DETERMINATION:

40. The Appellant lodged application dated 8/1/2016 before the Co-operative Tribunal orders to be enjoined as interested party in a dispute – and also for reliefs that;

- ***For stay of execution of its orders/directions of 14/3/2014.***
- ***For setting aside of same orders/directions of 14/3/2014.***
- ***Plus costs.***

41. The application was dismissed by the tribunal principally on grounds that a gazette notice no 6199 of 5/9/2014 the commissioner of cooperative developments was to appoint liquidator in respect of the applicant society. The notice also affected the deregistration of the applicant society i.e. it cancelled the registration of the applicant society and order to effect immediately. It also notified every member aggrieved by gazette notice to appeal to the minister within 30 days of the notice.

42. By a letter of 29/9/2014 an appeal was lodged. Subsequently a judicial review was lodged but failed as the decision of tribunal implemented in the gazette notice remained unchallenged.

43. By the date the appellant moved to court the orders issued by the tribunal had taken their course pursuant to section 62, 63 65 inter alia of the cooperative societies Act.

44. The decisions of tribunal, commissioner of cooperatives and minister are appealable under the statute within 30 days. In the case of **Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR** where the court of appeal held:

“In our view, there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed”.

45. Section 9(2) of the Fair Administrative Action Act provides:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings.”

46. The effect of the cancellation of registration and appointment of the liquidator means that the society ceased to exist as a body corporate meaning that it can neither defend nor institute suits in its own. Section 63 of the Co-operative Societies Act provides that:-

“Where the registration of a co-operative society is cancelled, the society shall cease to exist as a body corporate from the date the order takes effect.”

47. The cancellation goes hand in hand with the appointment of a liquidator. No proceedings can be taken for or against the society as it does not exist. Proceedings are taken against the liquidator or by the liquidator with leave. The others implication is that the management committee ceases to function as such. Members can only sue as such, that is, as such member.

48. See the decision in ***Kenton Kijabe Co-operative Society vs Commissioner of Co-operative Development & 5 Others (2012) eKLR.***

49. The upshot is that this appeal has no merit and same is **dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE