



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 343 OF 2002

ORION EAST AFRICA LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

MUGAMA FARMERS CO-OPERATIVE

UNION LIMITED.....DEFENDANT/JUDGMENT DEBTOR

AND

THE CO-OPERATIVE BANK OF

KENYA LIMITED.....INTERESTED PARTY

RULING

1. These are Garnishee proceedings and a Ruling partially determining the proceedings was rendered by Hon. F. Gikonyo J. on 26th May 2015.

2. In that Ruling, the Judge observed that documents availed to the Court showed that the Judgment debtor held shares in Co-operative Bank of Kenya Limited (the Garnishee). So as to make a final determination in respect thereof, the Judge ordered the Garnishee to appear before Court on a date fixed by Court to provide a record of all Shares and Dividends in the names of and due to the Judgment Debtor respectively, and to show cause why the Shares should not be sold and Dividends paid to answer the Decree herein together with the costs of the Garnishee proceedings.

3. That Court appearance took some time coming and on 14th July 2017, Mr. Nahashon Maore of the Bank attended Court when he was expected to give an insight of the issues ordered by Court. Nahashon is the Head of Share Registrar Services of the Bank and in that position is the custodian of the share Register of the Bank.

4. Under oath, he explained that on 3rd July 2008, the Bank was incorporated to take the Banking Business of the Co-operative Bank of Kenya, registered as a Co-operative Society under the Co-operative Societies Act. The latter entity changed its name to Co-opholdings Co-operative Society Limited (**Co-opholdings**). A copy of an extract of an information Memorandum published then of the Bank showed that Co-opholdings was owned by 3805 Co-operative Societies.

5. It was further explained that in a series of meetings held in 2008, Co-opholdings resolved to transfer all its assets and liabilities (in other words the business) to an entity incorporated under the Companies Act under the name Co-operative Bank of Kenya Limited (the Bank). On 5th August 2008, the Board of Directors of the Company resolved as follows:-

Resolution to allot ordinary shares of the company to Co-opholdings and the holders of class B shares of Co-opholdings a total of Kshs. 2,938,127,600 ordinary shares credited as fully paid on the terms set out in the Transfer Agreement, and approved the issue of Share Certificate thereof, and subject to completion of the Transfer Agreement, such allotment to be effected on 8th August 2008.

6. Nahashon's evidence was that Mugama does not hold any shares in the Bank but is a shareholder of Co-opholdings.

7. The representative of the Garnishee Bank was cross examined extensively on the basis of the Affidavit of Peter Ruo Mana sworn on 21st July 2015 and annexures thereto. Mr. Maina is the Managing Director of the Decree holder Company. In a letter of 29th January 2012, the Bank writes to the Decree holder in which it states that it is a customer and key shareholder of the Bank. In another letter of 9th December 2013, the General Manager of the Bank writes to the Director of the Banking Division in respect to the debt that forms the subject matter of these proceedings.

“the captioned subject matter refers.

Vide our various correspondences on the same, we hereby authorize (sic) to liquidate the creditors debts owing from the union from our future anticipated Co-operative Bank dividends net after any reconciliations.”

8. On 31st December 2013, the Managing Director of the Bank wrote to the Decree holder in which he says, in part;

“in terms of the various good meetings you have held with the Senior Management of the Bank, the last one being this morning, the Bank has intervened and the Management of Mugama have agreed that the decretal amount be satisfied from the proceeds of the dividend until full satisfaction. Please see the attached commitment letter from Muranga Farmers Union (formerly Mugama Farmers Union).”

9. Nahashon reacted by stating that the Bank wrote these letters as the Judgment debtor was its customer and that the Bank has been candid in its correspondence. The Bank's representative emphasized that the structure of the Bank is different from Co-opholdings. He however noted that the many societies do not appreciate the restructuring, and have referred their shareholding in Co-opholdings as their shares in the Bank.

10. After the taking of this evidence, lawyers representing the three parties to the Garnishee proceedings made some submissions which this Court has considered.

11. Two preliminary issues were raised by the lawyer of the Bank that deserve an immediate attention. It was submitted that the Decree holder had floated the express provisions of Order 22 Rule 18 as it has never sought to take out Notice to Show Cause proceedings. Secondly, that the final Decree extracted by the Decree Holder includes an element of interest which was time barred by the provisions of Section 4(4) of the Limitation of Articles Act which provides that no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

12. In the context of what was before Court, the Bank was not only overzealous but breaching the doctrine of res judicata. Overzealous because in the Ruling of 26th May 2018, the Bank was merely to provide a record of the Shares and Dividends in the names of and due to the judgment debtor and to show cause why these should not be sold to answer the Decree. The Bank was not required to take up the mantle of the Judgment-Debtor and to argue on the propriety of the interest sought or of the execution proceedings. In any event, the issues raised by the Bank were caught up with the Doctrine of res judicata as codified in Section 7 of the Civil Procedure Act as these issues were already subject to the Ruling of 26th May 2015 or ought to have been raised in the Applications which were the subject of that Ruling.

13. What has clearly emerged from the evidence of Mr. Nahashon Maore and the Documents placed before Court is that over 3800 Co-operative Societies are the owners of Co-opholdings which in turn holds the majority shareholding in the Bank. In Annual Reports and Accounts of the Bank for the years 2009-2015, Co-opholdings is described as follows:-

....the strategic and majority shareholder in the Bank representing the block strategic shareholding of the Kenya Co-operative Movement withCooperative Societies covering millions of Kenyans.”

14. Yet, Co-opholdings occupies a special position in the Bank. The history set out by Nahashon shows that the shareholders of the Co-operative Bank of Kenya Limited (registered as a Co-operative Society under the Co-operative Societies Act) transferred all its business, assets and liabilities to the Co-operative Bank of Kenya (incorporated as a public limited liability company under the Companies Act). The Bank Company then allotted 2,935,127,600 shares to Co-holding as fully paid Shares.

15. The evidence of Nahashon is that Co-operative Bank (**the Society**) changed its name to Co-opholdings (**a society**) and so the Shares of the Co-operative Societies (**who are shareholders of Co-opholdings**) are held as a block in the Bank (**the Company**). This structure and its rationale is explained as follows in the Information Memorandum of the Bank issued during its proposed listing of 22nd December 2008;

“Co-opholdings Co-operative Society Limited with the above structure now holds the equivalent of the entire shareholding previously held by the 3,805 Co-operative societies countrywide (formerly class “A” shareholders), and is hence the strategic investor and majority shareholder in the Bank; The structure as approved ensures the bank will retain its strategic identity as a ‘Co-operative movement in Kenya”.

16. It would be because of the special place it holds, I would think, that Co-operative Societies like the Judgment debtor refer themselves as being Shareholders of the Bank. And it also because of this special place that in its Annual Report and Accounts, the Bank finds it necessary to disclose the top ten (10) shareholders of Co-opholdings as part of its shareholder information. Contrast this with scanty information on its other shareholders like Kenya Commercial Bank Nominees Limited.

17. It must also be because of that extraordinary nexus between Co-opholdings and the Bank that Nahashon confirmed that his Department has the register of the Shareholders of Co-opholdings. He further disclosed that the judgment debtor was infact a Shareholder of Co-opholdings. What the witness did not do was to disclose the number of shares owned by the judgment debtor.

18. This state of affairs has led to conjecture. Counsel for the decree holder submits that the Judgment debtor holds 18,600,000 shares. This is inferred from the Judgment debtor's letter to the Decree holder in which it states that it was expecting to receive Ksh.9,300,000/= as dividend payout from the Bank for 2014/15 financial year. For the year ended 31st December 2014, the Directors of the Bank recommended a first and final dividend of Kshs. 0.50 for every ordinary share of Kshs. 1.00/=. Counsel then used the information to work the judgement debtor's shareholding.

19. There may be no need to infer the shareholding because the Bank is the custodian of the register of the shares of Co-opholdings. The Bank will have to provide this information. The Judgment debtor owes money that has been long outstanding. It has either been unwilling or unable to pay the debt. Its shareholding has a value, so would any dividend payable to it! These must be called in to pay the debt.

20. To enable this court make the final orders herein, it directs that the Bank does furnish to this Court a copy (or copies) of the Share Register of Co-opholdings showing the shares held by the Judgment debtor therein as at 26th May 2015 when the prohibition order was made and at the date of this order. Further the Bank shall provide a record of the Dividends due to the Decree Holder during this period.

21. This enable the Court makes its final Orders.

Dated, Signed and Delivered in Court at Nairobi this 15th day of February, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Nyaagah for Decree Holder

N/a for Defendant

N/a for interested party

Dennis – Court clerk