



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL MISC. APP. NO. 722 OF 2005
MUEMA KITULU & COMPANY ADVOCATES.....PLAINTIFF
V E R S U S
LUKENYA RANCHING & FARMING
CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT
AND
STANLEY ONGETI (Liquidator for Lukenya
Ranching & Farming Co-operative Society Limited.....APPLICANT

RULING

1. This ruling is the outcome of two applications. The first application IS taken out by Stanley Ongeti (liquidator for Lukenya Ranching & Farming Cooperative Ltd), hereinafter referred to as the applicant. The second application is the motion dated 18.05.2015 taken out by Muema Kitulu & Co. Advocates.

2. In the motion dated 22.12.2014, the applicant sought for *inter alia*:

- 1. THAT pending hearing and determination of this application, this honourable court's ex parte orders dated 27/10/2014 be stayed.**
- 2. THAT this honourable court's ex-parte orders dated 27/10/2014 be set aside, and the applicant herein be granted an opportunity to be heard on the plaintiff/ respondent's Notice of motion/application dated 10/10/2014.**
- 3. THAT in the alternative to prayer 3 hereinabove, this honourable court's ex-parte orders dated 27/10/2014 be reviewed and set aside.**
- 4. THAT costs of this application be paid by the plaintiff/ respondent.**

The motion is dated 22.12.2014 supported by the affidavit sworn by Stanley Ongeti.

3. When served, Muema Kitulu filed a replying affidavit he swore to oppose the motion. When the applications came up for hearing learned counsels recorded a consent order to have them disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against. I have taken into account the rival written submissions. The background of this dispute appear to be short and straightforward. Muema Kitulu t/a Muema Kitulu and Company Advocates (advocate) filed an advocate/client Bill of costs dated 19.5.2005 against Lukenya Ranching and Farming Cooperative Society Ltd (society) in which he asked the court to tax his costs/fees for legal services he rendered to Lukenya Ranching and Farming Cooperative Society Ltd vide Arbitration Cause no. 44 of 1995. By a notice of appointment of advocates dated 30/6/2005, the society dully appointed the firm of Nzei & Co. Advocates to represent it in the matter. The record shows that when the matter came up for mention before the deputy registrar on 18.7.2005, the court issued an order to have the Arbitration Cause records to be forwarded to court to facilitate the taxation exercise.

5. Mrs Nzei, learned advocate for the society stated before this court that Lukenya Ranching and Farming cooperative Society Ltd was duly dissolved under Section 6(1) of the Cooperative Societies Act by the commissioner of Cooperative Development on 8.3.2011 who also cancelled the aforesaid society's registration vide gazette notice no. 3221. The learned advocate pointed out that Lukenya Ranching and Farming Cooperative Society Ltd ceased to exist either as a corporate body or at all pursuant to the provision of Section 65 of the Cooperative Societies Act. In the same gazette notice, the commissioner of Cooperative Development appointed Mr. Stanley Ongeti (the applicant) as the liquidator of the society for a period of a year which period was extended from time to time. The learned advocate argued that the liquidator appointed did not automatically become a party to the proceedings herein but has to be enjoined by an order of court. Mrs. Nzei also pointed out that the plaintiff/advocate herein did not seek for leave to enjoin the liquidator as a party to these proceedings at the time of hearing the application dated 10.10.2014 i.e on 27.10.2014. The record shows that the aforesaid application had been filed against Lukenya Ranching and Farming /Cooperative Society Ltd which by that time had ceased to exist. Mrs Nzei further pointed out that the application is shown to have been heard exparte on 27.10.2014 and exparte orders were issued against the liquidator who was not a party to the proceedings. The learned advocate argued that she now seeks to correct the error through the motion dated 22.12.2014 by seeking to set aside the exparte orders by way of review.

6. The advocate/respondent opposed the motion claiming the firm of Nzei & Co. Advocates had way back on 16.9.2005 represented the society and even filed a notice of preliminary objection to oppose the advocates bill of costs. The learned advocate further pointed out that Mrs Nzei had by 6.12.2012 filed an objection arguing that the society no longer existed hence the Bill of costs had been overtaken by events. The advocate/respondent averred that between November 2013 and September 2014 he held meetings with the liquidator with a view of settling the various advocate bills of costs but no agreement was reached forcing the advocate to file the application dated 10.10.2014. It is alleged that the aforesaid motion was served upon the liquidator. It is the submission of the advocate that the liquidator assumes that corporate person of the society immediately he is appointed.

7. After a careful consideration of the rival submissions over the motion dated 22.12.2014 there is no dispute that the liquidator was not enjoined as a party to these proceedings. There is no credible and reliable evidence that the liquidator was served with the application with a date or a hearing notice of the motion dated 10.10.2014. In end I am convinced that the liquidator has been able to show that he was not served with application dated 10.10.2014 nor with a hearing notice hence it was not conceivable for him to attend court on 27.10.2014. Consequently I am satisfied that prayer 3 of the motion is merited. With respect, I agree with the submissions of Mrs. Nzei, that it is apparent that the lapses pointed out amount to errors apparent on the face of record. Consequently the orders issued on 27.10.2014 are reviewed and set aside. The motion dated 10.10.2014 to be re-served upon the liquidator and reheard afresh. Costs of the application to await the outcome of the rehearing and determination of the aforesaid motion.

8. Muema Kitulu t/a Muema Kitulu & Co. Advocates took out the motion dated 18th may 2015 in which he sought for the following orders *inter alia*:

1. THAT this honourable court be pleased to certify the application herein as urgent and service of the same be dispensed with in the first instance and further order that the same be fixed for hearing expeditiously.

2. **THAT this honourable court be pleased to order the arrest and detention of Mr. Stanley Ongeti (herein referred to as the contemner) in Civil jail for such a period as the honourable court may direct for being in disobedience of any/or for breaching this honourable court's order of 27th October 2014 requiring him to deposit into court the sum of kshs.3,161,865.70 (Three million one hundred sixty one thousand eight hundred sixty five seventy cent as security for taxed costs due to the applicant.**

3. **THAT this honourable court do make such other order or directions as may be expedient in the interest of justice including attachment of sale of the contemner personal property by public auction to satisfy the compliance with this honourable court's order of 27th October 2014.**

4. **THAT the costs of this application be borne by the contemner personally.**

9. The motion is supported by the affidavit sworn by Muema Kitulu.

The motion was served upon the liquidator who opposed the same by filing a replying affidavit sworn on 9.10.2015. I have considered the rival submissions. The motion dated 18th May 2015 is basically seeking for punishment of the liquidator for being in contempt of the court orders issued on 27.10.2014. This motion in my view is dependent on the outcome of the motion dated 22.10.2014.

10. It is the submission of the advocate applicant that the liquidator disobeyed this court's orders issued on 27.10.2014. It is argued that the liquidator was aware of the existence of the court order and has failed to deposit the amount he was ordered to deposit in court. The learned advocate urged this court to deny the liquidator audience until he complies with the court order.

11. The liquidator on the other hand is of the view that he was served with an application with altered dates. Furthermore the liquidator is of the opinion that he was not a party to the proceedings and no leave was sought to enjoin him. It is also argued that the orders issued on 27.10.2014 were issued against a non-existent party. After a careful consideration of the rival submission I am convinced that the orders sought in the motion dated 18.5.2015 cannot be issued because it is clear that the liquidator was not made a party to the proceedings. Secondly, it is also clear that there is no credible evidence that the liquidator was served hence he cannot competently be cited for contempt. In any case the order being sought to be enforced has already been set aside.

12. In the end, I find the motion dated 22.12.2014 to be well founded. It is allowed as prayed and as proposed hereinabove. However the motion dated 18.5.2015 is found to be without merit. It is dismissed.

13. In the circumstances of this case, I direct that each party meets its own costs.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant