REPUBLIC OF KENYA

High Court at Bungoma

Petition 7 of 2012

1. ALEX MALIKHE WAFUBWA

2. SAMUEL NGATI

3. DAVID KIBERENGE

4. TOM KUKUBO

5. EDWARD KISIANGANI

6. ERASTUS WECHULI

7. BENAINA SISUNGO

8. ROBERT MAMAYI …….…….....….....PETITIONERS

(KRAIDO & COMPANY ADVOCATES)

VERSUS

1. ELIAS NAMBAKHA WAMITA

2. JONATHAN WAFULA

3. BENARD SIANGU

4. MARTIN LUSWETI

5. COMMISSIONER FOR CO-OPERATIVES…….……...…..RESPONDENTS

RULING

INTRODUCTION

The order sought to be reviewed

[1] On 5th November, 2012, the court made the following order:-

...as it is the duty of the court to always preserve the subject of the suit, in my view it will be necessary the particular individuals namely 1st-5th Respondents do not undertake any of the functions for now in

relation to the business of the Bungoma District Co-operative Union until the date to be set by the court or agreed by the parties for the hearing of the application dated 26/10/2012. Such organizations are always amenable to transitional operations under the law which I suggest to be put in place to avoid paralysis of the Co-operative Union.

THE APPLICATION

Orders sought

[2] The above order is what precipitated the application by the 1st-5th Respondent dated 3rd December, 2012 by Notice of Motion under sections 1A, 1B, 3 & 3A of the Civil Procedure Act (hereafter CPA), and Order 45 Rule 1(a) and 3(2) of the Civil Procedure rules (hereafter CPR).

[3] The relevant prayer in the application is asking the court:-

To review, vary, vacate or set aside the orders issued on 5th November, 2012 pending the hearing and determination of application dated 26th October, 2012.

Grounds for the application

[4] The major grounds for the Application as contained in the application and urged by Mr. Kituyi are that the order of 5th November, 2012:-

a) Is oppressive and has paralyzed the operations of Bungoma District Co-operative Union

b) Has affected the lives of over 200,000 members of the said union as the affected respondents are the officials of the Union

c) Is not specific as to the particular accounts or activities are to be affected

d) Carries a mistake on the face as the members who are adversely affected by the order are not parties in the suit

e) Carries a mistake as it does not indicate that it shall affect only the five Respondents

f) Is for all intents and purposes a serious mistake before the application dated 26th October, 2012 is heard. That the order grants the application before it is heard.

Application is opposed

[5] Mr Kraido opposed the Application and termed it as frivolous, mischievous and an abuse of the process of the court. He urged the court to dismiss it on the reasons below:-

a) Except that the Respondents are not happy with the order, there is no mistake or error that has been pointed out by the Respondents as required by Order 45 of the CPR.

b) The order of 5.11.2012 was issued upon a formal application dated 26th October, 2012 which prayed for specific orders. The order is therefore in order.

c) The applicant is not saying that the order as extracted does not reflect the order that was issued by the court. Indeed they agree that it is in accordance with the order that was issued by the court. There is therefore no mistake whatsoever to warrant a review.

d) The Respondents are purporting to speak for the Union when their legitimacy is the one in question. If the Union wanted to speak it does so on its own and should apply as a body corporate

THE COURT DETERMINES THE ISSUES IN THE MANNER BELOW

Issues

[6] From the application and submissions of the parties, the issues that emerge are:-

a) Is there an error or mistake apparent on the face of the order issued on 5.11.2012?

b) Can the Respondents plead for orders on behalf of the Union?

Is there discovery of new and important matter?

[7] Mr. Kituyi attempted to persuade the court to accept that the alleged hardships being caused to over 200,000 members of the Union is a new matter on which review should be granted. Let me say from the onset that, this is not a discovery of a new and important matter in the sense of Order 45 of the CPR which would warrant a review. The allegation prominently featured in the Respondents' arguments in support of the Preliminary Objection they raised on the jurisdiction of the court. It is also substantially cited in their pleadings. The attempt to make that fact pass for a new issue under Order 45 of the CPR is an admirable ingenuity. Of necessity, the threshold for that ground is quite high and any review would be granted sparingly after a lot of caution. See the case of **COURT OF APPEAL; CIVIL APPEAL NO 217 OF 1998 (NBI) D.J LOWE & CO LTD v BANQUE INDOSUEZ; CIVIL APPEAL NO 225 OF 2008 (MSA) ROSE KAIZA v ANGELO KAIZA; MZEE WANJIE & 93 OTHERS v A.K SAKWA & 3 OTHERS.**I therefore dismiss the argument by Mr. Kituyi in that respect as it does not meet the legal standard.

Alleged error or mistake on the face of the order

[8] I will consider whether there is an error or mistake apparent on the face of the order.

[9] The wise words of the Court of Appeal in the case of **NATIONAL BANK OF KENYA v NDUNG'U NJAU CIVIL APPEAL NO 211 OF 1996** will offer judicial guide on this matter that:-

A review will be granted whenever the court considers it is necessary to correct an error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.

Further illumination is found in the case of **HERMAN P. STEYN CHARLES THYS CIVIL APPEAL NO 86 OF 1996,** when the Court of Appeal quoted with approval a statement in the case of **ODD JOBS v MUBIA [1979] E.A 476** that:-

A court may base its decision on an unpleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision.

On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

[10] To begin with, the parties herein agree and the record also bears testimony that the order as extracted reflects the order of the court made on 5.11.2012. The only quarrel the applicant has is that the order is oppressive for it:-

1. Has paralyzed the Union

2. Is affecting over 200,000 members of the Union who are not parties in the suit and

3. Grants the application dated 26.10.2012 before it is argue

[11] The question is whether these are proper grounds for review under Order 45 of the CPR.

[12] An error which is a potent ground for appeal, may not necessarily be a ground for review. It is only an error or mistake that is apparent on the face of the record, that is a ground of review under Order 45 of the CPR. The must however be so clear as not to require much probing to be revealed. Therefore, it must be an error or mistake that is indisputable and makes the decision being re-examined to be unquestionably erroneous. The reviewing court should be able to discern such error easily. See the Black's Law Dictionary, 7th Edition.

[13] The errors being alleged by the Respondents are not errors that will constitute proper grounds for review under Order 45 of the CPR given the fact that they do not relate to an error that is apparent on the face of the record. There are no grounds either that will invite setting aside of the order of 5.11.2012 *ex debito justitiae.* The order was made conscientiously by the court in full understanding of the justice of the case; that it is the legitimacy of the 1st-5th Respondents to hold office in the Union which is being challenged, and it will be legally incongruous to have stopped the 1st-5th Respondents from performing some activities on behalf of the Union and not others.It was easily discernable from the application dated 26th October, 2012, the entire circumstances of the case, the arguments and pleadings filed by the parties that it was necessary to preserve the subject of the petition. The order of 5.11.2012 was premised on that evaluation, and was not erroneous or *per incuriam* in any sense. I therefore do not find any reason to review the order of 5.11.2012.

Speaking for members of the Union

[14] It is worth repeating that the Respondents have continued to allege that the order of 5.11.2012 is affecting over 200,000 members of the Union. But all along, those members allegedly being affected by the order, have never filed any papers in court either by themselves or through a legal representative or recognized agent. The said affected members have never also appointed the Respondents or any one of them to represent their grievances in the matter. In short, they are not parties in this case and the Respondents cannot speak for them unless they show prove that they are their duly appointed agents, or those members suffer some form of inability recognized by law which permits representation by the Respondents in the manner permitted under the Constitution. Although the Constitution of Kenya, 2010 has enlarged the realm of *locus standi*that does not render obsolete the legal necessity that only right parties apply for orders in courts. Even if the Respondent were properly representing the members of the Union, they were still required to prove those members have been affected by showing real proof as opposed to mere allegations as is the case here. The members or the Union would still be called upon to make presentations. Neither can the Respondents be said to stand in the position of an *amicus curie.* Indeed the petitioners are members of the Union and have filed their grievances in court, and any member who is aggrieved by these proceedings should file their grievances for consideration by the court. It is only when such are parties in the suit or are properly represented that a court can exert jurisdiction and issue orders in their favour. At the moment, their perceived grievances remain mere allegations which cannot yield any redress to the Respondents by way of review.

Representing the Union

[15] This issue was prominently canvassed and counsels herein undertook to provide authorities to support their respective standpoints on the issue, but none was furnished. Both counsels confirmed that the Union is a body corporate as it has been duly incorporated under the Co-operative Societies Act. Section 12 of the Act declares all registered co-operative societies to be a body corporate with perpetual succession and a common seal, capable of suing and being sued. In particular, the proviso to section 4 of the Act clearly requires that co-operative union or apex society will only be registered with limited liability. The Union being a registered union, the novel concept of Corporate Personality perfectly applies.

[16] The Corporate Personality of a corporation or company was settled in the celebrated case of

SALOMON V SALOMON that it cannot be called upon to justify itself. Accordingly, a corporation is an entity by itself and is separate from the aggregate members or the members of management committee who compose it. Thus, the *prima facie* rule is that a corporate entity must sue in its own name and in its corporate character or through a person duly appointed by the corporation for that purpose by a resolution and under the company's seal. In accordance with the rule in **FOSS v HARBOTTLE (1843) Hare 461**, departure from the *prima facie* rule is permissible only where:-

1. The company is proposing or is acting ultra vires or

2. Majority intends to carry through some fraudulent acts on the minority or

3. Personal rights of the shareholder have been violated or

4. There is justification in the interest of justice to depart.

Judicial authorities on this subject are legion and I do not wish to multiply them.

[17] Applying this test, there is no justification in this case to provide for a departure from the cardinal rule and allow the Respondents to plead on behalf of the Union which is a body corporate. The 1st-5th Respondents are just members of management which does not grant them legal permission to apply in court in their names for orders on behalf of the Union. The Union should apply in its name and corporate character or through a duly appointed person through a resolution and under their common seal. If the Respondents are to legally represent the Union they need special authorization as laid down in law. And in the absence of a formal resolution appointing the 1st-5th Respondents to apply for orders on behalf of the Union, the said Respondents cannot apply to set aside the order herein on behalf of the Union on the belief that the order is oppressive to the Union. I do not think in the circumstances of this case there is anything that would prevent the Union from applying for orders in court in its name and corporate character.

[18] By way of *dictum*, and I said this in my order of 5.11.2012, the alleged paralysis should be alleviated through the provisions of the Co-operative Societies Act where the Union or the Commissioner for Co-operatives should exercise jointly or severally the transitional powers under the law and by-laws.

THE DECISION

[19] For reasons above stated, the application dates 3rd December, 2012 is dismissed with costs to the Petitioners.

Dated, signed and delivered in open court at Bungoma this 30th day of January 2013.

F. GIKONYO

JUDGE

30/1/2013
Before: Gikonyo, Judge

Kituyi for Respondents

Amateshe for Petitioners

Court Assistant: Alusa

Ruling delivered in court.

F. GIKONYO
JUDGE