



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.520 OF 2012

BETWEEN

JOHN RICHARD OUMA NYAMAI.....PETITIONER/APPLICANT

AND

THE CO-OPERATIVE TRIBUNAL.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

INTERCON SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LTD.....3RD RESPONDENT

RULING

1. The Petition herein is dated 12th November, 2012. Accompanying the Petition is a Chamber Summons Application dated the same day together with a Supporting Affidavit sworn by the Petitioner in Nairobi. The said Application seeks the following orders:

“a) ...

b) That this Honourable Court be pleased to grant an ex- parte conservatory order restraining the 1st and 3rd Respondents by themselves or through Officers of the Kenya Police Service, agents or servants from executing a warrant of arrest against the Petitioner in execution of a decree issued in Nairobi Co-operative Tribunal Case No. 123 of 2102 pending the hearing and determination of this Application interpartes. (sic)

c) That upon hearing inter partes, prayer no. (b) above be granted pending the hearing and determination of the Petition.

d) Costs of the application be provided for.”

2. The grounds in support of the Application are that the Applicant alleges that by issuing warrants of arrest against him in execution of a decree in Co-operative Tribunal Case No. 123 of 2012, the 1st Respondent is in gross violation of **Article 24 (1) (e)** of the **Constitution** and that the said warrant has been sought and obtained at the very first instance without first recourse being had to other modes of execution of a decree.

3. The Applicant further states that the 3rd Respondent is holding substantial shares in his name which it could have attached and sold in execution of the said decree instead of applying, in the first instance, for committal of the Applicant to civil jail, which the Applicant says is dehumanizing and degrading. He further states that his fundamental rights to liberty, freedom and inherent dignity are likely to be violated and that the 1st Respondent, being a tribunal established under the law is under an obligation to promote and protect the principles of the Constitution and including protection of fundamental rights.

The Applicant's Case

4. The Applicant is a member and shareholder of the 3rd Respondent herein by fact of being an employee of the Hotel Inter-Continental and he states that he also served on one of the Committees of the 3rd Respondent. That on or about July, 2006, the Applicant alleges that an incoming team of office bearers of the 3rd Respondent claimed that four former office bearers, including the Applicant, had allegedly stolen a total of Kshs.1,831,000 from the 3rd Respondent.
5. The Applicant together with the other office bearers were thereafter arrested and charged in Nairobi Chief Magistrate's Court Criminal Case Number 1372 of 2006 but in July 2010, he and his co-accused were acquitted of all charges and it is his case that upon acquittal, the 3rd Respondent changed tact and lodged fresh complaints under the guise of inquiries into the affairs of the Society. Subsequently, around November 2010, the Commissioner of Co-operatives issued a summons to the Applicant for that purpose.
6. That on or about August, 2011 the Applicant received a Notice of Intention to surcharge him for the sum of Kshs.296,950/- and the said notice stated that the members of the 3rd Respondent, by resolution at a special general meeting, had adopted the findings and recommendations of a report made after an inquiry instituted under **Section 58** of the **Co-operative Societies Act**. The said Notice also stated that the grounds upon which the resolution was reached by members included matters that were well within the knowledge of the Applicant but in fact he had no knowledge of the reasons and/or grounds leading to these allegations and that there was no inquiry report attached to the said notice.
7. The Applicant asserts that he wrote to the Commissioner of Co-operatives through his lawyers seeking to be supplied with a copy of the said report, but the Commissioner did not respond to that letter. Instead, he alleges that on the 15th February, 2012, the Commissioner forwarded another order surcharging him for the sum of Kshs.296,950/- and the letter again stated that the circumstances under which the surcharge is being made were well within the knowledge of the Applicant.
8. It is his further case that he thereafter invoked **Section 74** of the **Co-operative and Societies Act**, lodged and filed an appeal on the 15th of March, 2012 against the decision of the Commissioner of Co-operatives and that the same is yet to be heard. The Applicant further adds that notwithstanding the said appeal, the 3rd Respondent on 10th April, 2012 went ahead and filed a statement of claim at the Co-operative Tribunal against the Applicant, which claim he avers, was based on the surcharge orders of 15th February, 2012.
9. The Applicant alleges that his file at his Advocate's office got misplaced before he could file a defence in reply to the statement of claim, and the 3rd Respondent, in the interim, obtained interlocutory judgment against him. Subsequently, the 1st Respondent issued a decree against the Applicant and the 3rd Respondent then applied for execution of the said decree and warrants of arrest were issued against the Applicant. He states that he then proceeded to file an application under certificate of urgency illustrating the unconstitutionality of the warrant of arrest but the Chairman of the 1st Respondent declined to hear the same stating that it was not urgent and directed that hearing dates should be taken at the registry after service.
10. It is the Applicant's further case that the application for execution indicates that there has not been

any previous application/attempt for execution and that a perusal of the said application also indicates that a notice to show cause is to issue illustrating why the Applicant should not be committed to civil jail. He further adds that he has shares worth approximately Kshs.290,000/- with the 3rd Respondent and that as a member of the 3rd Respondent he still remits to the latter about Kshs.2,000/- as his monthly contribution. He therefore concludes that prior to issuing the warrants of arrest, the 1st and 3rd Respondents have recourse in his shares and they may also attach his salary in order to recover any monies owed.

11. The Applicant relies on the case of **Beatrice Wanjiku & Anor vs. Attorney General & Anor Nairobi High Court Petition Number 190 of 2011** where Majanja, J. held that committal civil jail in execution of civil debts should be a measure taken as a final resort and he also seeks support on the case of **Zipporah Wambui Gathara Bankruptcy Cause No. 19 of 2010** where Koome, J (*as she then was*) held that:

"...there are several methods of enforcing a civil debt such as attachment of property..... [and] an order of imprisonment to civil jail is meant to punish, humiliate and subject the debtor to shame....that goes against the International Covenant on Civil and Political Rights....and basic freedoms of movement."

The Applicant concludes by stating that under **Article 165(6)** of the **Constitution**, the High Court has supervisory jurisdiction over the Co-operatives Tribunal and that all Tribunals should be guided by the purpose and principles of the Constitution in execution of their duties and that he is deserving of the orders sought in the Application to safeguard his freedoms and liberty.

The 3rd Respondent's Case

12. The 3rd Respondent insists that the said Application constitutes outright falsehoods and state that the Applicant who is a member of the 3rd Respondent and a former member of the Executive Committee was involved in mismanagement, embezzlement and theft of funds belonging to members of the 3rd Respondent. That under **Section 58** of the **Co-operative Societies Act (No. 12 of 1997)** as amended by **Act No. 2 of 2004** and read with **Section 73** of the same **Act**, the Commissioner for Co-operative Development and Marketing is empowered to institute an inquiry into any Co-operative Society and the summons issued in this case were directed at all the office bearers who held fort when funds were allegedly lost within the 3rd Respondent during their time in office and that the Applicant ignored the said summons while all the other office bearers heeded the summons and gave valuable information regarding the subject of the inquiry.

13. The 3rd Respondent also alleges that after the inquiry, a report was compiled and which was then read out to its members at a General Meeting held on the 29th of April, 2011 and that the members overwhelmingly adopted the recommendations therein, including the proposal that the Applicant be surcharged for loss of Kshs.296,650/-.

14. According to the 3rd Respondents, under **Section 74** of the **Co-operative Societies Act**, an appeal against a surcharge order of the 1st Respondent is to be filed within 30 days of service of the surcharge order and that the Applicant's alleged **Appeal No. 3 of 2012** was never served upon them. That even if the said appeal had been filed on the 15th of March, 2012 as alleged by the Applicant, it defies **Order 8(3)** of the **Co-operative Tribunal Practice and Procedure Rules** and that they came to know of the Appeal through this Petition and Application and they would never have instituted **Tribunal Case No. 123 of 2012** if they had been made aware of its existence at the right time.

15. Further, that upon the institution of **Tribunal Case No. 123 of 2012**, the Applicant entered appearance but failed to file a defence in response to the statement of claim and the 3rd Respondents applied for judgment in default of filing a defence and then proceeded to serve the Applicant with a Ten (10) Day Notice of Entry of Judgment. That on the 8th October 2012, the 3rd Respondents served the Applicant with a Notice to Show Cause why execution should not be

made, and the Notice was slated for hearing on the 6th of November, 2012 but on that day the Applicant did not appear before the Tribunal but instead his Advocate sent a colleague to hold his brief because he was indisposed.

16. In answer to the argument that shares can be sold to recover the decretal sum, the 3rd Respondent contends that the shares are held as security for loans and with the express approval of the Applicant and therefore it would not suffice that the shareholding be applied as insinuated by the Applicant. That in any event the net earnings of the Applicant as displayed in his pay slip is Kshs.36,000/- which is not enough to off-set the decretal sum and the 3rd Respondent's case is that this Petition has been filed to frustrate the 3rd Respondent from realizing the fruits of its judgment and prays that the same be dismissed with costs.

The 1st and 2nd Respondents' Case

17. The 1st and 2nd Respondents filed Grounds of Opposition dated 5th March, 2013 wherein they state that the Application is misconceived because the 3rd Respondent has the fundamental right under the **Civil Procedure Act and Rules** to execute a decree that has been issued lawfully, and committal to civil jail is one of the modes employable in such circumstances. They also contend that at all material times, they followed due process and the Applicant was given the opportunity to propose how he intended to offset the debt due and owing but he instead failed and/or ignored to do so.

18. It is the further Submission of the 1st and 2nd Respondents that **Article 24 (1) (d)** of the **Constitution** provides that:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.”

That therefore in seeking to limit the fundamental rights and freedoms of individuals the Constitution provides that this limitation should not prejudice the rights and fundamental freedoms of others.

19. In that regard and to **Section 38** of the **Civil Procedure Act**, committal to civil jail is one of the modes of execution recognized by law and the same provision qualifies that the judgment debtor should be given the opportunity to show cause why he should not be committed to civil jail.

The 1st and 2nd Respondents add that the procedure to be followed in granting the judgment debtor an opportunity to show cause why he should not be committed to civil jail is prescribed by **Order 22 Rules 7, 31, 32 and 35** of the **Civil Procedure Rules** and this was done in the Applicant's case.

20. Further, add that the Application and Petition are based on the Applicant's assumptions and presumptions that he will be automatically committed to civil jail if arrested and yet the warrant of arrest was issued to secure the Applicant's attendance in Court so as to examine him on his means or otherwise to satisfy the decretal amount and the Court would thereafter proceed to give proper directions with regard to the payment of the said amount. The 1st and 2nd Respondents rely on the following cases in support of their stands; **Rosanna Pluda Moi vs. Phillip Kipchirchir Moi Nairobi Divorce Cause No.154 of 2008** and **Beatrice Wanjiku & Anor vs. Attorney General & Anor Nairobi High Court Petition No.190 of 2011**. where this Court addressed both its jurisdiction generally and in the latter case, the constitutionality or otherwise of committal to civil jail.

Determination

21. At the heart of this Application is the Applicant's submission that by issuing warrants of arrest against him in execution of a decree in Co-operative Tribunal Case No. 123 of 2012, the 1st Respondent is in gross violation of **Article 24 (1) (e)** of the **Constitution** because the latter at the very first instance resorted to issuing the warrants without recourse being had to other modes of execution.

22. What other modes of execution are available to the 1st Respondent which the Applicant insists should/could have been explored prior to issuing warrants for his arrest? Under **Rule 6** of the **Co-operative Tribunal (Practice and Procedure Rules)** it is stated that;

"The provisions of the Civil Procedure Rules shall apply in respect of the proceedings of the Tribunal."

23. **Section 38** of the **Civil Procedure Rules** which deals with the powers of Courts to enforce execution provides that;

"Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree- holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale, or by sale without attachment, of any property;

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted may require"

24. The proviso to **Section 38** of the **Civil Procedure Act** provides thus;

"Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing is satisfied;

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

i. *is likely to abscond or leave the local limits of the jurisdiction of the court; or*

ii. *has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or*

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account."

25. The question that should follow therefore is; after looking at the modes of execution of a decree on application by a decree-holder and the conditions to be satisfied above by the judgment debtor prior to committal to civil jail, is whether this court has the jurisdiction to assess whether the 1st Respondent in issuing warrants of arrest for the Applicant is likely to violate the latter's constitutional rights of liberty, freedom and inherent dignity and if the 1st Respondent ought to have employed other modes of execution as provided for in **Section 38** of the **Civil Procedure Act** prior to issuing the said warrants.

26. In that regard, the Co-operative Tribunal is established by **Section 77(1)** of the **Co-operative and Societies Act** which provides as follows;

"(1) There is hereby established a tribunal to be known as the Co-operative Tribunal which shall consist of the following members....."

The said Act further states that the Tribunal will be governed by its own procedure except where it is expressly provided for. Under **Rule 6** of the **Co-operative Tribunal (Practice and Procedure Rules)** however it is stated that:

"The provisions of the Civil Procedure Rules shall apply in respect of the proceedings of the Tribunal."

27. Is it then in order for the 1st Respondent to employ the option under **Section 38(d)** of the **Civil Procedure Act** in enforcing execution of the decree? In **Phillip Kipchirchir Moi (supra)** it was stated as follows;

"The Applicant has raised one serious issue which would require the High Court to resolve at some point but not necessarily in this Ruling. The issue is this; whether, in view of the provisions of the obviously very robust Bill of Rights in our Constitution, there is a place for the common order of civil Jail for inability to pay a debt. I am aware that Koome J. (as she then was) made a finding in Bankruptcy Cause No.9 of 2010 – Republic vs. Zipporah Wambui Mathara that committal to civil Jail was against Article 11 of the International Covenant on Civil and Political Rights as read with Article 2(6) of the Constitution. The learned Judge did not however, with respect, go ahead and declare any statute allowing such Orders to be unconstitutional, as the Applicant wishes this Court to do, specifically as regards his case." (Emphasis mine)

28. I adopt the same finding and in doing so, I am well aware that the Applicant was served with a Notice to Show Cause dated 19th September, 2011 so as to attend the 1st Respondent Tribunal on 6th November, 2011 to demonstrate why he should not be committed to civil jail for non-payment of the decretal amount. I am also aware that neither the Applicant nor his Advocate attended the Tribunal on that day and the warrant of arrest of the Applicant was then issued. The Applicant was clearly given the opportunity to demonstrate his ability or lack thereof to pay the decretal amount but he chose not to attend the hearing and instead proceeded to file a Chamber Summons Application in Tribunal Case 123 of 2012 seeking to set aside the interlocutory judgment and file his defence out of time and later, he filed the Petition now pending before this Court.

29. Further, the manner and procedure to be employed once a Court or tribunal is seized with an Application to commit a Judgment Debtor to civil jail for failure to pay a debt is provided for in **Order 22 Rules 7, 31, 32 and 35** of the **Civil Procedure Rules, 2010**. It is noteworthy that **Order 22 Rule 31 (2)** of the **Civil Procedure Rules** states that;

"Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor."

30. With the background that I have give above, I see nothing untoward about the above procedure

and therefore find that the warrant of arrest issued against the Applicant was in accordance with **Section 38** of the **Civil Procedure Act** and **Order 22 Rule 31(2)** of the **Civil Procedure Rules** and the said Sections are not unconstitutional and I will revert to that issue shortly.

31. The next question to address is whether the Applicant has recourse elsewhere? **Rules 17** of the **Co-operative Tribunal (Practice and Procedure) Rules** provides that; “**A judgment, order or award made ex parte under this Rules may, on application, be set aside on such terms as may be just.**” Under the **Civil Procedure Rules, 2010** the Applicant may also apply to set aside the interlocutory judgment to enable him file his defence as is provided under **Order 10 Rule 11** where it is stated that; “**where judgment has been entered under this Order, the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just**”. Indeed this is what the Applicant did when he filed his Chamber Summons Application dated 7th November 2012 under Certificate of Urgency.

32. I am not aware whether the Applicant served the said Application on the 3rd Respondent and whether dates were taken for hearing before the 1st Respondent but I am aware that the Applicant filed a Memorandum of Appeal against the surcharge order of the Commissioner of Co-operative Development and this is the Appeal that the 3rd Respondent claims was not served upon them as well.

33. As things now stand, therefore this Court is faced with a litigant who was:

- a. *Given the opportunity to appear first before the Commissioner of Co-operatives when a summons on the financial condition of the 3rd Respondent was issued;*
- b. *Given another opportunity, before the 1st Respondent when a statement of claim was filed by the 3rd Respondent and served upon him, to file a defence to the statement of claim but failed to do so alleging that his advocate's file was misplaced;*
- c. *Notified 10 days in advance of an entry of Interlocutory Judgment against him in the case before the Tribunal;*
- d. *Notified to show his capability or lack of it to settle the decree and/or agree on how he will pay the decretal amount;*

What did he do instead? He slept on his rights then he woke up in a huff and has now chosen to employ all possible avenues both on the original and review jurisdiction of the 1st Respondent as well as the original jurisdiction of the High Court under **Article 165 (3) (b)** of the **Constitution** in an attempt at saving himself. This is what is called “*forum shopping*” which is a flagrant abuse of the Court process and the Applicant is clearly avoiding the obligations imposed on him, lawfully, by the 1st Respondent.

34. Indeed the preamble to the **Co-operative Societies Act** states that it is;

“An Act of Parliament relating to the constitution, registration and regulation of co-operative societies and for purposes incidental thereto.” (Emphasis mine).

In that context the dispute placed before the 1st Respondent arose out of the action of the Commissioner of Co-operatives as authorized by **Section 58** of the **Co-operative Societies Act** which provides that;

“The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.”

This is the law that the Commissioner followed and the Inquiry found the Applicant to have misappropriated Kshs.296,950/- and he was surcharged accordingly.

35.Subsequently, the 3rd Respondent filed a statement of claim alleging a dispute under **Section 78** of the **Co-operative and Societies Act** where it is stated that;

“A dispute for the purpose of this Section shall include - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not”

All circumstances now point to the fact that the proper forum within which the Applicant should prosecute his case is before the 1st Respondent and not necessarily this Court.

36.The Applicant can of course *inter-alia* approach the High Court by invoking its appellate jurisdiction if aggrieved with any decision of the Tribunal because **Section 74 (2)** of the **Co-operative Societies Act** stipulates that:

“A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law”

37.This is not the case here because the Applicant has lodged this Petition and Application in the High Court citing that his constitutional rights stand to be violated in the event the warrants of arrest are enforced. The jurisdiction of the High Court in that regard is provided for in **Article 165** of the **Constitution** and **Article 165 (3) (b)** thereof provides that; **“Subject to Clause 5, jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”** is conferred on this Court but has any such right been violated or threatened with violation.

38.Majanja, J. in **Beatrice Wanjiku & Another (supra)** stated that;

“An analysis of the provisions of Section 38 of the Civil Procedure Act and the Order 22 of the Rules and their application demonstrates the following;

a) The process of arrest and detention is not arbitrary. The debtor is given an opportunity to show cause before an order is made by a judicial officer.

b) The Judgment-Creditor can only be committed to civil jail once it is demonstrated that he or she has refused or neglected to pay, is about to abscond or is intent on obstructing or delaying execution of the decree.

c) The burden of proof rests on the judgment-creditor to show prove the elements that are necessary for the arrest and committal of the judgment-debtor.

d) That arrest and committal is the last resort after other modes of execution have failed.

e) There is a right of appeal against the decision of ordering arrest and committal.”

39.The issues highlighted by the learned judge create a balance that must be achieved when the Applicant's rights to his fundamental freedoms and the 3rd Respondent's right to recover its debt are weighed against each other.

40.Further, the conditions to be met as illustrated above in denoting whether the 1st Respondent should enforce execution of the decree by committing the Applicant as a Judgment Debtor to civil jail are issues that are currently placed before the tribunal in **Tribunal Case Number 123 of 2012**; and the said tribunal is competent enough to adjudicate the same and nothing has been

placed before this Court to show that it is unable to conduct the proceedings within its constitutional mandate..

41. **Article 159 (2)** of the **Constitution** provides that;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles - (e) the purpose and principles of this Constitution shall be protected and promoted.”

The Constitution has thus donated power to the courts and tribunals to exercise judicial authority and the mechanisms of dispute resolution with regard to Co-operative societies are contained in the parent statute which is the **Co-operative Societies Act** which has established the 1st Respondent whose procedures are well articulated and defined in subsidiary legislation. The High Court should not be seen to be usurping the powers of Tribunals and inferior Courts without good reasons for doing so. I see none at this stage of present proceedings.

43. Turning back to the Application before me, conservatory orders can only be issued when an Applicant has demonstrated that it has *inter-alia* a *prima facie* with the probability of success. The present Applicant has completely failed to do so and I have shown why.

44. The Application is without merit and is best dismissed with costs to the Respondents.

45. As for the Petition, let parties now take directions as to how it can be best disposed of expeditiously and noting what I have stated above.

46. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Obura for 2nd Respondent

Miss Manegene holding brief for Mr. Getange for 3rd Respondent

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE