



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Miscellaneous Application 175 of 2011

PATRICK MUTUNE KATUBI..... APPLICANT

-VERSUS-

1. GENERAL MANAGER, HARAMBEE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LTD.....1ST RESPONDENT

2. GLADYS N. GICHOHI, SENIOR LEGAL OFFICER,

HARAMBEE CO-OP. SAVINGS & CREDIT

SOCIETY LTD..... 2ND RESPONDENT

AND

IN THE MATTER OF:

CO-OPERATIVE TRIBUNAL CASE NO.92 OF 2006

BETWEEN

PATRICK MUTUNE KATUBI..... CLAIMANT

-VERSUS-

HARAMBEE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED..... RESPONDENT

R U L I N G

Patrick Mutune Katubi, the applicant herein approached this court by way of a Chamber Summons application dated 12th April 2011 seeking leave to institute contempt of court proceedings against the General Manager and Senior Legal Officer of the Harambee Co-operative Savings and Credit Society (**hereinafter referred to as the Respondents**) for having deliberately disobeyed the orders issued by the Co-operative Tribunal on 21st August 2008 and on 11th February 2011 in Co-operative Tribunal Case No.92 of 2006 which had been duly served on them.

Leave was granted by Musinga, J on 12th April 2011 following which the applicant filed a Notice of Motion dated 19th April 2011 seeking the following orders:

1. **THAT** the two Respondents herein be cited for contempt of Court for having disobeyed the Orders of the Honourable Co-operative Tribunal in Co-op Tribunal Case No.92 of 2006 granted on 21st August 2008 and 11th February 2010.

2. **THAT** the Honourable Court do commit the Respondents to civil jail for a period of 6 months or such other period as this Honourable Court deems fit and order such other punishment as it deems appropriate in view of the aforesaid contempt.

3. **THAT** the said Respondents be compelled by a further order to abide by the orders made on 21st August 2008 and 11th August 2010 by the Co-operative Tribunal in the aforesaid case specifically that:-

(a) The Respondents do process and release to the Claimant title documents to Plots Nos.1058 and 1059, Greenfields Site and Service Scheme Nairobi.

(b) The Respondents do give to the Claimant vacant possession of the said Plots Nos.1058 and 1059.

(c) The Respondent do surrender to the Claimant the title documents duly processed and registered in the name of the claimant forthwith.

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

The application is supported by an affidavit sworn by the applicant on 19th April 2011 and is premised on the following grounds:

1. The Co-operative Tribunal on the 21st August 2008 and 11th February 2010 made orders against the Harambee Co-operative Savings and Credit Society Limited in the following terms inter-alia:-

(a) The Respondents do process and release to the Claimant title documents to Plots Nos.1058 and 1059, Greenfields Site and Service Scheme Nairobi.

(b) The Respondents do give to the Claimant vacant possession of the said Plots Nos.1058 and 1059.

(c) The Claimant be paid the costs of the suit by the Respondents.

(d) The Respondent shall surrender to the Claimant the title documents duly processed and registered in the name of the claimant on or before 11th April 2010.

(e) Costs to the Claimant/Applicant in any event.

2. Despite the Respondents being aware of the existence and being in force of the above stated Court's orders and having been served with a copy of the same by a duly authorized process server have continued to blatantly disobey the said orders by refusing to implement the same.

3. The Respondents are the Principal officers of the Harambee Co-operative Savings & Credit Society Limited and have the necessary instruments to give effect to the orders but they have persistently neglected and refused to do so.

4. The Respondents conduct amounts to disrespect of court orders and renders the course of justice an exercise in futility.

5. The Applicant has no other way of enforcing the said Orders.

6. That it is in the interest of justice that the court does assert its authority in order to protect the dignity and confidence in the judicial system.

7. The said orders have neither been discharged nor stayed by an order of the Court.

In response to the motion, the respondents filed a preliminary objection dated 1st December 2011 which counsel on record for both parties agreed should be argued in opposition to the motion instead of being heard separately in order to save judicial time.

The respondents did not file any replying affidavit with the result that the factual narration of the background against which the motion was filed as deponed to by the applicant in his supporting affidavit remained unchallenged or uncontraverted.

In the said supporting affidavit, the applicant spelt out his case and annexed evidence in the form of annexures marked PMKI, PMK2 and PMK4 to prove that Co-operative Tribunal Case No.92/06 had been determined in his favour and Harambee Co-operative Savings & Credit Society Ltd had been ordered to process and release to him title documents to Plot Nos.1058 and 1059 Greenfields Site and Service Scheme Nairobi and to give him vacant possession of the same – See PMK2 and PMKI.

The applicant contends that the respondent in Tribunal Case No.92/06 through its principal officers who are the respondents in this case despite having been duly served with the said orders and despite having entered into a consent recorded by the tribunal on 11th February 2010 undertaking to surrender to the applicant title documents for the plots in question duly processed in his name on or before 11th April 2010, has blatantly refused to obey the said orders and should be punished for contempt of court.

The respondents on their part objected to the hearing and determination of the applicant's motion on three grounds which included a challenge on the jurisdiction of this court to hear and determine the applicant's notice of motion.

Before dealing with the merits or otherwise of the applicant's motion, I propose to deal with the preliminary points raised by the respondent starting with the issue of jurisdiction because jurisdiction is everything.

Jurisdiction is donated by law and where there is a challenge on jurisdiction in any proceedings, the first step that a court must take is to ascertain whether or not it has jurisdiction to determine the issues in dispute, because if it is established that it has no jurisdiction, then it has no alternative but to down its tools. Jurisdiction is the wings that fly the court and the engine that propels the court in the right direction. Ascertainment of jurisdiction is of critical importance as anything done in excess of or without jurisdiction is a nullity in law and has no legal effect.

In this case, Mr. Chege learned counsel for the respondents submitted that this court does not have jurisdiction to hear the application as Article 165(6) of the Constitution of Kenya 2010 on which the application is grounded does not donate to this court power to punish for contempt of court.

It was Mr. Chege's further submission that Section 5 of the Judicature Act only gives power to the High Court and the Court of Appeal to punish for contempt of court to uphold the authority and dignity of those two courts and of the subordinate courts. It was his contention that the Co-operative Tribunal (**hereinafter referred to as the Tribunal**) does not fall under the purview of Section 5 since it is not a subordinate court.

It was further submitted on behalf of the respondent that the jurisdiction to punish for contempt of the Co-operative tribunal's orders was vested in the tribunal itself by virtue of Section 83 of the Co-operative Societies Act and that the instant application should have been filed in the Tribunal under that section.

Section 83 of the Co-operative Societies Act (*hereinafter referred to as the Act*) states as follows:

“It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish any such person for contempt in accordance with the provisions of this Act”.

Mr. Kingara learned counsel for the applicant on his part submitted that the court has jurisdiction to hear the application as under Section 5 of the Judicature Act, the power to punish for contempt of court is solely vested in the High Court and the Court of Appeal. He further submitted that the Co-operative tribunal cannot punish for contempt of court and that Section 83 of the Co-operative Societies Act does not take away the power of the High Court to punish for contempt of orders issued by the Tribunal. It was Mr. Kingara's position that since the respondents have not averred that they have complied with the tribunal's orders, this court should proceed to punish them for contempt of the tribunal's orders.

I have considered the rival submissions by the parties on the issue of jurisdiction. I have also perused the application and has noted that though the application mainly seeks orders to cite the respondents for contempt of Court for disobeying orders issued by the tribunal, the applicant has wrongly invoked the supervisory jurisdiction of this court by citing Article 165(6) of the Constitution of Kenya 2010 but has correctly invoked the jurisdiction of the court to punish for contempt of court by grounding the application under Section 5 of the Judicature Act and Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965.

Article 165 (6) of the Constitution is in the following terms:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court”.

The supervisory jurisdiction of the High Court is exercised by way of judicial review which has nothing to do with the enforcement of orders issued by subordinate courts, inferior tribunals or bodies or persons exercising either judicial or quasi judicial functions.

Judicial Review is the process by which the High Court supervises proceedings and decisions of inferior courts, tribunals or other bodies which carry out judicial or quasi judicial functions or are charged with

the performance of public duties in order to ensure that such tribunals or bodies do not act or make decisions outside or in excess of their jurisdiction or they do not abuse their powers by acting irrationally or unreasonably to the detriment of the rights or interests of citizens who appear before them.

The purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected. Since the applicant has not approached this court seeking the remedy of judicial review over acts done or omitted to be done by the Co-operative Tribunal, I find that the supervisory jurisdiction of the High Court is wrongly invoked and cannot aid the applicant in this case.

However, since the applicant's main prayer in the motion is to have the respondents cited for contempt of court and has nothing to do with the remedy of judicial review, I find that since the jurisdiction to punish for contempt of court is properly invoked, the error on the part of the applicant of simultaneously invoking the supervisory jurisdiction of the court does not affect the validity or competence of the application.

I respectfully wish to disagree with Mr. Chege for the respondents that this court does not have jurisdiction to punish for contempt of court for orders issued by the Tribunal under Section 5 of the Judicature Act allegedly because the tribunal does not qualify to be a subordinate court.

Section 5 of the Judicature Act states that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Subordinate courts are defined in Article 169 of the Constitution of Kenya 2010 as the:

(a) the magistrates courts

(b) the Kadhis courts

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2)”

The Co-operative Tribunal is a local tribunal created under Section 77 of the Co-operative Societies Act Cap 490 Laws of Kenya for the purpose of settling disputes between players in the Co-operative sector/industry.

It is therefore a subordinate court within the meaning of Article 169 of the Constitution of Kenya 2010.

Having made the finding that the Co-operative tribunal falls within the classification of subordinate courts, it automatically follows that the High Court has jurisdiction under Section 5 of the Judicature Act to punish for contempt of court persons who knowingly and deliberately disobey orders issued by the tribunal in order to uphold the Tribunal's authority and dignity. The preliminary objection raised by the respondents to the effect that this court does not have jurisdiction to grant the orders sought in this application cannot therefore be sustained.

However, I think that it is important to point out that it is not only the High Court and the Court of Appeal which have been clothed with jurisdiction to punish for contempt of orders issued by the tribunal.

The tribunal itself is empowered by Section 79 (3) and Section 83 of the Act to enforce its own orders/decrees as decrees of any other court and this includes the power to punish for contempt of court for disobedience of its orders.

The authority of the tribunal to punish for contempt of its orders is donated by Section 83 of the Act which should be read together with Section 94 thereof the Act in order to understand the nature and extent of the powers given to the tribunal for the aforesaid purpose.

Section 83 states:

“It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish any such person for contempt in accordance with the provisions of this Act”.

Section 94(2) compliments Section 83 by providing that:

“Every co-operative society, officer or member of a co-operative society or other person who commits an offence under this section shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding two years or to both”.

It is clear from the above provisions that the tribunal besides having a similar jurisdiction to punish for contempt of its orders like the High Court, it has power in the exercise of that jurisdiction to impose a fine not exceeding Kshs.50,000/- or sentence the contemnor to serve a period of imprisonment for a term not exceeding two years or both which in my view is a greater punishment than the one the High Court is empowered to pass on a contemnor as far as the term of imprisonment is concerned.

The High Court can only pass a sentence of imprisonment for a period not exceeding six months.

From the foregoing, I with respect find Mr. Kingara's submissions that the tribunal cannot punish for contempt of its orders legally untenable. Though I concur with his submission that Section 83 does not take away the High Court's jurisdiction to punish for contempt of the tribunal's orders, it is my considered view that the letter and spirit of the Act as can be discerned from a reading of Part XIV more particularly Section 77 – 95 is that the dispute resolution mechanism in the tribunal should be self sufficient so that once disputes are filed and heard in the tribunal, the tribunal should be in charge of enforcing its own orders and decrees either through the execution procedures in the Civil Procedure Act and Rules or by punishing for contempt of court parties who deliberately disobey its orders. A reading of the Act leaves no doubt that Parliament in enacting this Act intended that recourse to the High Court should be restricted to appeals under Section 81 thereof.

This is not to say that parties cannot seek the High Court's intervention either by way of Judicial Review where appropriate or by invoking its jurisdiction to punish for contempt of the Tribunal's orders but this should be done in exceptional circumstances for example where a party has exhausted the mechanisms provided under the Act for enforcement of the tribunal's award/order without achieving satisfactory results or where the tribunal for any reason is not conducting its normal sittings. In order to succeed in an application like the present one, it is my opinion that the applicant must demonstrate that filing contempt proceedings directly at the High Court was more efficacious and convenient than filing the proceedings before the tribunal.

In this case, though it is not disputed that the respondents had not complied with the tribunal's orders by the time the application was filed despite having been fully aware of the orders, it is apparent that the applicant did not attempt to enforce the said orders in the tribunal using the means provided under the Act before approaching the High Court.

Since the main objective of the applicant in filing the instant application was to have the respondents cited and possibly punished for contempt of court for blatantly disobeying the orders of the tribunal which objective would have been achieved by filing contempt proceedings before the tribunal itself under Section 83 of the Act, it is difficult to understand why the applicant chose to come to the High Court in the first instance instead of seeking the same orders from the tribunal which was more seized of the matters in question.

The applicant did not attempt to explain this glaring anomaly to this court in his pleadings.

In my opinion in the particular circumstances of this case, it is my finding that the tribunal should be given an opportunity to enforce its own orders since it is empowered to do so by the Act and it has the means and capacity to do so.

The purpose of punishing for contempt of court is to protect and preserve the authority and dignity of a court and to promote public confidence in the administration of justice and the rule of law. Where orders of the tribunal have been blatantly disobeyed by parties litigating before it, it is in my view important for the tribunal to assert its authority and safeguard its dignity by punishing the contemnors for contempt of its orders. This is the only way that it can cultivate public confidence in its dispute settlement mechanism. The tribunal can only inspire public confidence in its system of justice if parties were discouraged from ignoring its processes and seeking the High Court's intervention as a court of first instance unless in exceptional circumstances.

In my view, allowing parties to file contempt proceedings in the High Court without having first approached the tribunal and without requiring them to establish circumstances that prove that an intervention by the High Court would be more convenient and efficacious than that of the Co-operative tribunal would open a pandora's box and have the undesired effect of overwhelming the High Court with work which would otherwise be competently handled by the tribunal.

In this case, I am persuaded to find that the intervention of the High Court by granting the orders sought is not warranted since even if the orders are not granted by the court, the applicant is not likely to suffer any prejudice which cannot be compensated by costs as he still has an opportunity to canvass his application before the tribunal.

For all the foregoing reasons and in order to give effect to the spirit and objectives of the Act as stated earlier, I decline to grant the orders sought in the instant application. I instead direct that the said application be filed for hearing and determination before the Co-operative Tribunal.

Given the circumstances surrounding the filing of the instant proceedings, I order that the costs of this application will be borne by the respondents.

DATED, SIGNED and DELIVERED by me at Nairobi this 12th day of June 2011.

C. W. GITHUA

JUDGE

In the presence of:

Florence -Court Clerk

Mr. Kingara for Applicant

Mr. Chege for Respondents