



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 139 OF 2010

IN THE MATTER OF THE CO-OPERATIVES ACT, CHAPTER 490, LAWS OF KENYA

IN THE MATTER OF ARBITRATION CASE NO. 2 OF 1995

AND

IN THE MATTER OF EDGE WOOD CO-OPERATIVE SOCIETY LIMITED

DAVID KAMAU

NJOROGE.....APPLICANT

VERSUS

DAVID

KIMUNYA.....RESPONDENT

RULING

By a Notice of Motion dated 18th February 2010 and filed on 9th March 2010, the Applicant sought the orders following -

- (1) that the court do enter judgment for the Applicant against the Respondent in terms of the award of the Arbitrator Joash M. Ogutu in Arbitration Case No. 2 of 1995 dated 9th May 1995.
- (2) that the court do enter judgment for costs incurred by the Applicant herein in Appeal to the Commissioner of Co-operative Development being Appeal No. 5 of 1995 filed by the Respondent as assessed by the Commissioner on 21st February, 1997 and
- (3) that costs of the Application be provided for.

The Application was supported by the Applicants Affidavit sworn on 18th February 2010, and the grounds on the face thereof.

The application was opposed by the Respondent whose Replying Affidavit sworn on 3rd May 2010 was filed on 6th May 2010.

In addition to the respective affidavits, Counsel for both the Applicant and Respondent filed skeletal submissions which were highlighted before me on 14th February, 2011.

Before setting out arguments by counsel, it is both meet and proper to set out, albeit briefly, the facts giving rise to the application herein.

The Applicant and the Respondent were both members of a Co-operative Society known as Edgewood Farmers Co-operative Society Limited (*the Society*) whose activities included purchasing property and either distributing it among its members or selling it. In the latter context, the Society entered into an Agreement dated 5th November 1991 pursuant to which the Applicant agreed to purchase one of the Society's parcels of land known as Title No. Subukia/Subukia/Block 8/236 (EDGEWOOD) measuring approximately 0.93 Hectares.

The applicant claimed that the Society acted in breach of the Agreement, and sold the parcel of land to one David Kimunya Muthoni, Respondent herein. Unhappy and aggrieved with that development, the Applicant referred the dispute to the Commissioner for Cooperative Development. The Commissioner in turn referred the dispute to arbitration, and in Arbitration Case No. 2 of 1995, the Arbitrator made an award in favour of the Applicant.

In effect, the Arbitrator ordered EDGEWOOD (*which was not a party to Arbitration*), to sell the suit land together with improvements thereon to the Applicant as per the terms of the sale Agreement. The arbitrator also ordered that the Respondent do forfeit the title deed to the property issued to him by the Commissioner of Lands within 14 days from the date of the order, and in turn issue a new title to the Applicant thus transferring the suit land to the Applicant.

Aggrieved with the decision of the Arbitrator, the Respondent appealed to the Commissioner in Appeal No. 5 of 1995. This appeal was dismissed for non-attendance on 21st February 1997. Thereafter the Respondent moved to this Court by way of Judicial Review. His application for Judicial Review was equally unsuccessful. It was dismissed on 23rd June 2000 in Nakuru HC Misc. Application No. 109 of 1997. Undeterred, the Respondent moved to the Court of Appeal in Civil Appeal No. 247 of 2002 which, that court also dismissed after noting that it was unclear whether the award had been filed in court **for**

enforcement as provided by Section 80(1) of the repealed Act, if not, and if the award can still be enforced under the repealed Act, the appellant (the Respondent herein), will be given a chance to show cause why judgment should not be entered in terms of the award, and the High Court will have a discretion whether or not to enter judgment in terms of the award as provided by the proviso to Section 80(1) of the repealed Act.

The Application, the subject of this Ruling is essentially for the enforcement of the award of the Commissioner made on 9th May 1995.

Mr. Mbeche learned counsel for the Applicant argued that it is meet and just to grant the Application because the award made on 3rd May 1995 still stands and is unchallenged. There is no order of the court varying the award.

Secondly, counsel argued, the assessment of costs by the Commissioner of Co-operative's is not challenged. Counsel relied upon the provisions of Section 79(3) of the Co-operative Societies Act, 1997. Counsel also relied upon the decision of the Court of Appeal in this matter, among **DAVID KIMUNYA VS. EDGEWOOD CO-OPERATIVE SOCIETY LTD, DAVID KAMAU NJOROGÉ and THE COMMISSIONER FOR CO-OPERATIVE**, (*Civil Appeal No. 274 of 2002*), and prayed that the motion be allowed.

Mr. Kahiga for the Respondent opposed the Application. While acknowledging the existence of the award, Mr. Kahiga submitted that the award was challenged by the Respondent both before the Commissioner of Co-operative Development as is detailed in paragraph 4 of the Applicant's Supporting Affidavit sworn on 18th February 2010.

Mr. Kahiga submitted that throughout the challenges to the award, the appeal to the Commissioner for Co-operative Development, at the High Court through Judicial Review Application, and the Court of Appeal, (all of which actions were dismissed as against the Respondent) in none of those cases was the award considered on its merits and competence, and that in light of this fact, the Court of Appeal in its decision (**David Kimunya vs. Edgewood Co-operative Society Ltd & other (supra)**), observed that the Respondent still had opportunity to challenge the award, and that propriety of the award lay with this court.

Mr. Kahiga consequently submitted that this court will need to determine whether the terms of the award are proper for adoption. The first question to consider is whether it was proper for the Commissioner in his award, to compel the Respondent to sell the suit land, or deal with his property in a particular way, or manner. Counsel relied on the case of **Kenya Commercial Bank Ltd vs. Harmani [2002] eKLR 691** where the court held inter alia that "**in commercial dealings there is freedom of contract which should be respected.**" The court, counsel submitted, should not close its eyes to an illegal award.

On the second limb of the award, that, assessment of costs, Mr. Kahiga submitted that compelling witnesses who were not parties to the case cannot be allowed by the court.

Thirdly, Mr. Kahiga argued, compelling the Respondent to transfer land violated the provisions of Section 159 of the Registered Land Act, (*Cap. 300, Laws of Kenya*). On this limb Mr. Kahiga relied on the case of **OMBIRO ONG'ANG'A VS. NYATOME NYAMBURA [2004] eKLR** "**that tribunal has no jurisdiction to determine the issue of ownership that the tribunal could not order rectification of the Register. Only the High Court can issue such orders.**"

Having laid out the respective counsel's submissions, I now set out in the paragraphs following, my consideration of the various limbs of the submissions and conclusion thereon. I will commence with the question "***whether there was any dispute concerning the business of a registered society, the first Defendant in the dispute before the Commissioner for Co-operative Development.***"

To answer this question I will look at the enabling provisions Section 80 of the Co-operative Societies Act, (*Cap. 490, Laws of Kenya*), now repealed. The new Co-operative Societies Act, 1997 has no application to this case. Section 80 provides -

80. (1) If any dispute concerning the business of a registered society arises -

(a) among members, past members and persons claiming through members, past present and deceased members, or

(b) between members, past members or deceased members, and the society, its committee or any officer of the society, or

(c) between the society, its committee and any other registered society, it shall be referred to the Commissioner.

(2) A claim by a registered 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, is a dispute for purposes of this section.

(3) -

(4) The Commissioner shall, on receipt of a reference under subsection (1) of this Section and on being satisfied that a dispute exists, refer it for determination to an arbitrator or arbitrators (as he thinks fit and appointed by him) (in this section referred to as the arbitrator) in the prescribed manner.

(5) -

(6) the award of the arbitrator shall be final;

PROVIDED that any party aggrieved thereby may appeal to the Commissioner within the prescribed time and in the prescribed manner.

(7) A decision of the Commissioner under this section shall, subject to subsection 11 of this section, be final.

(8) The arbitrator shall have the same powers as the High Court to award costs.

(9) - (10)

(11) An award or a signed copy thereof, including a statement of the costs awarded under such award shall be filed in a court and shall thereupon be enforceable as if it were a decree of the court;

PROVIDED that an award for a sum including costs which exceeds three thousand shillings shall be filed in the High Court, where upon -

(i) either party may, within twenty-one days and after giving notice to the other party, show cause

why judgment should not be entered in terms of the award;

(ii) after hearing the parties to the arbitration, in accordance with paragraph (i) of this proviso, the court shall enter judgment in terms of the award; or may refuse to enter judgment, as the case may be, with or without costs, as the court may determine.

(iii) if neither party, within twenty-one days from the date of filing the award, shows cause why judgment should not be entered, the court shall enter judgment in terms of the award together with costs thereof.

(iv) where the court enters judgment in terms of the award together with the costs thereof, it shall issue a decree thereon, which shall be enforceable as any other decree of the court.

It is a pity that the so-called "**judgment**" of the Deputy Commissioner for Co-operative Development was long on the legalities of the sale, but short on the facts. For instance the Arbitrator who incessantly but wrongly referred to himself as a court, **(an arbitrator is not a court)**, did not set out what the business of the society was. Who was the owner of the disputed parcel of land with a house on it? Was the disputed sale of the house a one off transaction? There are no answers to these questions. There are no detailed terms of the sale agreement to the complainant, that is, David Kamau Njoroge.

In the circumstances one can only draw inferences from the tenor of the Arbitration award, that the house was a one off transaction of the remaining unsold property of the Society, and the sale of which would lead to dissolution of the society. The conclusion would then indeed be that the dispute concerned the property of the society, and therefore, the business thereof.

Having established that dispute did indeed concern the business of the society, the next or second question is who were the managers of the society and therefore authorized persons who could transact the business of the society? Again the answer to this question does not come out clearly in the arbitration award.

What can only be inferred from paragraph 2 of the Arbitrator's Award is that both Samuel Muthomi Njoroge and James Mwangi Waithaka were officials of the society, hence their condemnation to pay Kshs 132,070/= to David Kamau Njoroge. On this point, the arbitrator was clearly wrong in law however indignant he felt. These were merely witnesses. They had not been called to show cause why they should not be surcharged under Sections 77-79 of the now repealed Co-operative Societies Act, *(Cap. 490, Laws of Kenya)*. Whereas Section 80(8) empowers the arbitrator to award costs as in the High Court, costs in the High Court follow the event unless the court orders otherwise or as provided Section 27 of the Civil Procedure Act, *(Cap 21, Laws of Kenya)* provides costs. Costs are awarded against one or more parties in the suit, not against witnesses. It was unlawful for the arbitrator to order costs against the witnesses. This disposes off the issue whether it was lawful to condemn witnesses to pay costs.

Having determined the first leg of the issues in this application, I now revert to the over-all important issue here whether it was proper for the Commissioner in his award to compel the Respondent to transfer the suit land or to deal in a particular manner. In other words could the arbitrator order -

(a) the cancellation of the title to the suit land; and

(b) the rectification of the register?

To answer this question, it is necessary to go back and answer the question, what was the dispute before the Arbitrator. The dispute was essentially between the Applicant and the Society, and a person who appeared to be a past or present member of the society. The dispute was over the sale and purchase of one of the society's prime property.

The Applicant had obviously been out- manoeuvred and out-boxed by officials of the society. It seems to me that he had himself to blame. He had taken possession of the property in the year 1978/9. He stayed in it on open terms without paying any rent until 1991 when he applied (*presumably to the Society's Committee*), to purchase the property, after the committee resolved in **Minute No. 1/1991**, to sell the property. The applicant offered to purchase it at or for the price of Kshs 220,000/= to be paid in two instalments, Kshs 166,000/= by 30th November 1991 and the balance of February 1992. This did not however happen, leaving the Respondent to bid for the same property at the price of Ksh 156,000/= much lower price than the sum of Ksh 220,000/= offered by the Applicant. In the event the Respondent got title to himself.

Now in ordinary sale of land transactions where there is a breach of contract, and the property has been sold whether fraudulently or not the remedy for the aggrieved party is to sue for either specific performance or damages for breach of contract. The applicant chose arbitration before the Commissioner for Co-operative Development. The repealed Co-operative Societies Act (S.80) does not spell out what remedies the Commissioner may grant in the event of a reference of a dispute before him. In relation to ownership of land, the Commission would at most only declare who the rightful owner of the land ought to be. What the commission cannot in my respectful opinion do, is to order forfeiture and rectification of title. That function or jurisdiction is reserved to the High Court under Section 159 of the Registered Land Act.

In any event, the Applicant failed to file the award in the High Court within 21 days as is required by Section 80(ii) proviso (i) thereof. The award was made on 28th April 1995, the Appeal to the Minister was dismissed on 21st February 1997, the Judicial Review application was dismissed 23rd July 2000 and the Appeal to the Court of Appeal was dismissed on 25th April 2008. Even taking into account all those intervening circumstances, an application filed 18th February 2010, that is, some 22 months after the Judgment of the Court of Appeal, some 10 years after dismissal of the application for judicial review some 13 years after dismissal of the appeal to the Commission of Co-operative Development, and some 15 years after the award, is an afterthought. The delay is inordinate and is without any explanation.

For those reasons I must annul in its entirety the decision of the Commissioner for Co-operative Development, made on 28th April 1995, and strike out the Applicant's Motion dated 18th February 2010, and in light of the sorry state of management of called Edgewood Co-operative Society, I direct that each party herein shall bear its costs.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 18th day of March 2011

M. J. ANYARA EMUKULE

JUDGE