



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CIVIL DIVISION

MISC CIVIL APPLI 30 OF 2004

**OLKEJUADO TEACHERS CREDIT & SAVINGS SOCIETY
LTD.....PLAINTIFF**

VERSUS

**THE CHAIRMAN OF THE CO-OPERATIVE TRIBUNAL
NAIROBI.....RESPONDENT**

JUDGEMENT

The Ex parte Applicant is the Olkejuado Teachers Credit and Savings Society Limited (hereinafter referred to as “the Society”) which is aggrieved by the decision of the Chief Magistrate’s court, Milimani, of Commencing or allowing execution proceedings and issuing warrants of attachment dated 16th December, 2003 in the absence of an award and judgment to which such execution proceedings can be based. A former manager of the Society, Emanuel Wanderi Kahiga had on 22nd April 2002 filed a claim against the society in the Co-operative Tribunal at Nairobi seeking payment of Kshs.130,335.50 interest and costs being balance of the value of his shares in the society after his employment was terminated by the Society.

After summons was served on the society, it did not file any Defence within the prescribed period and default judgment was entered against the Society on 9th July, 2002 by the Chairman of the Tribunal.

The Plaintiff then procured issuance of a Decree on 30th August, 2002. The Decree was issued by the Tribunal and signed by the Deputy Chairman and was for a total sum of Kshs.149,249.70. This Decree was then lodged with the Chief Magistrate’s court on 5th September, 2002, for purposes of execution. The Chief Magistrate’s court upon application proceeded to issue warrants of attachment for execution by auctioneers who proclaimed the Society’s goods for attachment.

It is this execution process which triggered this application for an order of Certiorari to bring to this court inter alia, the warrants of attachment for quashing. The grounds upon which the application is based are:

1. That the purported entering of a judgment in default of appearance by the Chairman of the Tribunal is ultra vires the Tribunal’s powers.
2. The Tribunal went out of its way to treat the dispute as a liquidated claim.
3. The Tribunal abused its powers by not making an award capable of being filed and confirmed by a court as is required by law.

4. the Chief Magistrate's court Milimani acted ultra vires its power by commencing execution proceedings without receiving an award and confirming it as judgment.

In the grounds it would appear that the Applicant is also challenging the default judgment before the Tribunal and the issuance of the Decree under attack. With respect, the only prayer before the court is that an Order of Certiorari in respect of the warrants of Attachment of the Chief Magistrate's court. There is no specific prayer in respect of any of the decisions of the Tribunal. Parties are bound by their pleadings and I have no mandate under the pleadings to interfere with the default judgment and matters that took place at the Tribunal however questionable they may appear to be.

The question ultimately boils down to the manner of execution of a "decree" from the Tribunal by the Chief Magistrate's court. Could the Magistrate's court accept a Decree drawn by the Tribunal and process its execution by issuing warrants of Attachment?

The Applicant's counsel Mrs. Pareno submitted that the Chief magistrate's court was required to receive an Award of the Tribunal, have it entered as a judgment of the Magistrate's court before issuing a decree therefrom. The Applicant in effect claims that the Chief Magistrate's court could only execute "its own Decree" and not that of another court or Tribunal. Further, it asserts that the "Decree" issued by the Tribunal and which was being executed is not a "decree" as the Tribunal is not a court of law. That the Tribunal cannot issue decrees or warrants of attachment.

The Application is opposed by the Respondent/Decree-holder. Mr. Gitonga for the Respondent submitted that before the repeal of the 1966 Co-operative Societies Act by Act No. 12 of 1997, there was no provision allowing the Tribunal to enforce its decisions e.g. Awards or judgment and the Tribunal had been applying the Civil Procedure Rules. The Tribunal had not made any rules and the practice was to refer the matter to the magistrate's courts for enforcement of the award. Mr. Gitonga argued that with the respect of the old Act, the Tribunal could draw its own decrees and tax the costs. The tribunal was now empowered to make its own rules as to the procedure of determining disputes under Section 78 of the new Act.

In the co-operative Societies Act of 1966, now repealed, disputes concerning the business of registered Societies were referred to the Commissioner of Co-operatives who would then appoint Arbitrators to hear and determine the disputes. The arbitrator's award or the Commissioners upon appeal was final and enforceable through the courts. The court to which the Award was sent for enforcement depended on the value of the subject – matter which would determine the court which had jurisdiction to enforce the award. Section 80(11) of the Act read:-

"..... An award or a signed copy 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 which including costs exceeds three thousand shillings shall be filed in High Court, whereupon:-

(i)

(ii)

(iii) If neither party within twenty-one days from the filing of 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 enter judgment in terms of the award together with costs thereof it shall issue a decree thereon which shall be enforceable as any other decree. "

So it is clear from the repealed Act that there must be an award when the Act was in enforce, which was to be sent to the courts for enforcement. Upon receipt of the Arbitrator's Award it would finally be entered as a "judgment" after disposal of any objections, etc. The court would then issue its own decree

based on the judgment which has now been entered.

I have carefully read the provisions for the Co-operative Societies Act, 1997 No. 12 of 1992, and find no similar provisions relating to entry of awards as judgments to be followed by issuance of decrees. Section 78 (5) provides that:-

“Except as expressly provided in this Act any rules made thereunder the Tribunal shall regulate its own procedure.”

This court was not shown any rules which have so far been made by the Tribunal to regulate its procedure. In fact all counsel agreed that to date the Tribunal has not made any rules. Mr. Gitonga contends that the Tribunal has been applying and invoking the Civil Procedure Rules. He did not show the court any evidence that the Civil Procedure Rules has formally or officially been adopted by the Tribunal as its own Rules. Even if the Civil Procedure Rules governed the procedure of the Tribunal, there is nothing in the Civil Procedure Rules and the Co-operative societies Act which provides for the execution of Awards, judgments or decrees of the Tribunal.

The 1966 Act was repealed by Section 96 of the new Act but there was no saving provisions to retain Section 80 of the repealed Act to apply to the Tribunal. The questions that this court must therefore ask itself are:-

1. Under what law or legal Provisions was the Decree of the Tribunal transmitted to the Chief Magistrate's court for execution?
2. Which is the source of the Jurisdiction of the Chief Magistrate's Court to enforce the Decree in the light of the 1966 Co-operative Societies Act and to issue the Warrant of Attachment?

In respect of the first question, I have carefully scrutinized the Co-operative Societies Act, 1997, No 12 of 1997 and found no statutory provisions or Rules made by the Tribunal which regulate the enforcement of the Awards of the Tribunal. The Statute is totally silent. There are no provisions similar to Section 80 of the repealed Act and there was no saving provisions.

As indicated earlier, the Tribunal is empowered to make its own rules to regulate its own procedure. However, it is common ground that in fact the Tribunal has to date not made its own rules or in a legal or formal manner adopted that the Civil Procedure Rules shall apply to regulate its procedure. Counsel confirmed this position and I have no doubt that they are correct as some of them have appeared before the Tribunal on many occasions.

At this stage, I would like to point out that it is my view that even if the Tribunal adopted the Civil Procedure Rules as its own then there would be a requirement to publish the said Rules as its own then there would be a requirement to publish the said Rules whether in the Kenya Gazette or other form so that this is known to all and sundry. The rules of procedure and the law must be certain, enacted and put in place applying the due process of the law. It is not something to be imagined, assumed or arise due to some common usage or practice. This is because the procedure in a court or Tribunal affects the rights of the parties, and access to the justice system. If a procedure is put in place then it must be done openly and proclaimed to all as widely as possible, in writing and in accordance with some law.

Secondly, it is my view that even if the Tribunal adopted the Civil Procedure Rules to regulate its procedure this would not by itself give to the Tribunal power to transmit its decrees to the Chief's Magistrates' Court or any other court for execution. Such question is not a matter of procedure but substantive law which requires enactment or legislation by parliament.

The Tribunal unless provided by the Statute cannot decide which court should or ought to enforce its Awards, orders or judgment etc. Such decision can only be made by Parliament through an statute or other legislative methods known to law.

The question as to which court the Awards and orders the Tribunal are to be enforced are matters of jurisdiction. As an example the Civil Procedure Act in Section 30 states:-

“30 A decree may be executed either by the court which passed it or by the court to which it is sent for execution”

In applying that provision in the Civil Courts, the court to which a decree is sent for execution must have appropriate jurisdiction in the first place. In this case, the Tribunal cannot on its own decide that its Award or decree shall be forwarded to a particular court for execution. The Tribunal must be expressly mandated to do so by the Act or statute which established it or some other legislation.

The Second question is also one of jurisdiction. On what basis did the Chief Magistrates receive the Decree from the Tribunal register it and issue warrants of Attachment for enforcement? Again I did not find any assistance in the new Cooperative Societies Act. With the failure by Parliament to save the provisions of the old Section 80 of the 1966 Act or enact similar provisions in the new Act, the Civil Courts could not have any jurisdiction to enforce the Awards, judgments, orders or decrees of the Tribunal. The Civil Procedure Act makes no reference, of course, to the Cooperatives Tribunal neither do the Civil Procedure Rules.

It is always heartening to read the decision of the Late Justice of Appeal Nyarangi in the case of Owners of the Motor Vessel “Lillian” –v- Caltex Oil (Kenya) Ltd., 1989 KLR, 1 at p. 14. He relied on the definition of Jurisdiction in the book “words and Phrases legally Defined – Lord ED. Vol. 3 I – N. p. 113 which said:-

“By Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. Limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the fact in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Whether a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

These principles demonstrate how important the question of jurisdiction is. I am satisfied that the warrant of attachment and that of Sale of the Applicants goods dated 16th December 2003 have been sufficiently placed before the court and they are capable of being the subject of judicial review of the High Court. By signing the warrants the Principal Magistrate brought the same subject of the provisions of Order 53 Rules 1 and 2.

Under the provisions of the Civil Procedure Act, one Civil court could transfer its own decree to another Civil Court but in such a case the said court must do so in writing giving the reasons why the decree ought to be extended by the other court. Section 31 (1), (d) reads:-

“31(1) The Court which passed a decree may, on the application of the decree – holder, send it for execution to another court –

(a)

(b)

(c)

(d) If the court which passed the decree considers for any other reason which it has recorded in writing, that the decree should be executed by such other court. ”

It would appear that such transfer of decree for execution from one court to another is what confers jurisdiction. The said provisions are expressly provided for the Civil courts. The Co-operative Tribunal is not invoked the said provisions. The Tribunal is a special tribunal or court and all that appertains to it is found in the Co-operative Societies Act, Act No. 12 of 1997.

As I indicated earlier, even if the Tribunal had formally adopted that the Civil Procedure Rules would be what would regulates its procedure, this would not include the application of the provisions of the Civil Procedure Act. The Tribunal, in my view, cannot invoke or confer on itself strictly what may be said to be Statutory Powers particularly which will impose some obligation on another court or tribunal. A court or Tribunal cannot arrogate itself with jurisdiction where none exists on any ground whether of convenience, logical deduction, necessity, self-help or otherwise.

In the light of the foregoing I do hereby hold that the Chief Magistrate’s does not have any jurisdiction to receive any decree from the Co-operative Tribunal for enforcement, execution or otherwise. By issuing the warrant of Attachment the said court acted without jurisdiction. I therefore do hereby grant and issue an Order of Certiorari in terms of Prayer (a) of the Notice of Motion dated 6th February, 2004 with costs to the Applicant.

In the event, I am right in this Judgment, then it is the duty of this court to recommend to the Attorney General to act post-haste and initiate legislative process that will ensure that this serious and grave lacunae or omission by the draughtsman and ultimately the Legislature is quickly and firmly removed to avoid the paralysis of the functions and proceedings of the Co-operative Tribunal. Without any teeth for the enforcement of its Awards and Decrees, the Tribunal will be rendered useless and moribund , a situation that cannot be allowed considering the importance of the Cooperative Movement in Kenya.

Dated and delivered at Nairobi on this 12th day of July, 2005.

MOHAMMED K. IBRAHIM

JUDGE