



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 711 OF 1999

MURATA FARMERS SAVINGS & CREDIT SOCIETY

LTD.....PLAINTIFF

VERSUS

MUGAMA FARMERS CO-OPERATIVE UNION

LTD.....DEFENDANT

RULING

On the 14th June, 1999, this Court made an Order by CONSENT of the Plaintiff and Defendant. Justice Mbaluto entered and recorded the Order by Consent in the following terms”

- “1. THAT this matter be and is hereby referred to the Commissioner of Co-operatives for arbitration pursuant to Section 80 of the Co-operative Societies Act (now repealed) as read together with section 22 of the Interpretation and General Clause, Act,
2. THAT pending arbitration of this matter the Defendant herein shall not convene or organize any meeting of the Plaintiff Society
3. THAT the proceedings herein be and is hereby stayed until further orders of this court.
4. THAT costs be in the cause..”

In pursuance of the said order the Commissioner for Co-operative Development referred the dispute to and appointed M. J. K. Mwangi, the District Officer, Nyeri as to Arbitrator. He was ordered to make an Award within 2 months from the date of his appointment which was 21st July, 1999. The said Arbitrator delivered his Award on 26th April 2002 after hearing both parties. The Arbitrator, Mr. Joseph Kigira Mwangi titled his Award as a “Judgement” and explained in it the delay in the proceedings. It would appear from the said Award that the parties consented to or accepted the delays and the matter was concluded outside the initial period of 2 months given by the Commissioner. In any event, it was not an issue in any subsequent proceedings.

In his Award or Judgment, the Arbitrator recommended the following remedies, that:-

- (i) The Applicant, (Murata Savings and Credit Society Limited) has failed to prove beyond reasonable doubt interference by the Respondent into its affairs.

- (ii) A General Meeting of Murata Sacco be convened with grass root elections being conducted.
- (iii) Elected delegates re-assess the validity of the current by-laws and their applicability to the interests of the entire membership.
- (iv) The assets and liabilities of the two disputants be appraised since inception by a competent, professional and independent auditor to determine fair distribution between them.
- (v) Mugama Farmers Co-operative Union to restrict to its duties and obligations only as a member of Murata Sacco Society.
- (vi) Each party to meet its costs.

It appears from the record that both the Plaintiff and Defendant were ultimately satisfied with the aforesaid Award and recommendations. At the hearing of an application by the Defendant, on 5th August, 2002, the parties mutually and consensually once again recorded a Consent Order before Justice Ombija. The Court recorded a consent Order containing 7 Orders. The First Order read as follows:-

- “1. THAT the Award of an Arbitrator Joseph Kigira Mwangi, the Arbitrator in arbitration case No.1/99 be and is hereby adopted as a Judgment of this Honourable Court.
2. (as in Recommendation 1 in the Award)
3. (as in Recommendation 2 in the Award)
4. (as in Recommendation 3 in the Award)
5. (as in Recommendation 4 in the Award)
6. (as in Recommendation 5 in the Award)

I have deliberately omitted to replicate orders 2 – 7 for convenience and to save time as I was writing this Ruling. What the parties did was to adopt and have the **Award** entered as the Judgment of the court and subsequently, specially consented to the recording and entry of the Arbitrator's 6 recommendations as also Orders in the Consent order made by Justice Ombija.

In my view the replication of the Recommendations of the Arbitrator and inclusion as orders in the said Order by consent was strictly superfluous and unnecessary. Order 1 adopted the Award as the Judgment of the Court was what was contained in the entire Award including the recommendation and/or remedies given therein.

It is against this background and events that the Defendant filed the Notice of Motion dated 8th January, 2004 and which was heard by me on 24th June, 2004. The said application which is by way of a Notice of Motion under Section 5 of the Judicature Act, Section 3, 3A, 3 and 63 (e) of the Civil Procedure Act and Order 50, Rule 1 of the Civil Procedure Rules seeks the following orders:-

- “1. That the application be heard during the High Court Vacation owing to its urgency.
2. That the Chairman, Institute of Chartered Accountants or a firm of Accountants to ascertain and determine fair distribution of the assets and liabilities between the two parties as per the consent Judgment of this court made on 5th August, 2002 before Justice N.R. N.R.O. Ombija.
3. That the Auditor/Accountant appointed by the Institute of Chartered Accountants do file his/their report before this court within 90 days from the day of such appointment.

4. That this Honourable court be pleased to issue a restraining Order against the Respondent from interfering with the Arbitrator's Award and subsequently filed and forming the Judgment of this Honourable Court.
5. That this Honourable court be pleased to issue restraining Orders against the Respondent stopping them from issuing premises or interfering with its management of its assets until the determination of this matter.
6. That costs of this application be provided for by the Respondent in any event.”

The said application which is supported by an affidavit sworn by the Chairman of the Defendant, Mr. Harry Gachugi Kamau lists 4 main grounds for the application and these are:-

1. That the judgment of this Honourable court made on 2nd August, 2002 remains to date unimplemented.
2. That the Plaintiff/Respondent have adamantly and stubbornly refused to co-operate and have an agreed accountant or either person appointed by the Commissioner of Co-operatives to implement the judgment or parts of the judgment.
3. That the Plaintiff/Respondent are determined to frustrate the judgment by interfering with the elements or aspect of the judgment.
4. That the Plaintiff/Respondent have started to frustrate even the Defendant's/Applicant's business by refusing even to pay what they owe the Applicant.

The Application was opposed by the Plaintiff which filed a Replying Affidavit sworn by its Chairman on 16th January, 2004.

It is evident from the record that what triggered the filing of the Defendants application was the appointment of Receiver/Manager on 18th December, 2003 by the Plaintiff over 7 properties owned by the Defendant under its powers as chargee by virtue of Legal charges registered against the titles to the 7 properties. The Plaintiff demanded payment of various loans advanced to the Defendant and secured by the said Legal charges. The Plaintiff is claiming a total of Kshs.178,467,035.20 with interest according at 16% per annum.

I have read the Award of the Arbitrator and there was no reference to the said loans, and Legal charges. In any event, there was no decision affecting the said Legal charges. I do agree with the Plaintiff's counsel that the suit herein and the Award had nothing to do with the Legal Charges. In fact counsel for the Defendant in his submissions stated that the Defendant does recognize the Legal charges and that they are valid. It would appear that the Defendant I aggrieved by the appointment of Receivers on the ground that the amounts claimed and accounts are disputed and the said appointment of Receivers has been effected before the implementation or enforcement of the Judgment in this suit and in particular the auditing of assets and liabilities of the 2 parties by an auditor to determine a fair distribution between them.

Since this part of the Judgment relates to assets and liabilities of the Plaintiff and Defendant, this court of the view that there is a possibility that its enforcement would have “some bearing” on the loan, the obligations under the loan agreement and the enforcement of the Legal Charges. Be that as it may, there is no doubt that the Judgment herein does not touch on or affect the registration and validity or enforcement of the Legal Charges. A dispute in respect of accounts is one thing and a resolution thereof may possibly require the enforcement of the Judgment first. However, there is nothing in the Judgment which would stop or inhibit. The Plaintiff as chargee from invoking its powers of sole or powers to appoint Receivers/Manager over the secured properties. It is therefore not surprising that the Applicant has cleverly avoided to expressly seek injunctions against the appointment of Receivers and only talks of the restraining order to stop the Plaintiff from issuing any notices to the tenants in its premises or interfering

with its management of assets – see Prayer 5.

A similar trend is seen in prayer 4 which is quite generalized is seeking a restraining in seeking a restraining order against the Plaintiff from interfering with the Arbitrator's Award which constitutes the Judgment this court. A true construction as interpretation of this prayer will show that it is a veiled order to enforce the Judgment. I will come back to this shortly. For the moment, I do hereby hold that this court cannot in law grant Prayer 5 as this is a cause of action not contained in pleadings or Judgment before the court. Whatever the implications to the Defendant or its impact on the Judgment herein, the Legal Charges are independent of this suit and nothing about it was expressly pleaded, in respect of which prayers were sought or orders given upon. Any final or ultimate execution or enforcement of any Decree from the Judgment herein cannot affect the Legal charges or their enforcement. This court lacks the Jurisdiction to touch the Legal Charges in any manner in this suit. Any disputes about the Legal Charges can only be the subject matter of another suit or other proceedings. Having disposed of Prayer 5, I am of the opinion that what Prayers 2, 3 and 4 seek to do is the enforcement of the Judgment of the court in this matter. The question which the arises is – can this court enforce the Judgment herein through the application dated 8th January, 2004?

It is trite law that for a Judgment of a court to be enforced or executed there must be a **DEGREE** which has been extracted from the said Judgment and issued by the court. A **“Decree”** is defined in Section 2 of the Civil Procedure Act Inter alia as follows:-

“decree means the formal expression of an adjudication which so far as regards the court expressly it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it includes the strikingout of a plaint and the determination of any question within section 34 or section 91” (emphasis mine).

The decree therefore is the legal instrument through which Judgments are executed. It is well settled that no suit will lie on an executable Judgment (see Mulla – *The Code of Civil Procedure Act V of 1 908 – Vol. 1 at p.638*) A fortiori, I would say that no interlocutory application or other application will lie on an executable Judgment. The Judgment herein must therefore be executed through a Decree. The Notice of Motion herein is not a Decree

. Neither the Plaintiff nor the Defendant has moved the court to extract or procure the issuance of the Decree in this suit. This is submissions. This is conceded by the Defendant in its submissions. The Defendant says that the court can give effect of the findings in the Judgment in the interest of Justice and that this can be done at the court's own motion. That the Judgment should be given its legal force and the court should not have acted in vain.

With due respect, the only way this court can give Legal force or enforcement of the Judgment is by way of the Decree and after it has been settled, approved and confirmed by the court. The procedure for obtaining this is well stipulated in the Civil Procedure Rules.

There is no decree herein and therefore there can be no enforcement of the Judgment. There is no decree to execute. The court can only give effect to the Judgment through execution of a Decree. The Plaintiff contends that there is no executable Award herein as the Arbitrator only made recommendations that these are not capable of enforcement and are not obligatory. I think that this is quite odd coming from the Plaintiff which filed this suit in the first place and which was a party to the consent order which entered the Award of this a Judgment of this court. All said and done, I am of the view that it is premature at this stage to state that the Judgment is inexemtable . No one has attempted to extract it or moved the court to settle the terms of the Decree. There has been no failure by the Advocates on record in the said task. The court Registry has not been requested to assist or to draw the Decree.

Although the present application purports to invoke section 34 of the Civil Procedure Rules, the application is not one seeking determination of the terms of the Decree by the court. Where there is a dispute on interpretation of a Judgment, or ambiguities or otherwise, the court must be moved under this

section to settle the questions relating to execution, discharge or satisfaction of the decree. In the absence of such an application how can one say that the Judgment is inexecutable or ask the court to give it effect and force through another procedure not provided for in law?

The enforceability or executability of the Judgment or Decree can only be tested, if the court is moved. While I may already have my thoughts about the Judgment, the court cannot invoke section 34 at its own motion or through this application. There is no prayer for such in the body of the application.

While prayer 2 and 3 intends to give teeth and force to order or remedy No (IV) of the Award, if it is granted in the manner sought then it would lead to a variation or review of the Judgment. This is not possible in this application as it is not an application for review or otherwise. The Defendant or even the Plaintiff, if they desire to enforce the Judgment ought to consider the most appropriate and proper procedure or application to have the Judgment reviewed, the Award remitted to the Arbitrator, or otherwise to rectify the situation.

The upshot of the foregoing is that the Defendant's application must fail and it is hereby disallowed and dismissed. I will not award costs to the Plaintiff as the court is vexed as to why it does not appear to intend the enforcement of a Judgment entered with its consent in a suit it instituted in the first place. In the premises, there shall be no order as to costs.

The Interim Orders granted herein are hereby discharged.

Dated and delivered this 29th day of October, 2004.

MOHAMMED K. IBRAHIM

JUDGE

Coram: Ibrahim, J.

Court clerk: Buoro

Mr. Gitonga for the Applicant/Defendant

Mr. Kimathi for Dr. Kuria for the Respondent.

Ruling read in their presence.

MOHAMMED K. IBRAHIM

JUDGE