



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 8 OF 2018**

**MBUGUA NGANGA & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**KENYA PLANTERS COOPERATIVE UNION LIMITED.....RESPONDENT**

**RULING**

1. The Applicant filed the instant application dated 22/01/2021 seeking the following orders that;
  - a. the Court be pleased to enter judgment for Kshs. 46,965,845.96 against the Respondent in terms of the Certificate of Taxation issued on 11th June 2020 together with interest at the rate of 14% per annum from the date of taxation until payment in full.
  - b. the Certificate of Taxation dated 11th June 2020 be and is hereby adopted and issued as a decree of this Court.
  - c. the costs of this Application be borne by the Respondent.
2. The application is based on the grounds on the face of it and Supported by the Affidavit of G.N Mbugua Advocate. He deponed that the Bill of costs dated 21/4/2016 against the Respondent was taxed and allowed in the sum of Kshs. 46,965,845.16. A copy of the Certificate of taxation marked **GNM1** dated 11/6/2020 was annexed in support. That there has been no reference challenging the said taxation and therefore a Judgment and decree of the same is necessary for purposes of execution. He averred that the firm of Wambugu & Muriuki Advocates are on record for the Respondent and attached a copy of the Notice of Change of Advocates thereof.
3. Further that the decision to place the Respondent under liquidation was set aside by the High Court in JR No. 263 of 2019 on the 10/2/2020.
4. The Application is strenuously opposed. The Respondent filed its Replying Affidavit sworn by **Stephen Kamau Njoroge**, the liquidation team leader sworn on 22/4/2021. He deponed that the application is misconceived and incompetent because there is no legal entity called KPCU Ltd. That on 23/8/2019 the Commissioner for Cooperative Development appointed 4 liquidators of the defunct KPCU vide Gazette Notice 7963. That as a consequence of cancellation of KPCU registration, all its assets and liabilities were placed under liquidation.
5. He stated that vide JR No 263 of 2019, the High Court found that the Commissioner of Cooperatives had acted ultra vires and with ulterior motives when it placed the Respondent under liquidation and quashed the decision on the basis that it was procured in an unprocedural unfair and unconstitutional manner and reverted the KPCU in the state before the cancellation of its registration. Aggrieved by the said decision the liquidators appealed and sought a stay of the judgement which stay was granted by the Court of Appeal on the 19/3/2021 vide CA No 76 of 2020.
6. The decision of the Court of Appeal reverted the Respondent into a state of liquidation as ordered by the Commissioner of Cooperatives.
7. Accordingly, the deponent was emphatic that there can be no proceedings against a non-existent entity.
8. The Respondent maintained that the taxation proceedings proceeded ex parte and it was not notified of the Ruling. That the Advocates for the defunct KPCU cannot legally represent a Company under liquidation. Accordingly, he swore that the available remedy is to lodge a claim with the liquidators as provided for under sections 62-67 of the Cooperative Societies Act. He pointed out that Gitonga & Muriuki Advocates were appointed to make the necessary applications with a view to setting aside the impugned Bill of costs.
9. In a rejoinder, the Applicant filed a Further Affidavit sworn on 11/5/2021. The Applicant insisted that the High Court decision in JR Case No. 263 of 2019 setting aside the Respondent's liquidation has not been reversed or stayed thus KPCU is a legal entity. That Civil Appeal No. 367 of 2014 referred to in the Respondent's Replying affidavit was heard and dismissed on 5/6/2020. The Applicant also denied that taxation proceeded ex parte since the Notice of Taxation dated 25/5/2016 was personally served upon the Respondent and its Advocates.

10. On **11/3/2021** directions were taken for parties to canvass the Application by way of written submissions.

11. The Applicant filed its submissions dated 13/7/2021 through the firm of Mbugua Ng'ang'a & Co. Advocates. It submitted that the Advocates retainer between the firm and KPCU is not disputed. That the certificate of costs in the sum of Kshs. 46,965,845/= has not been challenged hence final under section 51(2) of the Advocates Act. The Applicant argued that the Court has to satisfy itself of the existence of the certificate of taxation and that there being no dispute as to retainer urged the Court to allow the instant Application. The cases of **Lubulleh & Associates Advocates v N K Brothers Limited [2014] eKLR** and **Gichuki King'ara & Co. Advocates v Mugoya Construction & Engineering Ltd [2015] eKLR** were cited in support.

12. On the other hand, the firm Gitonga & Muriuki Advocates filed submissions dated 9/7/2021 on behalf of the Respondent. The Respondent reiterated that it was undergoing liquidation and therefore any execution proceedings against it are void as stipulated under section 225 of the Companies Act. Reliance was placed on the case of **Re Kenya Bus Services Ltd [2019] eKLR** where the Court held that once a liquidation petition has been presented, the company's assets must be protected.

#### Analysis & Determination

13. There are two issues for determination; whether the application is competent. If the answer is in the affirmative, then the next issue will be whether the application has merit.

14. The Respondent has vigorously argued that the Commissioner of Cooperatives on the 23/8/2019 pursuant to section 65 of the Cooperative Societies Act placed the Respondent under liquidation and appointed 4 liquidators. That the Commissioner then proceeded under the section 62(1) ( b ) ( c) of the Cooperative Societies Act and the repealed companies Act cap 486 and cancelled the registration of the of the then KPCU Ltd and placed all its assets under liquidation. The Respondent castigated the Applicant for initiating proceedings against a non-existent entity. That the Ruling with respect to taxation was obtained exparte without the Respondent having been served with any notice. That the remedy available to the Applicant was to lodge the claim with the liquidators. The Applicant on the other hand insists that the company is not in liquidation.

15. I have read the two cases that the Respondent has annexed, the first being CA 367 of 2014. This appeal arose from the decision of the High Court in JR 312 of 2014. The Court of appeal in its decision rendered on the 5/6/2020 agreed with the superior Court that the Respondent operates under dual registration under both the Companies Act as well as the Cooperatives Act and it was evident that it was yet to elect whether to continue its operations as a company or as a cooperative society.

16. With respect to CA No 76 of 2020, I agree with the Respondent that the decision of the High Court in JR 263 of 2019 quashing the decision of the commissioner of cooperatives from cancelling the registration of the Respondent for being unconstitutional was stayed pending the hearing and determination of the appeal. The Court of appeal decreed an order maintaining status quo ante. What that means is that the setting aside of the liquidation was stayed thus reverting the company to the position of liquidation.

17. **Section 432 (2)** of the Insolvency Act, 2015 (formerly section 228 of the Companies Act) states;

(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

18. Accordingly, any proceedings undertaken against a company under liquidation are a nullity. See the Court decision in **Michael Kadowee Karisa v African Safari Club (In Liquidation through its liquidator, Official Receiver) Interested Party UAP Provincial Insurance Co. Ltd [2019] eKLR**.

19. Section 64 of the Cooperative Societies Act, is relevant to this application. It provides;

“The sections of the Companies Act (Cap. 486) specified in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule, shall apply mutatis mutandis in relation to the winding-up of a co-operative society as they apply to that of a company registered under that Act.”

20. **Part I** mentioned above lists the applicable sections of the Companies Act which included section 228 of the Companies Act, CAP 486 which provided that ;

“a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose,”

21. Under Section 66 of the Cooperative Societies Act, the liquidator is empowered to institute or defend suits against a society under liquidation.

22. In the case of **Kagaa Farmers' Co-operative Society v Daniel Githiora Garuha & another [2019] eKLR** the Court held that no proceedings can be taken for or against the society as it does not exist. In addition, the Court held that proceedings are taken against the liquidator or by the liquidator with leave of the Court.

23. The import of the above provisions is that when a society such as the Respondent is in liquidation, legal proceedings against it may be begun or continued only with the leave of the Court and subject to such conditions as the Court considers appropriate.

24. This application was filed on the 22/1/2021. There is no evidence on record to show that the liquidation of the Company has been set aside appealed and or vacated given the orders of the Court of Appeal maintaining status quo ante.

25. In the end I find that the application is incompetent and I hereby strike it out with no orders as to costs.

26. **It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF OCTOBER 2021**

**J. G. KEMEI**

**JUDGE**

**DELIVERED ONLINE IN THE PRESENCE OF;**

**APPLICANT – ABSENT**

**MURIUKI FOR RESPONDENT**

**MS. PHYLLIS MWANGI – COURT ASSISTANT**