



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 32 OF 2019

KALOLENI SECONDARY SCHOOLS SACCO

SOCIETY LIMITEDAPPELLANT

VERSUS

THE BOARD OF MANAGEMENT, ST. MICHAEL'S

DAY AND BOARDING SCHOOL.....RESPONDENT

(Being an appeal from the Ruling of Honourable L. N. Wasige, Principal Magistrate at Kaloleni in SRMCC No. 67 of 2014 delivered on the 15th May 2019)

CORAM: Hon. Justice R. Nyakundi

Lewa Advocates for the Appellant

Mwangi Njenga Advocates for the respondent

JUDGMENT

The appellants appeal against the respondents constitutes a ruling which the Learned trial Magistrate delivered on 15.5.2019 declining execution and enforcement of the decree duly issued by the trial court.

In arriving at the decision below, the Learned trial Magistrate considered herself bound by Section 21(4) of the Government Proceedings Act to hold that no execution or attachment or process in the nature thereof shall be issue from the court in enforcing payment against the Judgment debtor as they are exempted by virtue of the provisions under this Section.

Being aggrieved with the decision the appellant filed an appeal as detailed in the memorandum of appeal filed in court on 12.6.2019.

(1). That the Learned trial Magistrate erred in law and in fact by holding that the Notice To Show Cause dated 10th July 2018 was against Pascal Werehi, Abraham Njau Kariuki and Peter Riziki Mwaro, the Chairman, Secretary and Member of the Respondent's board of management, in their personal and or individual capacities and not in their capacities as members of the respondent.

(2). That the Learned trial Magistrate erred in law and in fact by dismissing the Notice To Show Cause dated 10th May, 2018 with costs.

(3). That the Learned trial Magistrate erred in Law and in fact by dismissing the Notice To Show Cause dated 10th May, 2018 as against Peter Riziki Mwaro who neither showed cause nor opposed it.

(4). That the Learned Magistrate erred in Law and in fact in holding that execution for the proceeds of the Judgment delivered on the 22nd November,2017 should be done in line with the provisions of the Government Proceedings Act, Cap 40 Laws of Kenya.

(5). That the Learned Magistrate erred in Law and in fact in holding that execution proceedings against the respondent, a body corporate capable of suing and being sued in its own name cannot be undertaken under the Civil Procedure Act and Rules.

(6). That the Learned trial Magistrate erred in Law and in fact by holding that Section 21(4) of the Government Proceedings Act, Cap 40 of the Laws of Kenya absolves the members of the respondent from being liable to pay the decretal amount.

(7). That the Learned Magistrate erred in Law and in fact by delivering a ruling in total disregard to the provisions of the Law.

Background

The plaintiff **Kaloleni Secondary School Sacco Society Ltd** in a plaint filed in court on 15.8.2014 sued the defendant being the chairman, management committee **St. Michael's Day and Boarding Primary School**. The claim of a liquidated amount of Kshs.1,444,295.00/= was instituted by employees of the defendant who also happen to be co-operators with the plaintiff Sacco. That between 2012 – June 2013 the defendant caused monthly deductions to be effected against the aforesaid members or employees for onward transmission to the plaintiff. Given the nature of claim, the employees/members of the plaintiff Sacco pay was dully deducted of the money by the defendant who failed to forward remittance to the plaintiff Sacco.

The plaintiff commenced proceedings and obtained Judgment dated 22.11.2017 being the decretal sum of Kshs.1,444,295/= plus costs and interest. Thereafter, the plaintiff instituted execution process in terms of a notice to show cause against members of the board in their individual capacity as to why the decree remains unsettled.

The appellant's submissions

The premise underlying this issue as argued by Learned counsel, was that an execution by writ of Notice To Show Cause why the Board members should not be held personally liable to settle the decretal sum was by virtue of their capacity being the management committee of the defendant school.

The reference by the Learned trial Magistrate that the execution should not issue against the individual board members was misconception of the Law submitted counsel for the appellant.

Further, Learned counsel contended that some members of the Board who acknowledged service of notice to show cause and did not seem to challenge it, therefore, leaving no room for the Learned trial Magistrate to disallow it as being incompetent.

Learned counsel also made observations in his arguments that Section 21 (4) of the Government Proceedings Act introduced by the Learned trial Magistrate had been misinterpreted in the context of their application. According to Learned counsel contention there are two sets of statutory provisions by dint of Section 55 (1) and 59 of the Basic Education Act which work together to govern the *locus standi* for the Board to be sued or capable of suing as a body corporate pursuant the enabling provisions on governance and management of the aforesaid institutions. They are so appointed to execute their mandate under the Act. Thereupon, counsel submitted that the dismissal order for the Judgment debtor not to proceed to satisfy the decree was against the provisions of the Basic Education Act.

Respondent's submissions

At the outset Learned counsel submitted that the enforcement of the Judgment and decree for the board members to comply with the order for payment of the sum due is in contravention of Section 21 (4) of the Government Proceedings Act. It was Learned counsel contention that no orders for payment can be made against the board members personally or in their fiduciary capacity pursuant to the prescribed provisions of the Act.

According to Learned counsel the ruling is a plain statement which needs no interpretation and therefore the notice to show cause issued against individual members is contemptuous of Section 21 (4) of the Cap 21 of the Laws of Kenya.

The gist of the submissions by counsel was that the Learned Magistrate did not error or misdirect herself as to the facts and Law on the matter. After summing up the facts and submissions from both counsels to this appeal there are certain scheme aspects to this case which fundamentally go to the root of the decision I am about to make.

Determination

What then is the procedure under Section 9 of the Education Act and the Education, school committees, regulations made thereunder. It is only school committee of a primary school which is mandated with the authority of managing the said institution. It is the school committee of the primary school with a capacity to sue and be sued.

Thus in Section 10 (2) of the Education Act Cap 211 provides that:

“The minister may by order, declare a board of Governors to be a body corporate under the name of the board of governors of the school or schools and the board shall have perpetual succession and a common seal with power to hold both moveable and immovable property, and may in its corporate name sue and be sued.”

The board members through their counsel submit that they ought not to be held personally liable for the Judgment debt due for the Judgment creditor pursuant to the above provisions. In my view, I agree with that legal position. There can be no doubt that in the case of **Republic v The Secretary to the Board of Governors Misingu High School Kakamega {2011} eKLR Lenaola J** held inter alia:-

“The governor shall be subject to any personal liability in respect of any matter or thing done or omitted or any contract entered

into by or on behalf of the board which he is a governor or by or on behalf of any school or group of school administered by that board.”

The courts went on to reaffirm the legal position of the Law on the entity referred to as Board of Management or Governors in the dictum in **J. N. & 5 others v Board of Management, St. G. School Nairobi and another {2017} eKLR and Evans Otiende Omollo v School Committee Union Primary School & Another {2015} eKLR.**

Back to the genesis of the impugned ruling dated 15.5.2019. In the Judgment of the trial court dated 22.11.2017, the respondent obtained reliefs against the appellant for a liquidated sum of Kshs.1,444,295/= plus costs and interest. The amount arose as a result of personal emoluments. Deductions of non-teaching staff, namely **Katana Baya, Joseph Banzi, Charo Kirao, Duncan Kaingu, Margret Kinde, Anderson Ngalla, Eunice Kenga and Christine Yeri** for the year June 2012 – June 2013.

The use of Section 35 (1) of the Co-operatives Societies Act empowers the employer who is under instructions of his employee to deduct the contributions for remittance to the co-operative society concerned within seven (7) days from the date upon which deductions was made. There are sanctions that the employer shall be liable to pay the sum deducted together with computed interest thereon at a rate not less than 5% per month.

The application made under Section 21 (4) of the Government Proceedings Act is to be viewed contra to and by reference to the underlying principle in Company Law.

“Where a director stands in a fiduciary capacity to the company and he company alone there is no duty owed by a director to creditors. The reasons in support of this is consonant with the author of common wealth Caribbean Company Law which reflects English Law on this branch of Law where he stated that: “The rule that directors owe their fiduciary duties to the company and the company alone means also that the directors do not owe any fiduciary duty to the company directors.

This position was further elucidated by **Dillon L. J.** in the English Court of Appeal case of **multinational Gas and petro – chemical vo v multinational gas services ltd {1983} CL 258, 299** where he said:

“The directors indeed stand in a fiduciary relationship to the company as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present, or future or to individual shareholders.”

The applicability of this principle though involved in the affairs of the company applies **Mutahi’s Mutandi’s** to the position in this appeal on established school management committees and Board of Governors by virtue of statutory instruments that signifies the governance of Education policy in both primary and secondary schools respectively.

I have carefully, examined this aspect of the matter which made it to this court on appeal. In this case a Notice to Show Cause had been issued to the individual members by the Judgment creditors for them to show cause why the Judgment debt remains unpaid. What the trial Magistrate cannot do in accordance to the Law is hold any one of the directors or members of the school management personally liable for the Judgment debt. What has been perplexing in the case is the position taken by the Learned trial Magistrate that the execution of and enforcement of the Judgment debt could be entertained within Section 21 (4) of the Government Proceedings Act. By and large this provision is crystal clear and any attempt to import it in the same cause of action was a misapprehension of the Law. Although for her decision she made attempts to appreciate the rule of **Section 21 (4) supra.**

Even though it is entirely clear from the Judgment of the trial court that the appellants failed to remit the deductions of the non-staff to their respective co-operative Sacco within the stipulated period of seven (7) days. Under Section 35 of the Co-operative Societies Act No. 12 of 1997 it does outline the execution and recovery mechanism of the debt, of this nature. The trial court took a different view that the enforcement of the pending decree could be satisfied as provided in the Government Proceedings Act as analyzed above. Incidentally, Section 35 of the Cooperatives Society Act provides a clear legal avenue upon which the Judgment of the court can be enforced as against the respondents.

Equally so, the right to have access of the funds as an instrument to recovery in a civil suit and thus guard jealously the interest of the employees at large. The deeming provisions state as follows:

“35 (2) the Commissioner may, on behalf of the society, institute legal proceedings in court for recovery of the sum owing under subsection (1) without prejudice to any other mode of recovery and such shall be a civil debt recoverable summarily. (3) the Commissioner may by written notice, appoint any person, bank or institution to be an agent of the society for the purposes of collection and recovery of a debt owed to the society. (4) The agent shall pay the amount specified in the notice issued under Subsection (3) out of any moneys which may, at any time during twelve months following the date of the notice, be held for the employer or are due from him to the employer. (5) Where an agent claims to be or to have become unable to comply with subsection (3) by reason of lack of moneys, held by or due from him, he shall give a written notification to the commissioner stating the reasons for his inability and the commissioner may

(a). accept the notification and cancel or amend the notice accordingly or if he is not satisfied with the reasons, reject the notification in writing.

(6). where an agent fails to notify the commissioner or the notification is rejected, it shall be presumed that the agent has sufficient moneys for the payment of the amount specified in the notice.

(7) Where an agent fails to pay the amount specified in the notice within 30 days from the date of service or the date on which any moneys come into his hands for or become due to him from the employer, the agent shall be liable for the amount specified in the notification as if he were the employer.

(8) In any proceedings for the collection or recovery of the amount specified in the notice. It shall not be a defence for the agent to claim lack of the moneys.

(9). This section shall apply notwithstanding that the failure under subsection (1) to remit the sum deducted may institute an offence under some other Law for which the employer has been presented or is being, or is likely to be presented.

(10) In this section employer includes any person, firm or organization holding remuneration or payment for produce of a member of a co-operative society and the term employee includes any person who receives remuneration or payment for produce from such persons or firm or organization.

According to these provisions enforcement of non-remittance of a member's contribution are available to the respondents before Judgment or at any time prior to and during proceedings, and or after they had obtained Judgment of the court.

In my opinion, the provisions applies to a cooperator who has a right to be paid the debt owing to him by his or her employer even before he or she has established his or her right by obtaining Judgment of the court.

The correctness of the discretion exercised by the Learned trial Magistrate was dispositive only the sources of Law, the application interpretation of Section 35 of the Co-operative Societies Act. Deciding the issue it was a question of ascribing weight to each elements provisions surrounding peculiar circumstances and facts of the case at hand. The precept of legal realism was best in the circumstances to invoke Section 35 of the Act as opposed to Section 21 (4) of the Government Proceedings Act. It emerges from the above that the appeal succeeds but not necessarily on the seven grounds enumerated by the appellant. I rested this appeal on the predominant issue of Law in contestation.

At this point, I am satisfied that the extent of the discretion by the Learned trial Magistrate was an irregularity which was fatal to the Ruling pronounced on 15.5.2019 in this case. The appellant in the alternative could have taken advantage of Section 35 of the Co-operative Societies Act to avail their members the protective reliefs notwithstanding subsequent enforcement mechanisms of a Judgment under the Civil Procedure Rules.

From the above reasons, the appeal is allowed and the impugned ruling set aside and consequential orders for being out of touch with the legal provisions of Section 35 of the Co-operative Societies Act and by extension granting or declining order against Section 21 (4) of the Government Proceeding Act which in my opinion was a misdirection on the issue. The umbrella words of Section 35 of the Act are instructive and mostly important intended to remedy the subject matter far more than the contemplated Section 21 (4) of the Government Proceedings Act.

In view of the importance of this matter the Judgment of the court be served upon the commissioner of Co-operatives to proceed by invoking Section 35 of the Act to require the Judgment debtor to satisfy the decree ostensibly and primarily at first instance as if he was the decree holder in any event. The costs of this appeal be paid by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mwanja holding brief for Lewa for the appellant.

2. Mr. Kariuki for the respondent