



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
CIVIL APPEAL NO. NO. 6 OF 2017

SAMUEL NJAGI MWANGI.....APPELLANT

-VERSUS-

JAMES KAMAU WAINAINA.....RESPONDENT/APPLICANT

RULING

1. The applicant **James Kamau Wainaina** who is the respondent in this appeal (to be referred to as the applicant in this ruling) brought an application seeking orders that **Memba Travellers** be ordered to deregister the applicant's motor vehicles No. KCC 640Y and KBP 241 F from their system pending the hearing and determination of this appeal. It is based on the following grounds:

a) Despite the Respondent/Applicant having applied numerous times to have the suit motor vehicles deregistered from the system of Memba Travellers Sacco Society Ltd, Appellant/Respondent has neglected, ignored, failed and/or refused to do so, thus grounding the said motor vehicles and rendering them totally inoperative.

b) The Appellant/Respondent has obtained a stay of the injunctive orders of the lower court and continues sitting on the said stay, thus subjecting the Respondent/Applicant to double jeopardy.

The application is also supported by his affidavit sworn on 11th September, 2017.

2. The respondent Samuel Mwangi Njagi opposed the application and filed a replying affidavit. He contends that the applicant is seeking orders against him as well as Memba Travellers Sacco Society who are not parties to this suit. He avers that the applicant who is a member of Memba Travellers Sacco has never applied to withdraw from the Sacco as provided for in the by-laws of the Sacco. He further deposes that the applicant has maintained that he sued him in his individual capacity. That the applicant seeks permanent orders which cannot be granted at interlocutory stage. That the Sacco demanded a debt from the applicant on 14th September, 2016 which he has failed to settle. That the applicant has never written to the Sacco to demand that the vehicles be deregistered. He prays that the application be dismissed.

3. The application proceeded by way of oral submissions. I have considered the application. The issue which arises in this application is whether the Court can issue orders against a person (or body) who is not a party to the suit.

Determination:

The main prayer in this application is that Memba Sacco Society be ordered to deregister motor vehicles Nos. KCC 640Y and KBP 241F from the system of the Sacco. If the prayer is successful it will be directed to the Memba Sacco Society to comply. Inevitably this will amount to this Court giving an order against a party who has not been given an opportunity to be heard. It is a well-founded principle of Natural Justice that any person or body for that matter who is likely to be affected by an order of the Court or of a body must be given an opportunity to be heard. Memba Sacco Society has not been made a party in this suit. The requirement for giving a party an opportunity to be heard is a matter of fairness and fair trial which is a constitutional right under **Article 25 of the Constitution**. **Article 50 (1)** states:

“Every person has the right to have any dispute that can be resolved by the application of the Law decided in a fair and public hearing before a Court or, if appropriate another independent and impartial tribunal or body.”

The Court will hesitate to issue orders to a body which is not a party to the suit to comply with the order. In his submissions the Counsel for the Applicant admitted that the Sacco was not a party. It is surprising that the Applicant can bring an application seeking orders against the Sacco who is not a party and was not involved in the proceedings in the lower Court. The applicant has not annexed evidence to show that he applied to withdraw from the Sacco and it was declined. It is an abuse of Court process to seek orders against the Sacco who is not a party.

4. The orders the applicant is seeking are permanent which cannot be given at interlocutory stage. The Applicant is seeking a shot cut as he owes the Sacco some dues. This he cannot achieve when the Sacco is not a member. The Court of Appeal has in binding decisions affirmed the right of a party to a fair hearing. In the case of **Said Juma Chitembwe V Edward Muriu Kamau & 4 others [2011] eKLR** the Court Appeal held:

“It is the basic tenet of our law that no man or woman may be condemned unheard. As the cardinal rules of natural justice were breached by the order of stay granted on 11th June, 2010, it has to be varied to exclude the applicant.”

This was also stated in a persuasive decision in the case of **Bellevue Development Company Limited V Vinayak Builders Limited & another [2014] eKLR** where it was held:-

“The application also seeks to have orders made against a person not a party to this suit or subject to the orders in the determined suit. It is trite law that orders cannot be enforced against a person not party to a suit. This principle emphasizes the doctrine of natural justice that one cannot be condemned unheard.”

The application by the Applicant which seeks orders against Travellers Sacco without giving them a chance to be heard as they are not parties to the suit cannot be allowed to see the light of the day. The application is without merits and is dismissed.

Dated and delivered at Kerugoya this 8th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Miano for Applicant, Respondent – absent, M/S Makworo for him absent, court assistant Naomi Murage this 9th day of February, 2018.

L. W. GITARI

JUDGE

9.02.2018