



REUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 259 OF 1998

KAMAU KIBUNJA.....APPLICANT

VERSUS

ATTORNEY GENERAL & 12 OTHERS.....RESPONDENTS

RULING

By Chamber Summons dated 23.6.98 the applicant has applied to this court for an interlocutory mandatory injunction directed at the 13th respondent to allow the applicant to sell his coffee through the 13th respondent. The Chamber Summons is brought under order XXXIX rules 1 to 3 of the Civil Procedure Rules, and is supported by the annexed affidavit of Kamau Kibunja the applicant. In his affidavit the applicant depones that he owns 5.38 acres of land in Mathira Division Nyeri District and virtually the entire parcel is planted with coffee. Since 1969 he has been marketing his coffee through the Kiamariga coffee preparing factory. He has been unable to sell his coffee since July, 1997 as the 13th respondent has been refusing to accept it. The prayer being sought in the present application is prayer 8 in the originating motion filed by the applicant on 16.3.98.

Mr Kibe Mungai for the applicant submitted that the expulsion of the applicant by the 13th respondent was illegal. He further submitted that as the purported election of the 7th – 12th respondents was irregular any action they purported to take on behalf of the 13th respondent against the applicant was null and void. Any facilities offered by the 13th respondent, Mr Mungai went on, are afforded to all members of the society, the applicant included. He urged the court to order that the status quo prevailing before the expulsion of the applicant be maintained. He referred the court to the case of *Gusii Mwalimu Investment Co Ltd & 2 others v Mwalimu Hotel Kisii Ltd* Civil Appeal No 160/95.

On the question of jurisdiction, Mr Mungai contended that this court has jurisdiction to determine the matter here. He referred me to the case of *Olive Casey Jaundoo v AG Guyana* [1971] AC 972 where it was held that the High Court has jurisdiction in disputes of the nature now before court. He concluded his opening submissions by stating that the applicant had made out a *prima facie* case and was therefore entitled to interim orders.

Mr Gichuru, who appeared for the 2nd and 5th respondents opposed the application. He relied on the grounds of opposition date 24.7.98 and filed on 27.7.98. He contended that the applicant is not entitled to the relief sought. He stated that the applicants case is being brought about one year after the alleged wrongs to the applicant. The facts of this case he contended, do not bring out the set principles for granting an injunction as was spelt out in the case of *Giella v Cassman Brown & Co* [1973] EA 358. The rights of the applicant as a member, he went on, were extinguished the day the members of the 13th respondent decided he was not acting as per their bylaws. According to him the applicant cannot be reinstated as a member of the 13th respondent because the management committee has no powers after the expulsion has been effected by the general meeting. Furthermore the applicant concealed a material

fact – the place he sold his coffee for 1997/98 season. In that regard the applicant is not entitled to the order sought and relied on the case of *Uhuru Highway versus Central Bank of Kenya & another* Civil Application No 140/95 on the delay by the applicant in filing suit immediately after the alleged wrongs Mr Gichuru cited the case of *Stanley Githunguri vs Jumba Credit Corporation Ltd* Civil Application No.161/88. Mr Gichuru further submitted that this court has no jurisdiction to defend the dispute and cited to court 2 authorities.

1. Court of Appeal Civil Appeal No 114/97 *Ernest Muiruri Njoroge & 28 others versus Kabiru Karanja & 4 others*

2. Meru HCC 99/97 – *Thomas Kinoti John & 8 others versus Benjamin Mugambi & 31 others*

Mr Mwangi for the 7th – 13th respondents also opposed the application and contended that the applicant is guilty of laches. He stressed that the applicant has not appealed against the expulsion in the manner provided by the Co-operative Societies Act – cap 490 Laws of Kenya. He urged the court to dismiss the application.

In reply Mr Mungai stated that the applicant incurred a loss in the intended sale of his coffee. He has deponed to this fact in his affidavit. Mr Mungai asserted that the legality of the expulsion of the applicant cannot be determined before evidence is adduced. As to why the applicant have appealed against his expulsion, counsel submitted that there was no mechanism available to the applicant. Furthermore his efforts were frustrated. He urged the court to exercise its discretion in favour of the applicant.

In his replying affidavit sworn on 25.5.98 the 7th respondent depones to the manner in which the applicant was expelled for the 13th respondent. He has annexed to the said affidavit the minutes of the special general meeting held on 12.5.97 by members of Rugur Farmers Co-operative Society Limited. The minutes are marked CGG2. The misconduct of the applicant was dismissed in minute 13/2/97 and his expulsion was determined in minute 15/12/97. The applicant contends that his expulsion was null and void as the 7 – 12th respondents were irregularly elected.

In his replying affidavit sworn in 7.7.98 the 7th respondent has annexed the bylaws of the 13th respondent. The same has been marked CGG4. Paragraph 10 of the said bylaws lays out the grounds upon which a member could be expelled. Paragraph 11 of the bylaws states:

11. “Any member expelled by the committee may appeal to the next general meeting which shall have power to reinstate him.”

The applicant apparently never took advantage of this laid down procedure but instead appeared to have been more preoccupied with the delivery of his office to the 13th respondent’s factory, his expulsion notwithstanding. By avoiding that cause of action the applicant denied himself an opportunity to present his case to a non partisan, if indeed it was, general assembly of the 13th respondent.

Mr Gichuru raised the issue of jurisdiction of this court to resolve a dispute of the nature presented herein. The applicant as he now stands is a former member of the 13th respondent. The dispute concerns the business of the 13th respondent. Section 80 of the Co-operative Societies Act states:

80 (1) If any dispute concerning the business of registered society arises; and
(a) Among members, past members, past members and deceased members; or
(b) Between members, past members or deceased members, and the society, its committee or any officer of the society; or
(c) Between the society or its committee and any other registered society, it shall be referred to the commissioner.

The applicant has instead of referring the dispute to the Commissioner of Co-operative filed the present motion. No reason has been advanced for not complying with the express provisions of the law. Section 80 of the Act expressly ousts the jurisdiction of the court in disputes of the nature now before court. The

applicant's prayer in this application would count to a final order as the applicant has prayed for the same order in paragraph 8 of his originating motion. That prayer can only be granted to the applicant after evidence has been adduced founding in the legality of the applicants expulsion. Counsel for the applicant succinctly put it so in his reply to submissions by counsel for respondents. The applicant avers that damages will not be an adequate remedy for the losses he has allegedly incurred. But in his application he has exhibited the report and valuation of the loss of his coffee crop. As he has quantified the same in monetary terms the damages will not prove illusory as he wished this court to believe.

In a nutshell the prayer sought by the applicant is not available to him fill the issue of his expulsion from and membership to the 13th respondent has been resolved. This could be done at an interlocutory stage. The applicant has not proved a *prima facie* case with a probability of success.

The application lacks merit the same is dismissed. I make no order as to costs.

Dated and delivered at Nairobi this 13th day of August, 1998

MITEI

JUDGE