IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (WAKI, NAMBUYE & AZANGALALA JJA

CIVIL APPEAL NO. 269 OF 2014

KENYA PLANTERS CO-OPERATIVE UNION LIMITED.....APPELLANT

VERSUS

GITHARA CHUCHU & 473 OTHER

MEMBERS OF GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED.....1ST RESPONDENT

GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED.....2ND RESPONDENT

(Appeal from the Order and Decree of the High Court of Kenya at Nairobi (Ojwang, J.) Dated 17th February, 2006 and the 12th July, 2006

in

HC Civil Case No. 3619 of 1983)

****

JUDGMENT OF THE COURT

The appeal arises from the two inter related Rulings of the High Court of Kenya sitting at Nairobi **J.B. Ojwang, J** (as he was then) dated 17th February, 20065 and 12th July, 2006.

The background to the appeal, as relevant to the impugned Rulings is that, the 1st respondent took out a Notice of Motion dated 3rd of August, 2004 brought under **order L. Rule 1** of the Civil Procedure Rules (CPR) and **section 3A** of the Civil Procedure Act (CPA), substantively seeking the following orders.

> ***(1) That the Chairman of the Board, or the Managing Director /General Manager and or the Finance Manager of the Kenya Planters Co-Operative Union (2nd defendant) be summoned to court and ordered to tell the court whether the 2nd defendant is still holding Kshs. 13,251,549.95 which belongs to the plaintiffs herein; or (b) whether the 2nd defendant has released the said sum of Kshs. 13,251,549.95 to anyone else.***
>
> ***(2) That the representative of the 2nd defendant as aforesaid, so summoned, be required to name the person to whom the 2nd defendant released the said money, state the date of such release, if the said money has been released."***

The application was supported by grounds on its body and supportive affidavits deposed by **Njoroge Mburu** on 5th August, 2044 and **Simon Chuchu** of 3rd August, 2004. In summary, it was deposed that the appellant had been unjustly holding the sum of Kshs. 13,251,549.95 since the Commissioner of Co-Operatives ordered that it be paid to the 1st respondent; that the 1st respondent had knowledge that the appellant had released a cheque equivalent to the above amount to its advocates Messers Muchui & Co. Advocates for them to work jointly with the firm of Chege Wainaina and Company Advocates who were then on record for the 1st respondent to distribute the same to the 1st respondent; that efforts to have the said sums of money released to the 1st respondent had proved futile.

It was further contended by the 1st respondent that the issue with regard to the aforesaid amounts had also been handled administratively

through the office of the Permanent Secretary in the Ministry of Co-operative Development and Marketing, who with a view to resolving the matter appointed a two person committee of inquiry to find out why the said moneys had not been released to the 1st respondent. That the said committee upon deliberation, recommended the registration of **Giagithu** and **Kimathi** Factories as Independent Societies, which was ignored by a State Counsel who refused to release the requisite registration certificate; that the High Court in HC Misc. Civil Application No. 81 of 1986, HCCC No. 3619 of 1983 and the Court of Appeal in Civil Appeal No. 46 of 1985, had ruled variously that the 1st respondent were rightfully entitled to the said sum of money.

In rebuttal, the appellant and the 2nd respondent also filed depositions contending *inter alia* that, the court had no jurisdiction to handle the matter as the **Hon. Mr. Justice Akiwumi** (as he then was) had made orders on 11th September, 1988 referring the matter to the Commissioner for Co-operatives for settlement; that when the matter went before **Mr. Justice Mitei**, he made similar orders on 6th July, 1999; that the 1st respondent's attempt to have those orders reviewed was dismissed, while the appeal No. 124 of 2001 filed against the refusal to review the orders of the H**on. Mr. Justice Mitei** made on 6th July, 1999 was withdrawn by consent of the parties. It was therefore not correct as contended by the first respondent that the proceedings before the Commissioner for Co-operatives had lapsed by effluxion of time by reason of the Commissioner of Co-Operatives' failure to remit the award within the stipulated time.

Lastly, it was deposed that the appellant had furnished the requisite evidence before the Commissioner for Co-operatives demonstrating that it had paid to all the members of the two factories all the dues payable for all the deliveries of Coffee during the period in question; that the issues that the 1st respondent was raising in the application then under consideration, were the same issues that were pending arbitration before the Commissioner for Co-Operatives, and lastly, that it is the 1st respondents who were blocking the crystallization of those issues through the validly instituted arbitration process.

The trial court analyzed and assessed the record in light of the rival submissions made before it and concluded *inter alia* that, both the High Court and the Court of Appeal had long concluded that the 1st respondent was rightfully entitled to the sums they were claiming from the appellant; that the court had jurisdiction to entertain the issues in controversy as between the parties before it; that it was therefore erroneous for the appellant and the 2nd respondent to allege that the matter was pending arbitration before the Commissioner for Co-operatives.

In light of the above reasoning, the trial court issued orders as follows:

> ***1. The Chairman of the Board, or the Managing Director/General Manager and/or Financial Manager of the 2nd Defendant/Respondent (Kenya Planters Co-operative Union) shall appear before a Judge in the Civil Division of the High Court, to answer the following three questions:***
>
> > ***(i) Is the Kenya Planters Co-operative Union (2nd Defendant) still holding the sum of Kshs. 13,251,549/95 which belong to the Plaintiffs herein?***
> >
> > ***(ii) Has the Kenya Planters Co-operative Union (2nd Defendant) released the said sum of Kshs. 13,251,549/95 to anyone other than the Plaintiffs?***
> >
> > ***(iii) If the Kenya Planters Co-operative Union (2nd Defendant) has released the said sum of Ksh.13,251,549/95 to someone other than the Plaintiffs' then who is that other person, and when was the said sum of money released to that other persons?***
>
> ***2. The Court, upon due compliance with the orders herein by the 2nd defendant, shall issue orders for payment to the Plaintiffs of the said sum of Kshs. 13,251,549/95 with appropriate interests, while providing also for the plaintiffs' costs; and the Court shall make any such further Orders as it shall deem fit and proper.***
>
> ***3. The 1st and 2nd defendants shall jointly and severally bear the plaintiffs' costs in this application."***

Following the above orders, the addressees of the orders appeared before the trial court on 12th July, 2006 and upon hearing oral representations of learned counsel for the respective parties, with regard to the directions of the court in the orders issued on 17th February, 2006, the trial court made observations thereon as follows:

> ***"The clear and crisp finding in that ruling is that the plaintiffs are owed, right from the 19th of April 1983 when the High Court determined the question, the sum of Kshs. 13,251,549.95 which decision was confirmed by the Court of Appeal on 31/7/1987.***
>
> ***Who owes that money? Directly the person who owes that money is the 2nd defendant. Recently, on 14th June, 2006 the managers of the 2nd defendant appeared before the Hon. Mr. Justice Kariuki, for the purpose of explaining why the said sum of Kshs. 13,251,549.95 had not timeously been placed in the hands of the plaintiffs- in spite of the clear and unequivocal orders of the court.***
>
> ***The explanation given on behalf of the 2nd defendant was that the money in question, though not directly released to those entitled to them namely the plaintiffs, was entrusted to the 1st defendant. Why should it be entrusted to the 1st defendant, when its rightful owners were the plaintiffs" It would be unlawful to give Paul's money to Peter on the basis that Peter is holding on trust!***
>
> ***The courts of this land has made it abundantly clear that the money in question belong to the plaintiffs- and not to anyone else. Because the 2nd defendant, an organization of some standing which ought to apply good financial practices, opted to pay Paul's***

money to peter, the legal burden of compliance falls squarely upon the 2nd defendant. It must be assumed that the 2nd defendant did not pay Paul's large sums of money to Peter without solemn procedures, in the share of concrete records.

It will be for the 2nd defendant to use the formal records to claim in equity and trust from Peter; but this Court's orders are not to be in vain; and I now make final orders as follows:

1. Within 30 days of the date hereof, the 2nd defendant shall comply with the court's orders and shall pay to the plaintiffs the total capital sum of Kshs. 13,251,549.95.

2. Within 60 days of the date hereof, the 2nd defendant shall pay to the plaintiff interests on the said capital sum of Kshs. 13,251,549.95 at court rate starting from 19/4/83.

3. The costs of the plaintiffs in the application of 3rd August, 2004 shall be borne jointly and severally by the 1st defendant's and the 2nd defendant's- and the same shall bear interests at Court Rates as from the date of filing the application".

The appellant was aggrieved and filed this appeal raising eight (8) grounds of appeal which may be paraphrased as follows:- the learned Judge erred in fact and in law when:

(1) Without jurisdiction heard and determined the 1st respondent's application dated 3rd August, 2004 when the dispute was pending before the three (3) Arbitrators in Arbitration cause No. 6 of 1999 pursuant to orders of court made on 6th July, 1999 which had not been set aside.

(2) He made orders that the appellant make payment to the 1st respondent of Kshs. 13, 251,549.95 when:

i. There was no dispute that the money was paid to the appellant who had declared that it was ready and willing to show how it had disbursed the money to the 1st respondent.

ii. No arbitral award was ever made for the payment of the said amount to the 1st respondent.

iii. It was not known how that amount was arrived at.

iv. The 1st respondent had not prayed for payment of the said sum to them in the application then under consideration.

v. It was made on a mention date.

The appeal was canvassed by way of oral submissions. Learned counsel **Mr. G. Gitonga Murugara** appeared for the appellant, learned counsel **Mr. Frank N. Nabutete** appeared for the 1st respondent, while learned counsel **Mr. Mbithi** holding brief for **Mr. Muchui** appeared for the 2nd respondent.

Supporting the appeal, learned counsel **Mr. G. Murugara** argued all grounds of appeal as one. It is counsel's submission that, although the suit in which proceedings giving rise to this appeal arose was filed way back in 1983, the same has never been determined on merit. Consequently, the decree arising from the impugned orders was erroneous and unenforceable. Counsel drew our attention to the observations made by **Okubasu, J** (as he then was) in a Ruling dated 4th November, 1994 for the disposal of a chamber resummons dated 1st March, 1994. In summary, these were that the matter was first referred to the Co- operatives tribunal which declined determination citing want of jurisdiction; that upon being remitted back to the court, the 1st respondent successfully applied to have the appellant and 2nd respondent's defences struck out and judgment entered in their favour as prayed for in the plaint vide orders made pursuant thereto on 31st May, 1985, but no decree resulted from those orders as the appellant successfully applied for stay of execution of those orders pending appeal. The appeal resulting from the said orders namely Civil Appeal No. 46 of 1985 was allowed vide the orders made on 31st July, 1987 setting aside the orders issued on 31st May, 1985 and remitting the matter back to the High Court with directions that both parties do request the Commissioner for Co-operatives to withdraw the order to withhold payments in respect of **Kimathi** and **Kiaguthi** Co-operative Societies with a rider that the matter be expeditiously heard by the High Court.

Further observations on the content of the said ruling were that, it was apparent from the record that upon the matter being remitted back to the High Court, it was once more referred to arbitration under **section 80** of the Co-operative Societies Act Cap 490 of the Laws of Kenya, pursuant to which **Mr. Daniel Mutiso** was appointed arbitrator and who after hearing the dispute delivered an award on 8th May, 1989 in which he awarded the 1st respondent Kshs. 8,999,480/-; that the 2nd respondent successfully appealed against that award, which appeal was heard by the Deputy Commissioner for Co-operative Development who allowed the appeal on 6th February, 1992, setting aside the award handed down by **Mr. Mutiso** in favour of the 1st respondent; that there after there was a reference to three arbitrators namely; G**.K. Muriuki** as **Chariman and Zablon Omari** and **George Mugambi** as members of the Arbitral panel; that the matter went before the three arbitrators on 1st April, 1992 and although the three arbitrators ought to have determined the dispute as at the time, **Okubasu, J** delivered his ruling on 4th November, 1994, there was no evidence that they had done so. In light of the above observations, **Okubasu, J** set aside the orders of the court made on 15th July, 1983 as had been prayed for in the application dated 1st March, 1994.

Counsel continued to submit that undeterred, the 1st respondent filed a notice of motion dated 26th March, 1999 seeking orders to revoke

Arbitration Cause No. 6 of 1992, supercede the said arbitration and proceed with the suit or alternately adopt its earlier judgment in the matter and order payment to the 1st respondent of Kshs. 13,251,249.95 plus interest at commercial rates from the 19th day of April, 1983 to the date of payment in full; that the authority of the arbitrators F**. Kanyoni, P. K'oremo** and **Peter Waweru Mungai** to act as arbitrators in Arbitration Cause No. 6 of 1992 ceased at the end of the months of February 1999 when they failed to complete their assignment after several extension of time; and that the said arbitrators **F.Kanyoni, P.K'oremo** were guilty of misconduct and or misconducted the arbitration and their authority to arbitrate is revoked; that the Commissioner for Co-operatives raised a preliminary objection against the said application whose merit determination gave rise to the ruling of **Mitei, J** (as he then was) dated 6th July, 1999 upholding the preliminary objection raised by the Commissioner for Co-operatives and dismissed the application but sustained the suit.

Counsel also submitted that it is against the above background that the 1st respondent presented their application dated 3rd August, 2004 and filed on 9th August, 2004, premised on the provision of law specified above; that the application was opposed on the ground that the High Court had no jurisdiction to entertain the application, which objection the trial court declined to sustain and erroneously proceeded with the matter in the manner of a mini trial, resulting in the impugned orders of 17th February, 2006; that in obedience to the impugned orders of 17th February, 2006, the appellant presented its officials who gave plausible responses to the questions the trial court had raised in the impugned orders of 17th February, 2006 as follows: that before the dispute arose, the 1st respondents were members of two unregistered societies namely **Kimathi** and **Kiaguthi;** that the two factories were members of the Gititu Farmers' Co-Operative Society the 2nd respondent; that the appellant remitted payments for any deliveries to it by the two factories to their members through the 2nd respondent who were to release the funds to the members of Kimathi and Kiaguthi factories who in turn would then pay their members.

Turning to the impugned orders of 12th July, 2006, counsel submitted that, there was no basis for the trial court issuing the same considering the plausible explanation the appellant's officials had given in response to matters raised by the trial court, in the orders of 17 th February, 2006; that the trial court orders that money be paid to the 1st respondent by the appellant amounted to a decree erroneously issued in a matter which had not been heard and determined on its merits either through arbitration or the court process; that in arriving at the said impugned erroneous orders, the trial court failed to appreciate that the 1st respondents were under an obligation to prove their claim and demonstrate how the money was owed to them, an obligation the 1st respondent had not discharged in the absence of proof of either a trial having been undertaken and concluded by the court, or alternatively, through an arbitral award.

In light of the totality of the above submissions, counsel urged us to fault the decree the 1st respondent intends to execute against the appellant because, firstly, it was irregularly arrived at using a mode of trial unknown to law; secondly, the 1st respondent cannot be allowed to benefit from an illegality they contributed to; thirdly, the explanation the appellant's officials gave were cogent and based on material particulars on the record and should not have been ignored by the trial court; fourthly, in light of the explanation , the appellant's officials gave, the 1st respondent's claim should be directed against the 2nd respondent only; fifthly, the orders of 12th July, 2006 were made without basis and irregularly as they were made on a mention date and should not therefore be allowed to stand.

In a brief submission, learned Counsel **Mr. Mbithi** supported the appeal and reiterated **Mr. Murugara's** submission that there was clear demonstration before the trial court that the matter was pending arbitration. The trial court therefore had no jurisdiction to entertain the application whose determination gave rise to the impugned orders. They also disclosed in the Affidavit filed in opposition to the 1st respondent's Notice of Motion dated 3rd August, 2004 and filed on 9th August, 2004, that they received the money from the appellant and disbursed the same to the rightful claimants.

Learned counsel **Mr. Frank N. Nabutete,** in his submissions in opposition to the appeal, conceded that the main suit is still pending as the main plaint has never been heard; that the appellant and 2nd respondents' respective defences were struck out, and although they successfully appealed against the orders of 31st July, 1985 striking out those defences the court of Appeal never reinstated those defences. Counsel also conceded that it is in the same Ruling of **O'kubasu, J** of 31st July, 1985 where the amount the 1st respondent moved to enforce were computed; that the Court of Appeal sitting on appeal of the orders of **O'kubasu, J** of 31st July, 1985 also found as a fact that the amount claimed was due and owed to the first respondent and gave appropriate directions.

In further submission in opposition to the appeal, counsel submitted that the order of 1983 is not on record. There was therefore nothing on the record to suggest that the matter was ever referred to arbitration by the court; that if there is any order in existence, alleged to have been made by **Akiwumi, J** referring the matter to Arbitration, then the same must be a forgery. That according to him, it is the lawyers on their own volition who decided to send the matter to arbitration; that there was no evidence to demonstrate that parties instructed their lawyers to refer the matter to arbitration.

Turning to the orders made by **Mitei, J** on 6th July, 1999, counsel conceded that those orders have never been set aside as the appeal preferred against those orders namely appeal number 124 of 2001, was withdrawn by consent of the parties. Counsel also conceded that it is the 1st respondent who had applied to have the proceedings in Arbitration Cause No. 6 of 1992 pending before the arbitration panel revoked save that in counsel's view, the preliminary objection giving rise to those orders should not have been sustained as it had been raised by a nonparty to the proceedings.

Counsel maintained that the 1st respondent has a legitimate claim against the appellant and the 2nd respondent; that both the High Court and the Court of Appeal crystalized the 1st respondent's legitimate claims against the appellant and the 2nd respondent as correctly found by the trial court, a position we were urged to affirm and dismiss the appeal with costs.

There was no reply to the 1st respondent's submissions.

This is a first appeal. Our mandate is as set out in Rule 29(1) of the Court of Appeal Rules (CAR) is to reappraise the record and arrive at our own conclusions on the matter. This mandate has aptly been restated in numerous decisions. We take it from the case of **Mwangi versus**

Wambugu [1984] eKLR 453, where the Court stated firstly, that although

> "***an appellate court is always reluctant to interfere with the findings of fact by a trial Judge who has both heard and observed the witnesses, in first and final appeal, the court is obligated to reconsider and assess the evidence. Secondly, that although "a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless such findings is based on no evidence or on a misapprehension of the evidence or that the Judge is shown demonstrably to have acted on wrong principles in reaching the finding, an appellate court is not bound to accept a trial Judge's finding of fact if it appears that he has clearly failed on the material point to take account of particular circumstances or probability material to an estimate of the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

See also the case of **Musera versus Mwechelesi & another [2007] 2KLR.**

We have considered the record in light of the rival submission set out above. The issues that fall for our determination are the same two issues condensed above.

Regarding the first issue of want of jurisdiction, the position in law was crystalized by the Court in the case of the **Owners of the Motor Vessel "Lillians S" Versus Caltex Oil (Kenya) Ltd [1988] KLR1** *inter alia* that:

> "***jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

The issue of want of jurisdiction raised by the appellant and as supported by the 2nd respondent, when the trial court was seized of the application dated 3rd August, 2004 and filed on 9th August, 2004 was on the sole ground that the trial court was not properly seized of the matter as the issue intended to be adjudicated upon before the court were the same issues pending arbitration. The rival position of the respective parties with regard to this issue are as already highlighted above. We find no need to rehash them for purposes of reasoning in the determination of this appeal. It is sufficient for us to bear them in mind which we hereby do.

We have traced on the record the ruling of **Okubasu, J** dated 26th July, 1984 along the following lines.

> "***I have carefully considered this application before me and I note that in the plaint filed reference is made to HC Misc. Application No. 81 of 1980. I have called for that file and it has become very clear that this dispute started way back in 1980. There was the issue of splitting from the main Gatitu Coffee Growers. The dispute was systematically handled by this court and finally by the Commissioner of Co-operatives.***
>
> ***In HC Misc. Application No. 81 of 1980 the dispute between the parties in this suit was concluded by Platt J on the 19th April 1983. I will invite the counsel in this case to have a closer look at the orders made in HC Misc. Application No. 81 of 1980 and I am sure it will dawn on them as it has dawned on him the dispute herein is very much narrowed. What the plaintiffs are asking for springs from the orders of this court in the HC Misc. Application No. 81 of 1980.***
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> ***This is a matter involving a large number of coffee farmers. It would appear that a large sum of money is involved. Coming back to the order sought, I would say that as regards the dispute being referred to the Commissioner of Co-operatives this has actually been done and there would be no point repeating the exercise.***
>
> ***Perspective of HC Misc. Application No. 81 of 1980 was to make this point absolute.***
>
> ***We have already passed that stage. As shown who are members and who are not this makes it easy to prove. I am sure the end since those are not members would certainly have no one to sue. Gititu Farmers' Co-operative Society*** (sic).
>
> ***On my own part I say that this is the case that calls for urgent determination.***
>
> ***The dispute may be resolved this way or the other to save time and money.***
>
> ***I urge the advocates involved to consider taking an early hearing date.***
>
> ***As for the application before me, I find that it has no merits.***
>
> ***It is accordingly dismissed with costs to the plaintiffs.***
>
> ***Orders accordingly."***

We have also traced on the record the ruling of **Okubasu, J** dated 31st January, 1985 in which the appellant and the 2nd respondent's defences were struck out. Among the issues raised in those struck out defences was that the Court had no jurisdiction as the matter it was then seized of fell within the ambit of the provision of **section 80** of the Co-operative Societies Act (supra).

We have also traced on the record an order made by **Aluoch, J** on 11th May, 1988 as follows:

"Order: This matter is one that falls to be determined by the Commissioner for Co-operatives by virtue of section 80(1) of Cap 490.

It is not for me to say that it should not have been brought to this court since that has been overtaken by events. I will make an order in an attempt to rectify the situation that the suit be referred to the Commissioner for determination by him under Section 80(i) of Cap 490.

Costs in the cause.

Liberty to apply."

There is a further order made by **Okubasu , J** on 15th July, 1993 as follows:

"Having considered the Judgment delivered on 31/1/85 and noting that there had been no appeal, it is hereby ordered that the Commissioner for Co-operatives do facilitate the recovery of funds from the Gatitu Coffee Growers Co-operative Ltd and remit it to plaintiff's advocate for payment."

The above orders were the basis for the observations made by **O'kubasu, J** in the ruling dated 4th November, 1994 already highlighted above in which the Judge was categorical that the matter was pending arbitration. This is borne out by the following excerpt from the said ruling.

"It is unfortunate that this matter is yet to be resolved but it is hoped that the advocates involved will move with speed so that the panel of the three arbitrators can resolve the dispute immediately. Costs of the application will abide the results of arbitration panel."

There is a further order made on 28th March, as follows:

"By consent, the Commissioner of Co-Operatives is hereby directed to constitute the arbitration panel within three months from the date mentioned on 28th June, 1995."

Proof that the 1st respondent had also submitted themselves to the jurisdiction of the panel of arbitration is borne out by the content of the representations made to court by a **Mr. Muchui** indicated as appearing for all defendants which went as follows:

"Mr. Muchui.

There was an order by arbitrators that each party should pay 15,000/. We have paid but plaintiffs have not done so. We paid on 21st March, 1994 and we have a receipt here. I suggest that the matter be marked stood over generally and the plaintiff to pay the 15,000/- for arbitration to commence."

It is the above representations that gave rise to the orders of the same date of 28th June, 1995 along the following lines:

"This matter is marked stood over generally. Plaintiffs to pay 15,000/- as ordered by arbitrators so that arbitration may proceed."

Further orders were made by **Olekeiwua, J** (as he was then) on 13th March, 1998 along the same lines as follows:

"In the circumstances revealed by Mr. Muchui, I do not think the application under section 60(1) of the Constitution, section 3 of the Judicature Act or Section 3A of the Civil Procedure Act for the court to hear the case which was referred as second (sic) ***by this Court for arbitration is well founded.***

It is not in dispute that this Court has unlimited jurisdiction. But section 80 of Cap 490 provides that matter under this Act shall first be referred to the Commissioner of Co-operative. I am of the opinion that since the applicants have paid the outstanding fees of the Commissioner, the Commissioner must proceed to hear or constitute a panel in accordance with the Act to differentiate what was referred to him. The Commissioner must do his duties within 3 months of todate.

Stood over generally."

The above order was followed up by further orders of **O'kubasu, J** made on 16th July, 1998 as follows:

"***Since this dispute started way back in 1982 and considering the long delay, it is hereby ordered that the Commissioner for Co-operatives proceeds under Rule 53(3) (c) of the Co-operative Rules in appointing the arbitrators one of them will be the Chairman.***

The arbitration to take place within 30 days from today and the award to be filed on or before 16th September, 1998 when the

matter will be mentioned in courts."

On 16th September, 1998, the court was informed in the presence of learned counsel for the respective parties that there was a new Act in place and that the office of the Commissioner for Co-Operatives had identified officers to carry out the arbitration. On 19th January, 1999, upon inquiry from learned counsel for the 1st respondent as to who the arbitrators were, learned counsel appearing for the Commissioner for Co-Operatives gave out the names of the arbitrators as follows:

Mrs. Florence Kenyoni who was described as the **Chair person, Mr. P. K'oremo , Mr. Njoroge Mburu** and a **Mr. Peter Waweru Wangai** indicated as nominated by the complainants on 15th February, 1999. Counsel for the 1st respondent is on record as having gone to see the chair lady of the arbitration panel who had informed him that their mandate had expired. Secondly, that he had also had occasion to construe the provisions of the new Co-operative Societies Act and had come to the conclusion that the Commission for Co-operatives had no power and any process undertaken in furtherance of that process (before the Commissioner for Cooperatives) would be unlawful.

We have no doubt the above information is what led to the orders of **O'bukasu, J** of 26th March, 1999 advising the 1st respondent to proceed as advised on the one hand, and the presentation of the 1st respondent's application dated 26th March, 1999 that gave rise to the orders of **Mitei** of 6th July, 1999 on the other hand. It is therefore not correct as contended by learned counsel **Mr. Nabutete** that there were no court orders referring the issues in dispute between the parties to arbitration. Neither is it also correct as contended by the same learned counsel that it is the lawyers for the respective parties who on their own motion referred the matter to arbitration without consent and or consultation and instructions from the respective parties. The above survey of what transpired on the record before the trial court is a clear demonstration that both parties and their respective advocates then on record for them were involved in the process of referring the matter to the Commissioner for Co-operatives for arbitration notwithstanding that, we have not traced on the record the orders allegedly made by **Akiwumi, J** on 11th September, 1988 referring the matter for arbitration.

It is also not disputed that when **Mr. Justice Mitei** declined jurisdiction in the orders made on 6th July, 1999, the 1st respondent was aggrieved and filed an appeal number 124 of 2001 against those orders, but was subsequently withdrawn with the consent of both parties. The withdrawal of that appeal sanctified the orders of **Mitei, J** of 6th July, 1999 crystalizing the true position on the record that the court had no jurisdiction to proceed with the matter so long as the issues in controversy as between the parties before it were still pending before the arbitral panel. It matters not that the preliminary objection sustained by **Mitei, J** was raised by a non-party. That is a matter that could have been interrogated had the resulting appeal No. 124 of 2001 not been withdrawn. The 1st respondent is therefore deemed to have abandoned the right to complain as such. It is therefore a non-issue for consideration in this appeal. The above being the correct position, it therefore follows that unless and until jurisdiction was wrestled from the arbitral process and restored back to the trial court, there was no jurisdiction in the trial court to entertain the 1st respondent's application dated 3rd August, 2004 and filed on 9th August, 2004. Both the proceedings and the impugned orders of 17th February, 2006 and 12th July, 2006 were a nullity and of no consequence. The above being our conclusion on the matter, we find no need to interrogate the 2nd issue as doing so would be tantamount to delving into the merits of the rival issues that fall for determination either by the Arbitral panel or the trial court as the case may be.

The upshot of the totality of the above assessment and reasoning is that the appeal has merit. It is accordingly allowed. Considering the nature of the issues in controversy herein, we direct that costs of the appeal and the High Court in the proceedings giving rise to this appeal shall abide the result of the arbitration.

The Judgment is signed under **Rule 32(9)** of the Court of Appeal Rules (CAR), since the Hon. Mr. Justice **F. Azangalala, JA** ceased to hold office of Judge of Appeal upon retirement from service.

Dated and Delivered at Nairobi this 27th day of September, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.