



Republic v Chief Magistrates Bungoma; Wandabwa (Interested Party); Nee Chesikaki Farmers Co-op Society Limited (Exparte Applicant) (Judicial Review 4 of 2023) [2023] KEELRC 3244 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3244 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW 4 OF 2023
JW KELL, J
DECEMBER 11, 2023
IN THE MATTER OF AN APPLICATION BY NEW CHESIKAKI FARMERS
CO-OPERATIVE SOCIETY LIMITED FOR JUDICIAL REVIEW
AND
IN THE MATTER OF SOCIETIES ACT, CAP 76(1) LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF MAGISTRATES BUNGOMA RESPONDENT

AND

CHARLES SIMIYU WANDABWA INTERESTED PARTY

AND

NEE CHESIKAKI FARMERS CO-OP SOCIETY LIMITED EXPARTE APPLICANT

RULING

(On grant of leave to institute judicial review proceedings)

1. The Exparte Applicant is a cooperative society and the Respondent in Bungoma CMCC ELRC Claim No. 2 of 2021 Charles Simiyu Wandabwa v New Chesikaki Farmers Co-op Society Limited where a judgment was entered against it on the 17th April 2023 by Hon. C.A.S Mutai for the sum of Kshs.. 928,868/- plus costs on basis of wrongful termination from service.



2. The Exparte Applicant being aggrieved with the decision has brought before court an application by way of chamber summons application dated 5th October 2023 seeking leave of the court to institute judicial review application for Order of Certiorari to quash the judgment of Hon. C.A.S Mutai.
3. The court pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules ordered for interpartes hearing on whether or not to grant the leave. Order 53 Rule 1 of the Civil Procedure Rules states:-
 - “(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
 - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
 - (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”
4. The court at first instance granted order of stay pending decision on leave. The Court ordered service of the Chamber summons application for response. On the 7th December 2023, the interested party(claimant) and the Exparte Applicant appeared for the hearing of the application and requested the court to decide based on the documents filed. The said documents were the application by the Exparte Applicant only.

Determination

5. The application is unopposed. The grant of leave is a prerequisite to file application seeking Order of Certiorari under Order 53 Rule 1 to wit:-
 - “(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”
6. The main grounds of the application is articulated clearly in the supporting affidavit of Jestmore Wakwaeika Kibaba sworn on 5th October 2023 at paragraphs 5 to 7 to wit:-
 - “5. That the Respondent (Hon. C.A.S Mutai) heard the claim and awarded the interested party Kshs. 928,808/- (JWK02),



6. The Interested party has taken steps to execute the decree including taking out warrants of attachment and issuing a notice of desire to execute (JWK03),
7. The respondent lacked jurisdiction to hear and determine the suit as the dispute between a former member of the cooperative and the cooperative ought to be entertained at the cooperative tribunal.”

I find paragraph 7 forms the basis of my decision whether or not to grant leave.

7. The parties did not cite any authorities to guide the court. Thanks to the robust law reporting via the Kenya Law online platform the Court is able to access precedents easily. I accessed decision by Justice L. NJUGUNA in Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical And Dental Clinic & 6 others [2022] eKLR where the Judge cited with approval the decision of Waki J(rtd) on the reasons for grant of leave to institute judicial review proceedings in paragraph 7 as follows:-

“ The reasons for leave were explained by Waki J. (as he then was) in Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived”

8. I uphold with approval the foregoing decision in my decision herein. The case of the Exparte Applicant is that the lower court lacked jurisdiction to hear and determine the claim leading to the judgment sought to be executed.
9. Before the lower court was a claim by the interested party who had been sent on early retirement with pay by the Exparte Applicant. As at time of the decision to retire him, the interested party was holding the position of Chief Executive Officer. The interested party , their employee, contested the decision of forced retirement and the lower court determined it was wrongful termination of employment and awarded compensation.
10. The question then before the court is whether or not the Respondent/ Magistrate had jurisdiction to determine the claim. The interested party is a cooperative society. The interested party is a former employee of the cooperative society. The Exparte Applicant asserts that the Magistrate lacked jurisdiction to determine the dispute as the same lay with the Co-operatives Tribunal.
11. It is now settled law that the jurisdiction of the Court flows from *the Constitution* or other written law. The original jurisdiction to handle all employment disputes belongs to this court pursuant to article 162(2)(a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*. The Magistrate court exercises jurisdiction over employment as per gazette notice by Chief Justice Maraga GAZETTE NOTICE NO. 6024 of 22nd June 2018 where the Magistrates were given jurisdiction over employment matters as follows:- “IN EXERCISE of the powers conferred by section 29 (3) and (4) (b) of the *Employment and Labour Relations Court Act*, 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of Senior Resident Magistrates and



above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
2. Matters relating to the following specific areas—
 - (i) offences under the *Work Injury Benefits Act*, 2007
 - (ii) offences under the *Employment Act*, 2007
 - (iii) offences under the *Labour Institutions Act*, 2007
 - (iv) offences under *Occupational Safety and Health Act*, 2007; and
 - (v) offences under the *Labour Relations Act*, 2007.

The conferment under Gazette Notice No. 9243 is revoked.

Dated the 10th June, 2018.

David K. Maraga,

Chief Justice/President, Supreme Court of Kenya.”

12. The Hon C.A.S. Mutai (SPM) was thus qualified as empowered under the Gazette notice to handle employment disputes of less than Kshs. 80000 gross salary p.m.. The claimant had indicated his monthly salary of Kshs. 20,400/- hence within the jurisdiction of the Magistrate court.

What is the jurisdiction of the Co-operatives tribunal?

13. Section 76 of the Co-operative Societies(CAP 490 Laws of Kenya) provides for the jurisdiction of the cooperatives tribunal as follows:-

“76. Disputes

- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through 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 and any other co-operative society, it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include—
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;



- (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

14. The jurisdiction of the Cooperative Tribunal has been interpreted by the Courts before. In *Mombasa Republic Versus Matheka Kithome and 4 Others Misc. Civil. Appl. No 664 Of 2010 (UR)(CITED in Abeid Mwamburi v Sokoro Savings & Credit Co-Operative Society Limited [2021] Eklr)* where Edward M. Muruthi, J. stated as follows:-

“In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service, or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws, and rules. Such dispute must be referred to the tribunal which under section 77 of the Act is required to be composed of a majority 4 of 7 members of persons with experience in cooperative law and cooperative management and practice. See *Gatonye Coffee Guard’s vs Gitau (1970) E. A. 361 R. VS. Comm of Coop Development Exp Kabuthi & Org. EA 168.*”

Cited in same decision was also *Lukenya Ranching V. Kavoloto 1970 E.A. 414* and *Wakiro V Comm. of Bugisu Coop 1968 EA 523* where the court stated as follows:-

“I find that the discipline of a member by a cooperative society for any reason including the performance of the member's duties is outside the purview of section 76 of the Act. The dispute arising therefrom is not one “concerning the business of a cooperative society” as cooperative societies do not have as their business the quasi-judicial determination of discipline claims. When the cooperative society constitutes itself as disciplining mechanism it moves out of its ordinary business contemplated under section 76 of the Act and it becomes the proper subject of the constitutional supervisory jurisdiction of the High Court under Article 165(6) of *the Constitution*.”

14. A plain reading of section 76 of the Co-operative Society Act is that the tribunal has jurisdiction concerning the business of the cooperative society and employment disputes between a society and an employee in relation to employment contract falls outside the jurisdiction of the tribunal. I do uphold the decisions cited above on the interpretation of the jurisdiction of the cooperative tribunal.
15. Consequently, I do hold that the employment dispute between the interested party and the Exparte Applicant was not a business of a co-operative society as provided under section 76 Co-operative Society Act and was thus outside the jurisdiction of the Co-Operatives Tribunal’s jurisdiction. This holding is consistent with the decision in *Lukenya Ranching V. Kavoloto 1970 E.A. 414* and *Wakiro V Comm. of Bugisu Coop 1968 EA 523* where the court stated as follows:-

“I find that the discipline of a member by a cooperative society for any reason including the performance of the member's duties is outside the purview of section 76 of the Act. The dispute arising therefrom is not one “concerning the business of a cooperative society as cooperative societies do not have as their business the quasi-judicial determination of discipline claims. When the cooperative society constitutes itself as disciplining mechanism it moves out of its ordinary business contemplated under section 76 of the Act and it



becomes the proper subject of the constitutional supervisory jurisdiction of the High Court under Article 165(6) of *the Constitution*.”(supra) I do uphold the said decision to apply in the instant application.

16. Consequently having held the Hon C.A.S. Mutai had jurisdiction to handle and determine the employment dispute between the parties, I decline to grant leave , based on ground of the court having lacked jurisdiction, to the Exparte Applicant. To grant leave, based on the grounds of lack of jurisdiction by the Magistrate, would be a waste of judicial time the court having decided employment disputes do not fall under the Co-operative Tribunal’s jurisdiction.
17. In the upshot, the application for leave by way of Chamber Summons dated 5th October 2023 is dismissed for lack of merit. The Order of stay hinged on the application of leave consequently stands vacated.
18. The application was not opposed. No Order as to costs.
19. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DECEMBER 2023.

**JEMIMAH KELI,
JUDGE.**

