



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 66 OF 2002

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

GITITU COFFEE GROWERS

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

1. The Award in this case was delivered on 18th November 2003 by Retired Justice Charles P. Chemuttut as follows –

“The parties, however, urged the Court to formulate an acceptable mode of payment by instalments.

On anxious consideration of this matter, and in order to avert the collapse of this reputable Society and the inevitable loss of further jobs, I award and order that the Society should liquidate the said indebtedness as follows:

a. Kshs.600,000/= be paid by 31st December, 2003

b. The balance of Kshs.13,294,075.55 be paid in five (5) equal yearly instalments of Kshs.2,658,815.11 each year, with effect from 31st December, 2004 and on 31st December of the subsequent years, without default or any deductions whatsoever, until payment in full.

2. In the Notice to Show Cause dated 6th December 2019, the Claimant applied to this Court for the attachment and sale of the Judgement Debtor/Respondent’s property in execution of the decree issued in the sum of Kshs.13,296,025.55/=.

3. The Respondent, through its Vice Chairman, David Njau Kinyanjui swore a Replying Affidavit on 25th February 2020 and was filed in court on 27th February 2020. He opposes the Notice and avers that the entire attempted execution proceedings are statute barred by dint of Section 4(4) of the Limitation of Actions Act. He states that the Application is misconceived and unmerited.

4. The Respondent avers that the redundancy dues to various employees of the Respondent who were declared redundant is payable to individual employees of the Respondent and not to the Claimant as an entity.

5. He states that at the time of redundancy, the Respondent had undergone a split with five of its factories joining Nyakiri Coffee Farmers Co-operative Society Limited and eight factories remaining under the Respondent. Therefore, the assets and liabilities of the former Gititu Co-operative Society was split between them both via a Memorandum of Understanding.

6. He avers that from the MoU, the Respondent was to pay terminal redundancy dues of Kshs.10,644,749.70 while Nyakiri Coffee Farmers’ Co-operative Society Limited was liable for Kshs.6,652,968.60.

7. The Respondent avers that on 1st July 2010, its Chairman wrote to Nyakiri Farmers’ Co-operative Society Limited forwarding terminal benefit schedule for retrenched employees. The Respondent states that it has paid all its dues to individual employees in compliance with the decree at their respective preferences and directions and that no genuine claim has been brought against it.

8. He avers that Nyakiri Farmers' Cooperative Society has paid out a substantial portion of its dues with a balance of Kshs.2,649,326.45. He however states that he does not know whether the balance has been settled. That the Claimant ought to have sought those particulars before applying for the Notice to show cause; which it has not done.

9. The Respondent states that it has fully settled its indebtedness as per the decree and that any ascertained unpaid amount is due from and payable by Nyariki Farmers' Co-operative Society to its employees. He avers that it would be unjust and unfair to grant the orders sought in the Notice considering the above factors. He therefore urges this court to dismiss the Notice with costs.

10. In response to this, the Claimant filed a Further Affidavit sworn on 24th May 2020 by Joseph Kabera Cimbi one of the grievants herein on behalf of the others. In it, he avers that the Respondent has not satisfied the award in full as directed by this Court but has instead employed cavalier and underhand tactics in an attempt to defeat and avoid the settlement of the award in full.

11. He avers that although his total dues payable as per the award was Kshs.272,120.95/=, the Respondent has only paid Kshs.101,100/=and is yet to fulfil the balance of Kshs.171,020.95/=. That the other grievants are also in the same predicament of partial payments of their dues and that the award can only be satisfied in full once all the dues awarded to each individual grievant is settled in full.

12. On the averment that the claim is statute barred, the Affiant avers that the same is unmerited and based on a misreading and misinterpretation of the law. He also states that the grievants had individually and unequivocally consented to the Claimant to represent them in the matter.

13. The Affiant states that the entity Nyakiri Coffee Farmers' Cooperative Society is a complete stranger to the grievants and the splitting of liabilities therein is something new to the grievants. They were not consulted nor informed of the said arrangements and to their knowledge, the liability of settling any outstanding amounts rests squarely on the Respondent.

14. He avers that it would be unreasonable for the Respondent to expect the grievants to follow their Claim with another unknown entity who is not a party to this matter before this Court. Additionally, he states that the amount quoted by the Respondent to be split between itself and Nyakiri is not accurate as it totals to Kshs.17,297,718.30 being a sum more than the award of Kshs.13,894,075.55.

15. He states that the Respondent has not disclosed to this Court that it employed an opaque system of paying some amounts to the Grievants. This was through sending consolidated cheques to different financial institutions where individual grievants would be advised to collect their dues. That it is therefore dishonest in demanding that grievants produce proof of payments received and outstanding amounts as it should have the same in its possession.

16. He concludes by stating that it is only fair that the execution proceedings are allowed to proceed so as to recover the amounts owed.

Claimant Submissions

17. The Claimant relied on the provisions of Section 4(4) of the Limitation of Actions Act which states as follows:

"An action may not be brought upon a judgement after the end of twelve years from the date on which the judgement was delivered (or where the judgement or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of default in making the payment or delivery in question ..."

18. It submitted that the Respondent was expected to have satisfied the claim due to the Grievants in full by December 2009 which it did not. Any reference to the limitation of actions should therefore be premised on this default date and the Respondent's allegation that the limitation of action should be premised on the judgment date is misplaced and misconceived and further based on misrepresentation of the law.

19. On whether the Respondent satisfied the claim awarded by this Court in favour of the Claimants, the claimant submitted that the Respondent has failed to prove that it has satisfied the Award of this Court. The Respondent has instead sought to cloud the issues around the Grievants claim by introducing documents and information which are not related to the matter currently before this court.

20. Regarding pay outs by Nyakiri Coffee Farmers' Co-operative, the claimant submitted that under the law, where there is business reorganization affecting an incorporated organization, it is the responsibility of the body undergoing restructuring to ensure that all liabilities are cleared and further that no creditors are prejudiced in any way by the said reorganization. Therefore, the Respondent acted in extremely bad faith by failing to bring to this Court's attention the alleged transfer of part of its liability to settle the award of this Court to another entity.

21. In conclusion, the Claimant submitted that the grievants are senior citizens of this Republic who have an outstanding and legitimate claim over the award made in their favour by this Court, they are deserving of relief from this Court to recover the outstanding amount against their claim. Some of these grievants have since passed on and the claim is being pursued by their estate and dependents.

22. It is therefore in the interest of justice and equity that this Court intervenes to secure the compliance by the Respondent with the Order of this Court of settling the award in favour of the grievants in full.

Respondent's Submission

23. Aside from placing reliance on the provisions of Section 4(4) of the Limitations of Actions Act, the Respondent relied on the case of **Njuguna v Njau [1981] 1 KLR 225** where the Court of Appeal held that:

“Action in the context of Section 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings.”

24. It also relied on the case of **Willis Onditi Odhiambo v Gateway Insurance Co. Ltd (2014) eKLR** where the court of Appeal judges held that Section 4(4) of the Limitation of Actions Act covers execution of Judgments. In the case they stated as follows: -

“In other words the appellant wanted to execute the said decree against the respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act which is in the following terms-

“4(4) an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered”.

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008”.

25. Further, in **ELC No. 5704 of 1992 (OS) Hudson Moffat Mbue v Settlement Fund Trustees & 3 others (unreported) Mutungi J** while considering the application of Section 4(4) of the Limitation of Actions Act where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed but was determined until after the period had expired observed thus;

“What I understand the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such execution”.

26. The Respondents based on the above cases submitted that the law is clear that this notice ought to fail as it is statute barred.

27. On fulfilment of its obligations, the Respondent reiterated its position in its pleadings and submitted that it has fully settled its indebtedness as per the Decree herein and that any ascertained unpaid amount is due from and payable by Nyariki Farmers’ Co-operative Society Ltd to its employees.

28. In conclusion, it submitted that it would be manifestly unjust and unfair to grant the orders sought in the Notice to Show Cause as considering both that the Claimant has paid the decretal sum and that the execution proceedings are statute-barred.

Analysis and Determination

29. The pleadings herein raise three issues; whether the execution process by way of notice to show cause is time barred and whether the Claimant/Decree Holder is entitled to execute.

Limitation

30. Section 4(4) of the Limitation of Actions Act provides as follows –

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

31. In the judgment of the Court herein, the Court awarded as follows –

“On anxious consideration of this matter, and in order to avert the collapse of this reputable Society and the inevitable loss of further jobs, I award and order that the Society should liquidate the said indebtedness as follows:

c. Kshs.600,000/= be paid by 31st December, 2003

d. The balance of Kshs.13,294,075.55 be paid in five (5) equal yearly instalments of Kshs.2,658,815.11 each year, with effect from 31st December, 2004 and on 31st December of the subsequent years, without default or any deductions whatsoever, until payment in full.

32. The last date for payment of the decretal sum was therefore 31st December 2008, assuming that the Respondent paid the decretal sum in compliance with the judgment. This would mean therefore that the limitation period of 12 years would have lapsed on 31st December 2020. The application herein having been made on 6th December 2019, was within the limitation period. It is thus not statute barred as alleged by the Respondent.

33. The second issue raised by the Respondent is that the amount due was to individual employees and not the Respondent.

34. The judgment does not state that the payment was to be made to individual employees. The claim having been filed by the Claimant, it has a right to execute the same. None of the individual employees was a party and none of them can therefore individually move the Court for payment.

35. I find that the Claimant/Applicant, is the proper entity to move the Court for purposes of execution having been the Claimant and therefore the decree holder.

36. The Respondent avers that there was a split of the Respondent into Nyakiri Coffee Farmers' Co-operative Society and Gititu Coffee Growers Co-operative Society through Memorandum of Understanding (MoU). The MoU annexed to the replying affidavit of David Njau Kinyanjui as annexure "DNKI" does not have a date and it is not possible to tell when it was signed or what period it covers, whether it is before or after the judgment. Further, the Claimant was not party to the same.

37. Thirdly, the judgment does not make any reference to the MoU.

38. The MoU is therefore an internal document of the Respondent that is only binding on the parties thereto. It cannot be used as a defence in the application herein. The only party against whom the decree herein can be executed is the Respondent in the claim against whom judgment was entered.

39. I have also perused the schedules of payments allegedly made by the Respondent and the said Nyakiri Farmers' Co-operative Society to the redundant employees. The same were never shared with the Claimant herein. The judgment having been in favour of the Claimant, it was incumbent upon the Respondent to share with the Claimant and indeed obtain the Claimant's approval that it had settled part of the decretal sum. The judgment was clear and explicit on the payment mode.

40. The Respondent has not demonstrated that it has paid the decretal sum as awarded by the Court.

41. No breakdown of payments made to each of the Grievants who were beneficiaries of the Court Award has been given by the Respondent either to the Court or to the Claimant. Indeed, one of the Grievants Joseph Kabera Cimbi has sworn an affidavit dated 24th May 2020 in which he states that the total dues payable to him was Kshs.272,120.95 out of which he has only been paid Kshs.101,100, leaving a balance of Kshs.171,020.95. He states that his case is a representation of all the Grievants.

Conclusion

42. From the foregoing, I find that Respondent has not demonstrated that it has settled the decretal sum herein. It is therefore directed to show cause why execution should not issue against it as per notice to show cause dated 6th December 2019.

43. Date for parties to appear before the Deputy Registrar for the notice to show cause will be given at the time of delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE