



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

JUDICIAL REVIEW NO. 6 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS UNDER ARTICLE 47 OF THE CONSTITUTION, SECTIONS 8 & 9 OF THE LAW REFORM ACT (CAP 26) AND ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ARTICLES 201(D) AND 221 OF THE CONSTITUTION

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF THE CONTEMPT OF COURT ACT, 2016

AND

IN THE MATTER OF UNSATISFIED JUDGEMENT DEBT AGAINST THE COMMISSIONER FOR CO-OPERATIVES & G.K. KARUKU

IN THE SUM OF KSHS. 27,718,055.45/= TOGETHER WITH INTEREST ON THE DECRETAL SUM AT 12% P.A. AND COSTS ARISING FROM THE JUDGEMENT OF THE EMPLOYMENT & LABOUR RELATIONS COURT CASE NO. 102 OF 2015 DELIVERED ON 24TH NOVEMBER 2017 AND THE SUBSEQUENT FINAL DECREE AND CERTIFICATE OF COSTS DATED 13TH FEBRUARY 2019 AGAINST THE COMMISSIONER FOR CO-OPERATIVES & G.K. KARUKU

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER FOR CO-OPERATIVES.....1ST RESPONDENT

G. K. KARUKU AS LIQUIDATOR OF TETU COFFEE FARMERS CO-OPERATIVE

SOCIETY LTD.....2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INDUSTRIALIZATION & CO-OPERATIVE

DEVELOPMENT.....3RD RESPONDENT

1. JOHN GITHAIGA GACHU NGWA

2. WINFRED WANGECHI THEURI

3. SAMUEL NDUNG'U GICHURE.....EX PARTE APPLICANTS

JUDGMENT

1. The Ex Parte Applicants filed a Judicial Review application dated 5th August 2019 seeking for the following reliefs:

a. an order of *mandamus* do issue against the Respondents jointly and severally, compelling them to pay the *Ex Parte* Applicants the judgement debt herein in the sum of Kshs. 27,718,055.45/= together with all accrued interest on the principal sum from the date of filing at 12% per annum and such further interest as will be found due at the date of settlement rising from the judgment of this court in ELRC Case No. 102 of 2015 (John Githaiga Gachungwa & Others (on behalf of 399 former employees of Tetu Coffee Farmers Society Ltd v the Commissioner of Cooperatives & 2 Others) delivered on 24th November 2017.

b. That in default of compliance with the order of *Mandamus* and failure to pay the judgement debt in the sum of Kshs. 27,718,055.45 together with all accrued interest amounts at 12% per annum, the order of *mandamus* be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act, 2016 to the persons holding the offices of the 1st, 2nd and 3rd Respondents requiring them to show cause why contempt of court proceedings should not be commenced against them 30 days after service of the orders of *mandamus*.

c. That in default of compliance with the order of *Mandamus* and failure to pay the judgement debt in the sum of Kshs. 27,718,055.45 together with all accrued interest amounts at 12% per annum and failing to show sufficient cause for non-compliance with orders of *mandamus* the *ex-parte* applicants be at liberty to commence of court proceedings against persons holding the offices of them and committed to civil jail for the contempt of this honorable court

d. That the respondents be condemned to bear the costs of this application.

2. The 1st Respondent Mr. Geoffrey Njeru Njang'ombe filed a replying affidavit and opposed the application for *mandamus* filed by the *Ex parte* Applicants herein. The 1st Respondent deponed that when the 2nd Respondent was appointed to take over from the 1st Liquidator, Tetu Coffee Growers Co-operative Society Ltd had no assets. This is because the assets had been distributed to 18 societies which were formed after split of Tetu Coffee Growers Co-operative Society Ltd. The deponent asserted that the 2nd Respondent had no way of settling the staff benefits other than distributing the liability to the new Societies which inherited the assets of Tetu Coffee Growers Co-Operative Society Ltd. The 1st Respondent deponed that the 2nd Respondent prepared a scheme of distribution which was approved by the 1st Respondent on how the staff benefits were to be paid by the new societies. The deponent asserted that staff benefits were to be paid by Mutheka F.C.S Ltd, Aguthi F.C.S Ltd, Gathaithi F.C.S Ltd, Githiru F.C.S Ltd, Gachatha F.C.S Ltd, Gakoe F.C.S Ltd, Giakanja F.C.S Ltd and Wachuri F.C.S Ltd. The deponent asserted that Chairmen of the above named societies were served with letters specifying the amount and staff by the name whose benefits they were to settle. The 1st Respondent deponed that the Claimants in ELRC No. 102 of 2015 failed to disclose to the Court that they had been paid part of their staff benefits to the tune of Kshs. 5,418,000/- through an overdraft obtained by the 1st Liquidator notwithstanding salary advances to the same staff which stood unpaid at the time of dissolution of Tetu Coffee Growers Co-Operative Society Ltd. The 1st Respondent further deponed that the assets of Tetu Coffee Growers Co-operative Society Ltd were to be proportionately shared among all 18 new societies and each new society was to repay it shares, debts, salaries for its former employees and liquidation maintenance and operations according to its obligation and agreement. The 1st Respondent deponed that the salary arrears of Tetu Coffee Growers Society Ltd staff from July to December 1999 were to be paid when funds were availed by individual societies for those who worked in their respective 18 factories which formed those new co-operative societies. The 1st Respondent deponed that the 18 factories of Tetu Coffee Growers Co-operative Society Ltd became the newly formed 18 Co-operative Societies and it cannot be said that there was no evidence that they inherited the factories including movable and immovable assets. The 1st Respondent deponed that the 1st and 2nd Respondents were facilitators of the liquidation process and at no time did the Claimants in this matter become the employees of the 1st Respondent and that therefore the burden of settling the staff salary arrears is to be borne by the newly formed societies as per the resolutions of the special general meeting.

3. Parties agreed to dispose of the Judicial Review Application by way of written submissions. The *Ex parte* Applicants' submitted that they have satisfied the parameters of the law to justify the prayers sought. The *Ex parte* applicants submitted 1st Respondent in his replying affidavit contended that the liabilities due to the Applicants ought to be settled by 18 societies formed as splinter societies of Tetu Coffee Farmers Co-operative Society Ltd. The *Ex parte* applicants submitted that this argument should be rejected, firstly because there is in existence a valid judgement from this Court (Ongaya J.) finding the 1st and 2nd Respondent jointly and severally liable to settle the decretal sum, and costs to be borne by the 1st Respondent. Secondly, the *Ex parte* Applicants had no privity of contract with the 18 splinter societies on employment. The *Ex parte* Applicants submitted that they were employees of Tetu Farmers Cooperative Society Ltd and consequently the process of liquidation having been put in motion, the Liquidator and the Commissioner for Co-operative Development are the proper persons to settle the liabilities of the said Co-operative Society Ltd in liquidation. Thirdly, they submitted, it was the finding of the Court that the 1st Respondent has wide statutory powers under the Co-operative Societies Act. The Applicants submitted that the 1st Respondent had failed and/or neglected to exercise his residual supervisory powers to ensure payment of salary arrears as well as other terminal benefits due to the *Ex parte* Applicants. The *Ex parte* Applicants submitted that from the foregoing, it is evident that they have demonstrated that there exists an unsatisfied decretal sum due and owing to them by the 1st and 2nd Respondents as per the attached copies of decree and certificate of costs. It was also submitted that the 1st Respondent has both a statutory and a legal duty as Commissioner of Cooperatives to ensure that the

liquidation process of Tetu Coffee Farmers Co-operative Society Ltd is completed and all liabilities paid in full. The *Ex parte* Applicants submitted that the judgment awarded to them was the sum of Kshs. 27,718,055.45 which sum has attracted interest from the date of filing suit 5th April 2009 a total of 9 years, 7 months (as at 5th November 2019) and is accruing interest amounting to Kshs. 277,180.55 every month. The *Ex parte* Applicants submitted that the costs of the suit (ELRC 102 of 2015) awarded against the 1st Respondent were assessed at Kshs. 1,138,285.80 on 13th February 2019 and the same continues to accrue interest at the rate of 14% per annum which amounted to Kshs. 119,520/- as at 13th November 2019 and further interest at the rate of Kshs. 13,280/- per month until the same is settled in full. The *Ex parte* Applicants urged the Court to grant the prayers sought. They cited the case of **Republic v Principal Secretary State Department of Interior & Principal Secretary Ex parte Awadh Salim & 12 Others [2018] eKLR** and **Republic v Town Clerk of Webuye County Council & Another [2014] eKLR**.

4. The 1st, 3rd and 4th Respondents submitted that the judgement of Ongaya J. was crystal clear as to who was to settle the judgment debt. They submitted that order (a) of the Judgment read; “*that the 2nd defendant to disburse, pay or release to the plaintiffs their salaries and terminal benefits of Kshs. 27,718,055.45 and for that purpose the 1st and the 2nd defendants are jointly and severally liable for the full realization of the said payment in line with their respective statutory duties or powers as provided for under the Co-operative Societies Act.*” The 1st, 3rd and 4th Respondents submitted that the 1st Respondent performed his duties as is envisaged under the Co-operative Societies Act, by dint of approving a scheme of distribution of assets and liabilities that included the salaries and terminal benefits of the *Ex parte* Applicants. They submitted that they therefore cannot be said to have failed in their statutory duties as they went ahead to approve how the liabilities were to be paid. The 1st, 3rd and 4th Respondents submitted that a special general meeting of the defunct Tetu Coffee Growers Co-operative Society Ltd was held on 19th January 2000 and all the *Ex parte* Applicants herein attended and resolved that the splinter societies would take up the assets and liabilities, including their salaries, of Tetu Coffee Growers Co-operative Society Ltd which was under liquidation. The 1st, 3rd and 4th Respondents submitted that the *Ex parte* Applicants have never been their employees and cannot now be seeking salaries against them. The 1st, 3rd and 4th Respondents submitted that under Section 68(1)(b) of the Co-operative Societies Act, the Liquidator has power to institute and defend suits on behalf of the society in his own name or office and to appear before the Tribunal as a litigant in person or on behalf of the society. The 1st, 3rd and 4th Respondents submitted that in this instant application there was no proof that the liquidator was at all served to appear in the proceedings and neither did he participate, whereas he is the person the court obliged to settle the judgment debt. The 1st, 3rd and 4th Respondents submitted that if at all the *Ex parte* Applicants had been aggrieved by any of the decisions of the 1st Respondent, they had 30 days to appeal to the Tribunal which they never did. The 1st, 3rd and 4th Respondents submitted therefore that this application must fail as against them since the burden of settling the judgement debt lies on the 2nd Respondent who never appeared in those proceedings. They submitted that they had only played their statutory duties as envisaged in law as per the directions of Justice Ongaya. They cited the authorities of **Republic v Ali and Another Ex parte The Standard Ltd & Baraza Ltd [2018] eKLR** and **James Samwel Mburu v Hon. A.G & Another [2017] eKLR**.

5. The genesis of this dispute is the matter involving the *Ex parte* Applicants in Cause No. 102 of 2015 – John Githaiga Gachungwa & 3 Others (suing on behalf of themselves and over three hundred and ninety five former workers of the defunct Tetu Coffee Farmers Co-operative Society Limited) v Commissioner for Co-operatives & 2 Others [2017] eKLR. In that suit, hereafter ‘primary suit’, the *Ex parte* Applicants successfully sued the 2nd Respondent as Liquidator of the society in question. Orders were made as against the Liquidator and the 1st Respondent in the primary suit. There is nothing on the satisfaction of the decree of the court that requires the involvement of the Hon. Attorney General or the Principal Secretary Ministry of Industrialization & Cooperative Development. When leave was sought even the PS Ministry of Industrialization & Cooperative Development was not a party. I order the names of the 3rd and 4th Respondents struck out from these proceedings. Now to turn to the Cause that precipitated this suit, whereas there was a judgment of the court rendered in November 2017 in the primary suit, the judgment of Ongaya J. did not convert the Respondents to employers of the *Ex parte* Applicants. In the decision the learned Judge found in favour of the over 395 former employees of the defunct Tetu Coffee Farmers Cooperative Society. From the material before me it is clear there was substantial compliance with the orders of the Court and the decree has been substantially satisfied. Having not been presented with statements of accounts by the *Ex parte* Applicants I am not persuaded that an order of mandamus should issue directed at anyone since the Rulings and Judgment of the Court placed the sum owed at much lower sums than are claimed in the Judicial Review. Having so found and on account of the foregoing, I dismiss the Judicial Review with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 25th day of February 2020

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy

Registrar