



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 49 OF 2013

(Formerly Meru High Court Civil Case No.34 of 2005)

MISHACK KIRIMI MWITHIMBU..... 1ST CLAIMANT
KITHINJI MBERIA.....2ND CLAIMANT
JUSTUS GIKUNDA.....3RD CLAIMANT
SILAS KINOTI.....4TH CLAIMANT
GEOFFRY KIRIMI.....5TH CLAIMANT
LAWRENCE MAGANJU.....6TH CLAIMANT
JUDITH RIMA.....7TH CLAIMANT
ZACHARIA KIRUKI.....8TH CLAIMANT

VERSUS

THE LIQUIDATOR NKUENE FARMERS CO-OPERATIVE

SOCIETY LIMITED..... 1ST RESPONDENT
COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....2ND RESPONDENT
KIERU FARMERS CO-OPERATIVE SOCIETY LIMITED.....3RD RESPONDENT
KAUBAU FARMERS CO-OPERATIVE SOCIETY LIMITED.....4TH RESPONDENT
KAGURU FARMERS CO-OPERATIVE SOCIETY LIMITED.....5TH RESPONDENT
TAAU FARMERS CO-OPERATIVE SOCIETY LIMITED.....6TH RESPONDENT
MUTEGO FARMERS CO-OPERATIVE SOCIETY LIMITED.....7TH RESPONDENT
MUGURU FARMERS CO-OPERATIVE SOCIETY LIMITED.....8TH RESPONDENT

MUNANI FARMERS CO-OPERATIVE SOCIETY LIMITED.....9TH RESPONDENT
NKUMARI FARMERS CO-OPERATIVE SOCIETY LIMITED.....10TH RESPONDENT
NTEMWENE FARMERS CO-OPERATIVE SOCIETY LIMITED.....11TH RESPONDENT
KANGURWE FARMERS CO-OPERATIVE SOCIETY LIMITED....12TH RESPONDENT
GITUNE FARMERS CO-OPERATIVE SOCIETY LIMITED.....13TH RESPONDENT
NUGU FARMERS CO-OPERATIVE SOCIETY LIMITED.....14TH RESPONDENT
NKUNGUGU FARMERS CO-OPERATIVE SOCIETY LIMITED.....15TH RESPONDENT
KANDIGI FARMERS CO-OPERATIVE SOCIETY LIMITED.....16TH RESPONDENT
RUGETU FARMERS CO-OPERATIVE SOCIETY LIMITED.....17TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 29th June, 2017)

RULING

The court delivered a ruling in the suit on 27.05.2016 on the notice to show-cause why warrants of arrest should not issue against the 1st and 2nd respondents for their arrest and committal to civil jail in execution of the decree. The court determined the notice to show-cause with orders as follows:

- 1) In view of the orders by way of declarations and directives in the judgment and the material now before court, the liability and duty to pay the claimants' terminal dues as found due in the judgment rests with the 1st respondent, the liquidator.
- 2) In absence of any other material, the amount due to the claimants from the 1st respondent is **Kshs. 16, 801, 164.00** less the money shown by the 1st respondent to have been paid to the claimants out of the **Kshs. 16, 801, 164.00**.
- 3) The 1st respondent to pay the claimants the amount due in order (2) above by 01.09.2016 failing interest at court rates to be payable thereon from the date of the suit, 05.05.2005, till full and final payment.
- 4) The 1st respondent to file in court within 30 days from the date of this ruling an affidavit setting out the schedule of the money already paid to the claimants out of the **Kshs. 16, 801, 164.00** together with a time bound scheme of arrangements to pay the claimants the outstanding amount taking into account the schedule of distribution of liabilities at page 35 of the scheme of distribution approved by the liquidation committee on 9.11.2000 and filed in court on 22.10.2015 as exhibit PNG1 on the replying affidavit of P.N. Gichuki.
- 5) The parties to mention the matter on a convenient date for further directions and orders by the court as will be necessary.
- 6) Each party to bear own costs of the notice to show-cause dated 14.04.2015.

On 24.05.2017 one Boniface Mwaura Karanja filed in person a notice of motion dated 23.05.2017. The notice of motion did not cite the law under which it was brought but prayed for orders:

- a) That the order delivered on 15.07.2016 be reviewed or set aside by the honourable court.
- b) That the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 17th respondents be held responsible to pay claimants.
- c) That if the order is not reviewed or set aside it will be detrimental to the 1st respondent or applicant.

The application was supported with the affidavit attached thereto sworn by the said Boniface M. Karanja. The said Boniface M. Karanja stated that he is the current liquidator of Nkuene Farmers Co-operative Society Limited effective his appointment by the 2nd respondent effective 20.08.2007. That prior to the appointment, he says that there had been three previous liquidators namely Festus Miriti, Andrew B. Mbui, and Robert Mburu Mungai who was replaced by the said Boniface M. Karanja. It is his case that the said Robert Mburu Mungai formed the Liquidation Committee with representation from all the new societies being the 3rd to 17th respondents. The purpose was to involve the new societies to make the liquidation process easier, participative and transparent. The outstanding salaries, allowances and arrears agreed upon were paid out. On 08.03.2001 the Liquidation Committee signed the scheme of distribution of the assets and liabilities. He states that in that scheme of distribution at page 16, certain assets were set aside to be sold to pay the staff benefits, liquidator's fee and other creditors. The assets to be sold as per the said page 16 included land at head office, six parcels of land, and motor vehicle valued at a sum of Kshs. 21, 800,000.00. All the assets had been sold except the one valued at Kshs. 500, 000.00 yet the claimants' claims remained not settled as had been agreed. On 20.08.2007 the said Boniface M. Karanja was appointed and the then outgoing liquidator one Mburu Mungai did not handover to the said Boniface M. Karanja who proceeds to state as follows:

- a) As at time of his appointment on 20.08.2007, the remaining properties and assets were actually distributed to the new registered societies.
- b) The new societies were irregularly registered because the liquidator's terms and conditions of service were to sell the properties and pay creditors and then distribute their remaining assets. As at 20.08.2007 the properties set aside to be sold to pay workers' benefits had already been sold off.
- c) Page 35 of the scheme of distribution provides the distribution of assets and liabilities to the new societies (3rd to 17th respondents) so that the 3rd to 17th respondents and not the 1st respondent should be held liable to pay the employees' terminal dues.

The claimants filed the grounds of opposition on 07.06.2017 and dated 06.06.2017 through Mithega & Kariuki Advocates. It was stated that the application be dismissed with costs upon the following grounds:

- a) That no basis for review of the orders of the court dated 27.05.2016 has been established as the orders of the court to the effect that the 1st respondent is liable to pay the claimants' dues are in line with provisions of section 66 of the Co-operative Societies Act.
- b) That the orders sought in prayer 2 are superfluous in the light of the powers of the 1st respondent provided for at section 66(e) of the co-operative Societies Act.
- c) That the orders sought to be reviewed of 15.07.2016 are non-existent.

The court has considered the material on record and makes findings as follows:

- a) Despite service the 2nd to 17th respondents failed to file papers to oppose the application and did not attend the hearing of the present application. The court considers that the finding by the court is that the 1st respondent is to satisfy the decree herein in favour of the claimants, and further the court considers that the ruling by the Court of Appeal in Civil Application No. NYR.41 of 2015 (UR

22/15) granted orders of stay of execution of the decree against the 3rd to 14th respondents pending the hearing and determination of the appeal; thus the 3rd to 14th respondents would not, understandably so, be involved in the present application.

b) As urged for the claimants, there are no orders dated 15.07.2016 that may be subject of review by the court.

c) The applicant sought to review the orders in the ruling delivered on 27.05.2016 and orders issued 15.07.2016 and the court returns that the applicant has not established the known grounds for review such as fresh evidence which with due diligence was not available at the hearing, or an error or mistake on record, or manifest injustice that will result if the review was not allowed.

d) The applicant has confirmed that it is for the 1st respondent to pay the terminal dues for the employees and since there was no privity of contract between the new societies (3rd to 17th respondents) and the claimants, it was for the liquidator to settle the claimant's dues as already found in the ruling delivered on Friday 27.05.2016. The court considers that an agreement between the respondents amongst themselves may not relieve the 1st respondent of the duty to act and pay the claimants' dues as per the 2nd respondent's terms of reference as the liquidator.

e) The applicant has confirmed that assets were set aside to be sold by the liquidator to settle the claimants' terminal dues and an account had not been rendered by the liquidator as the claimants' claims remained not settled. Thus, the court upholds its opinion and finding in the ruling delivered on 27.05.2016 that it is for the 1st respondent to settle the claimant's dues per his terms of the appointment. The arrangements between the 1st respondent and third parties in which the claimants are not parties would not, in the court's opinion, absolve the 1st respondent from the duty to pay the claimants' terminal dues as owed by Nkuene Farmers Co-operative Society Limited now in liquidation and as per provisions which govern the liquidation being sections 65 to 69 of the Co-operative Societies Act, Cap 490.

f) In view of the above findings together with the further finding that the application for review was filed belatedly after unexplained long delay, the court returns that the application will fail.

In conclusion the application filed on 24.05.2017 by way of the notice of motion dated 23.05.2017 is hereby dismissed with costs.

Signed, dated and delivered in court at Meru this Thursday, 29th June, 2017.

BYRAM ONGAYA

JUDGE