



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 102 OF 2015

(Formerly High Court Civil Case No. 59 of 2009 at Nyeri)

**JOHN GITHAIGA GACHUNGWA, WINFRED WANGECHI THEURI,
MARTIN KANYEKI WAIHIGA, AND SAMUEL NDUNGU GICHURE**

(Suing on behalf of themselves and over three hundred and

ninety five former workers of the defunct Tetu Coffee

Farmers Co-operative Society Limited).....PLAINTIFFS

VERSUS

COMMISSIONER FOR CO-OPERATIVES.....1ST DEFENDANT

G.K. KARUKU.....2ND DEFENDANT

HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

AND

GIAKANJA, KAGUMO, GACHATHA, GAKOE, KAMUYU,

KIANDU, CHORONG'I, WACHURI, GATHAITHI, THIRIKU,

KIHUYO, GITHIRU, KIGWANDI, MUNG'ARIA, MUTHUA – INI,

KAIGURI, ITHEKAHUNO, AND

GAKI CENTRAL COFFEE FACTORIES.....THIRD PARTIES

(Before Hon. Justice Byram Ongaya on Friday, 24th November, 2017)

JUDGMENT

The plaint was filed on 08.04.2009 through Gori & Ombongi Advocates. The initially sued liquidator being the 2nd defendant known as Mburu Mungai & Associates filed a defence on 03.07.2009 through

Gatumuta & Company Advocates and prayed that the suit be dismissed with costs. By order in the ruling delivered on 19.06.2014, the court ordered that Mburu Mungai & Associates be substituted with the subsequently appointed liquidator being the named 2nd defendant. The plaintiffs filed an amended plaint on 10.05.2013 through Muthigani & Company Advocates and prayed for judgment against the defendants for:

- a) An order that the defendants jointly and severally disburse, pay or release to the plaintiffs their salaries and terminal benefits of Kenya Shillings 27,718,055.45 plus interest at bank rates from July 1999 to date.
- b) Costs and interest of the suit be borne by the defendants.
- c) Such other relief as the honourable court deems fit to grant.

The plaintiffs are 399 former employees of the Tetu Coffee Farmers Co-operative Society Limited. The plaintiffs while in employment were deployed to serve across the factories being the mentioned 3rd parties. The list of the claimants was filed as per exhibit SNG on the affidavit of Samuel Ndung'u Gichure sworn on 28.09.2012.

The members of the Tetu Coffee Farmers Co-operative Society Limited resolved that it was desirable to liquidate the said Tetu Coffee Farmers Co-operative Society Limited. In accordance with the provisions of the Cooperative Societies Act and by reason of the said resolution, with concurrence of the 1st defendant, a committee was appointed to inquire into the affairs of the Cooperative Society. The terms of the committee were set out in Gazette Notice No. 2381 of 21.04.1999. Subsequently, the 1st defendant appointed Robert Mburu Mungai trading as Mburu Mungai & Associates as the liquidator of Tetu Coffee Farmers Co-operative Society Limited as per Gazette Notice No. 1584 of 17.03.2000. The liquidator was subsequently changed to the 2nd defendant.

On 3.12.2015 the Attorney General obtained leave of the court to serve third party notices upon the factories mentioned as third parties purportedly being the splinter Co-operative Societies formed from the Tetu Coffee Farmers Co-operative Society Limited. Yvonne Muthoni Muhoro Advocate acted for the third parties.

The plaintiffs opted to rely on the pleadings and the supporting affidavit of Samuel Ndung'u Gichure sworn on 03.11.2014, exhibits attached thereto together with the documents filed for the plaintiffs. The defendants failed to file witness statements and their respective cases were closed without the defendants availing witnesses. The 1st and 3rd defendants' submissions relied upon the pleadings and affidavits on record. The parties, except the 2nd defendant, filed final submissions.

The **1st issue** for determination is whether the plaintiffs have established their claim for the amount of money as prayed for. The court has considered the material on record and there is no dispute that as submitted for the plaintiffs, the plaintiffs' salaries, terminal dues and statutory dues deducted but not remitted have remained unpaid by the liquidator. As submitted for the plaintiffs, the defendants have not challenged in any material respect the amount as computed in the documents filed for the plaintiffs and as prayed for. Further and as submitted for the plaintiffs, the court returns that the amount claimed was assessed and ascertained by the liquidator, the 2nd defendant, as per exhibits SNG2a, SNG3, SNG 4 and SNG5 on the affidavit of Samuel Ndung'u Gichure sworn on 03.11.2014. The plaintiffs further relied upon exhibits PNG2, PNG3f, and PNG3g on the affidavit of P.N. Gichuki sworn on 22.10.2015 to establish their claim. The court has revisited the defendant's pleadings and submissions and returns that the defendants have not in any material respects rebutted the amount as claimed by the plaintiffs. Thus, the court has considered the cited material on record and returns that the plaintiffs have established that they are entitled and they have not been paid their respective terminal dues as claimed and prayed for in the sum of **Kshs.27,718,055.45**.

The **2nd issue** is to determine, of the defendants and cited third parties, who is liable to pay the plaintiffs

the amounts found due. The plaintiffs have submitted that the court should follow its holding in **Meshack Kirimi Mwithimbu –Versus- The Liquidator, Nkuene Farmers Co-operative & Others [2016]eKLR** that the Commissioner for Co-operatives Development, the 1st defendant, was the embodiment of his office and that of the liquidator, the 2nd defendant, and therefore the court should find that both the 1st and 2nd defendants are liable to pay.

It was further submitted for the plaintiffs that the 1st defendant had wide and far reaching powers under statute and generally about the ensuing liquidation proceedings so that it was appropriate to censor the 1st defendant for dereliction of his statutory duties. It was submitted that it was truly a scandal that the plaintiffs' terminal benefits had remained unpaid for the last seventeen years and the liquidation process was on-going to date.

The 1st and 3rd defendants submitted that Tetu Coffee Farmers Co-operative Society Limited was placed under a liquidator for purposes of distribution of its assets and liabilities as per section 65 of the Co-operative Societies Act, Cap.490 which provides thus, **“Where the registration of a co-operative society is cancelled, the Commissioner may appoint one or more persons to be liquidators of that society (hereinafter referred to as the liquidator) and all property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect.”**

The 1st and 3rd defendants submitted that the liquidator in consultation with the duly appointed liquidation committee prepared a scheme of distribution which was approved by the 1st defendant. Further, under the scheme, the plaintiffs' salaries and terminal benefits were to be paid by the newly formed societies which took over the assets and liabilities of Tetu Coffee Farmers Co-operative Society Limited. The 1st and 3rd defendants submitted that the scheme of distribution was acceptable to the plaintiffs and each newly formed society was allocated or apportioned the liability of the amount to pay the plaintiffs accordingly. It was submitted that the liquidator then communicated the obligations to each of the newly formed societies. It was also submitted that it was the liquidator's view that since there were no assets to sell and a factory taken up by any of the newly formed societies could not be sold to pay the employees, it was prudent to distribute the staff salary arrears to the current societies which inherited the assets and liabilities of the former Tetu Coffee Farmers Co-operative Society Limited. The 1st and 3rd respondents then concluded the submissions thus, **“We therefore submit that none of the respondents is liable to pay the claimants claim. This responsibility falls squarely upon the newly formed societies as clearly indicated by the liquidator in his letter to the 1st respondent and the scheme of distribution attached as exhibit PNG2.”**

For the cited and purported third parties, it was submitted that the 2nd respondent or defendant was the one liable to pay the sum of Kshs. 27, 718, 055.45 as the third parties were not liable in view of section 65 of the Act.

The 2nd defendant offered no evidence or submissions to oppose the plaintiffs' claims and prayers.

The court has considered the material on record and the parties' respective positions and makes findings as follows:

- a) All assets and liabilities of the former Tetu Coffee Farmers Co-operative Society Limited vested in the liquidator as per section 65 of the Act quoted earlier in this judgment.
- b) As per section 63 of the Co-operative Societies Act, upon cancellation of the registration of the former Tetu Coffee Farmers Co-operative Society Limited, the Society ceased to exist as a body corporate.
- c) The effect of the cancellation of registration of the former Tetu Coffee Farmers Co-operative Society Limited was that the employees of the society were rendered redundant and they became entitled to terminal benefits as per section 40 of the Employment Act, 2007 as read together with

the terms of the contracts of service between the parties. By reason of section 65 of the Co-operative Societies Act, the liquidator became liable to pay the plaintiffs' final benefits consequential to the ensuing redundancy and liquidation.

d) There is no evidence before the court that the newly formed cooperative societies said to have inherited the factories enumerated as third parties agreed to take up the liability to pay the plaintiffs' final benefits and further, there was no evidence that the plaintiffs were privy to any such arrangement. Further, there was no evidence that the liquidator transferred funds to the alleged newly formed societies to pay the plaintiffs' claims. In any event, the liquidator's duty was to pay the plaintiffs as creditors to the former Tetu Coffee Farmers Co-operative Society Limited and there was no statutory or otherwise provision to pass that obligation to third parties or to vitiate that obligation as was vested in the liquidator.

e) It is clear that the entities mentioned as third parties are factories and the court returns that such are not Co-operative societies that would be corporate persons under the Co-operative Societies Act. Accordingly, the court returns that there were no proper 3rd parties cited in the case and as the defendants sought to enjoin the newly formed cooperative societies as third parties, that intention was obviously not achieved at all. The court returns that the cited factories were not persons in law as defined in Article 260 of the Constitution thus, "**person**" includes a company, association or other body of persons whether incorporated or unincorporated. The cited factories not being persons in law, the court returns that it lacks jurisdiction to make orders or entertain proceedings against them because a proper party to the suit is a compulsory prerequisite for the court to validly exercise jurisdiction.

f) The court reckons that the liquidation process is still on-going and there is nothing under the law to stop the 2nd defendant as the liquidator to discharge the obligations as vested per section 65 of the Co-operative Societies Act. Since the 1st defendant has wide statutory powers over the 2nd respondent, the judgment would be entered jointly and severally against the 1st and 2nd defendants so as to achieve full compliance. While making that finding, the court considers that determination or review of the 2nd defendant's tenure of office is undertaken by the 1st defendant in exercise of the relevant statutory powers.

g) The court has considered the 1st defendant's statutory role in the matter together with the plaintiffs' valid lamentations about the shortcoming in the exercise of the said statutory powers thereof spanning over 17 years without payment of the plaintiffs' terminal dues in view of the ensuing liquidation proceedings. The court returns that in the circumstances of the case, the 1st defendant will meet the plaintiffs' costs of the suit.

h) The plaintiffs prayed for interest from the date of filing of the suit. The 1st and 3rd defendants have submitted that interest should not be granted because the claimants failed to pursue the newly formed societies and instead filed suit against the defendants. The court has found that the plaintiffs had no privity with the alleged newly formed societies and further found that the 2nd defendant had a duty to pay the claims within the over-arching statutory powers of the 1st defendant. To balance justice, the court will allow a window within which the plaintiffs' final benefits will be paid without interest and in default, interest shall run at court rates from the date of filing the suit till full payment.

i) Finally, the court has considered the submission by the 1st and 3rd defendants that there were no assets to be sold to pay the plaintiffs' final benefits as claimed in the present suit. The court returns that there was no case that the said former Tetu Coffee Farmers Co-operative Society Limited was insolvent and in which event, the court returns that Part VIII of the Employment Act, 2007 on insolvency of an employer would not have been available towards satisfaction of the plaintiffs' final benefits. Indeed, it was not the defendants' case that the former Tetu Coffee Farmers Co-operative Society Limited was insolvent. That having been not the case, the court once again

returns that there is no reason why the 2nd defendant should not be held liable to satisfy his statutory duty as the liquidator of that former society which was an otherwise going concern and, whose assets and liabilities were vested in the 2nd defendant as the liquidator.

In conclusion, judgment is hereby entered for the plaintiffs against the defendants for:

- a) The order 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 2nd defendants are jointly and severally liable for the full realisation of the said payment in line with their respective statutory duties or powers as provided under the Cooperative Societies Act.
- b) The payment in order (a) above to be effected by **01.03.2018** failing interest at court rates be payable thereon from the date of filing of the plaint till full payment.
- c)The 1st defendant shall be liable to pay the plaintiffs' costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 24th November, 2017**.

BYRAM ONGAYA

JUDGE