



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1299 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 21st November, 2017)

JOHN KAHIATO BARI

JAMES WACIURI

BENARD KANADEA

JACKSON WARUI NJAU

(All suing on behalf of themselves and as

Representatives of all former employees

of the Kenya Cooperative Creameries Limited

as per the schedule of Names attached)..... CLAIMANTS

-VERSUS-

NEW KENYA COOPERATIVE CREAMARIES LIMITED1ST RESPONDENT

THE ATTORNEY GENERAL (for the Government

of the Republic of Kenya).....2nd RESPONDENT

RULING

1. On 11th July 2017, this Court directed the parties herein to file submissions and address Court on the relationship between New KCC Cooperative 1st Respondent herein and KCC Cooperative to determine the relationship between the 2 entities.
2. This order was informed by submissions advanced by the Counsel for 1st Respondent that the 1st Respondent was not in existence when the cause of action presumably occurred.
3. The Claimant filed their submissions on 9th August 2017. They have submitted that the Claimants were employees of the precursor parastatal to New KCC the 1st Respondent. The Claimants were

apparently summarily terminated in November 1997 after a strike. Their Union filed Case No. Industrial Court No.24/1994 and the Court found that the Claimants were entitled to their terminal benefits.

The Claimants submit that pursuant to the Court's order, the management of then KCC Limited produced a schedule of payments due for every employee in terms of their terminal benefits and gratuity totaling Kshs.109,640,482/= and unremitted Maziwa Sacco dues totaling Kshs.92,803,457/=.

5. (Page 64-107 and 120 and 121 of the Claimants' documents) shortly thereafter and to their surprise, receivers were appointed by a Party Creditor, Kenya Commercial Bank to take over the Company's assets in a receivership allegedly to recover monies advanced to the company by the said bank. This necessitated the Claimants to move to Court to obtain a winding up order against the Company to enable them appoint their own receiver to wind up the company and secure their benefits.

6. The Claimants submits that while the winding up case was proceeding in Court, the Government of the Republic of Kenya entered into negotiations with the Parastatal Company Creditors in which the Government offered to pay-off all outstanding debts due from the Company to recover the company and reopen its operations. That the winding up cause was abandoned and the Company reopened operations and proceeded with its operations with a firm promise to pay the Claimants terminal benefits.

7. They further submit that the Government did pay the Company's debts but the Claimants' dues were not paid with a promise that they were to be paid once the company operations resumed. That the Company did resume operations but under a new name New KCC Limited with the shareholding being the government in the name of one Joseph Kinyua the then PS Finance holding all the shares save for one held by another director to complete the Company.

8. The Claimants state that the issue that arises from these actions is whether the New KCC Limited was a different legal entity from KCC Limited. On this point the Claimants submit that KCC Limited was a government entity envisaged under the provisions of the State Corporations Act Section 2(b) which describes a State Corporation as a body corporate established before or after the commencement of the Act and in which the Government is the majority shareholder or a subsidiary of such a Corporation.

9. It is also the Claimants' submission that when the Government paid the creditors of KCC Limited it retook its operations as a going concern. They further state that the offices of KCC Limited and New KCC Limited remains the assets of the Company, the NSSF and NHIF numbers, the employees who were in service with KCC Limited, remain registered in the name of KCC Limited and the employees were retained by New KCC Limited.

10. The Claimants submit that the Government only effected a change of name from KCC Limited to New KCC Limited and as such this could not absolve them from responsibility. They cite Section 20(4) of the Companies Act, Cap 486 where it states:-

“A change of name by a company under this section shall not affect any rights or obligations of the Company or render defective any legal proceedings by or against the Company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.”

11. They further rely on Section 66 of the Companies Act No. 17 of 2015 which is to the effect that:-

“A change of a Company's name has effect from the date on which the certificate of change of name is issued. The change does not affect any rights or obligations of the company or invalidate any legal proceedings by or against it. Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name.”

12. They also cite the case of **Kenya Scientific Research International Technical and Allied Institutions Workers Union Vs Flame Tree Brands Limited and 2 Others (2013) eKLR** Justice

James Rika expounded on the question of change of business name as follows:-

“Change in business name does not mean the business has ceased to exist.... The Respondents continued to own the business, manufacture and sell cosmetics form the same business premises, under the same management. There were no roles phased out or diminished by the employer; there were no new roles introduced at the workplace...”

13. It is the Claimants’ position that the New KCC Limited remain the same business and there was no change in the operations of the company. That the exercise was a mere rebranding and had no effect on the status of the Claimants and the Company’s obligations towards them.

14. The Claimants also submit that there was a transfer of business from one entity to another which therefore meant that assets and liabilities were also transferred. They cite the Indian case of **Argha Sen Vs Interra Information 2007 75 SCL 150 Delhi High Court** where it was held:-

“Since this company merged with the respondent-company (Transferee Company) the respondent company will have to assume the liability to pay the debt of the transferor company as well... Once the liabilities are taken over by the respondent company, it cannot state that there is no privity of contract between the petitioner and the Respondent Company and the Respondent Company is not liable to make the payment.”

15. The Claimants pray for the Court to find the 1st and 2nd Respondents jointly liable.

16. The 2nd Respondent in their submissions give a brief history of the wound up KCC Limited wherein they state that the High Court on 30th January 2003 in Winding Up order in Cause No. 1 of 2002 which was subsequently served upon the official receiver on the 26th February, 2003. That the official receiver caused the winding up order to be gazetted in Gazette Notice No. 1756 of 14th March, 2003.

17. That KCC Limited was indebted to Kenya Commercial Bank (KCB) who set in motion the winding up process. KCB appointed receivers who tried to manage the Company back to profitability but their efforts were not fruitful. That a decision was then made to sell by public advertisement and the highest bid came from KCC (2000) at Shs. 400,600,000 and the sale was completed in August, 2002.

18. The Respondents submit that after the winding up order was issued and served upon the official receiver, the official receiver demanded a statement of affairs with regard to the affairs of KCC Limited from the Receiver Managers which statement was received on 16th June, 2003, establishing the following:-

A. That KCC Ltd was insolvent, its liabilities were in excess of its assets.

B. That all the assets of KCC Ltd were sold to KCC (2000) Ltd vide an agreement for sale dated 21st April 2001.

C. That the assets of the said company were sold under powers contained on four debentures made in favour of Kenya Commercial Bank.

D. That KCC Ltd had no assets at all, that could be managed by the Official Receiver and utilized to pay dividends to the creditors.

19. Further that the Government made a policy decision to buy back the KCC business from KCC 2000 Limited and made a capital injection to revive the Company. That New KCC was then registered as a state corporation under the repealed Companies’ Act as a new legal entity and KCC Limited was wound up vide High Court Misc. Application No. 846 of 2005 on 15.11.2005.

20. It is the Respondents’ submission that the Claim cannot be sustained as New KCC, KCC Ltd and

KCC 2000 Ltd are all different legal entities and as such cannot be compelled to bear liabilities of the now liquidated KCC Limited and wound up KCC 2000 Limited.

21. The Respondents pray for the claim to be dismissed with costs.

22. From the submissions filed herein and documentation available, when KCC (old) was facing financial problems, the Claimants herein took them to Court and instituted a winding cause. The winding cause was never concluded because the Government of Kenya initiated a process to bail out KCC and offered to pay off all outstanding debts.

23. The winding cause was abandoned and the Government then decided to have the company resume its operations under a new name New KCC Limited with the shareholding being 99% Government.

24. The Respondent submitted that KCC wound up but they did not submit evidence to this aspect.

25. The Claimants have submitted that since the (old) KCC was never wound up, what happened was a mere change of name as envisaged under Section 20(4) of the Companies Act (supra). This change of name in my view did not therefore affect the business entity. This has been held in **Kenya Scientific Research International Technical and Allied Institutions Workers Union vs Flame Tree Brands Limited & 2 others (2013) eKLR** (supra).

26. The relationship between the Old KCC and New KCC is perceived from the documents filed herein – see communication from New KCC (Appendix 9) page 126 of Claimants’ documents showing payments to NSSF for one Dedan Maera Ngali who was an employee of the Old KCC. This shows that the New KCC retained all documents in relation to the old employees of the Old KCC because the entity remained one.

27. Since the ‘Old’ KCC and the New KCC remained in principal one entity same for the change in name, the 1st Respondent cannot run away from the liabilities if any that are due to the Claimants.

28. It is therefore my finding that since New KCC is a Government Parastatal, it is liable with the 2nd Respondent if there are any dues payable to the Claimants. Those are the orders of the Court.

Read in open Court this **21st day of November, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wathome for Claimant – Present

No appearance for Respondent