



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)

MESHACK 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.....	6 TH
RESPONDENT	
MUTEGO FARMERS CO-OPERATIVE SOCIETY LIMITED.....	7 TH
RESPONDENT	
MUGURU FARMERS CO-OPERATIVE SOCIETY LIMITED.....	8 TH
RESPONDENT	
MUNANI FARMERS CO-OPERATIVE SOCIETY LIMITED.....	9 TH
RESPONDENT	
NKUMARI FARMERS CO-OPERATIVE SOCIETY LIMITED.....	10 TH
RESPONDENT	
NTEMWENE FARMERS CO-OPERATIVE SOCIETY LIMITED.....	11 TH
RESPONDENT	
KANGURWE FARMERS CO-OPERATIVE SOCIETY LIMITED.....	12 TH
RESPONDENT	
GITUNE FARMERS CO-OPERATIVE SOCIETY LIMITED.....	13 TH
RESPONDENT	
NUGU FARMERS CO-OPERATIVE SOCIETY LIMITED.....	14 TH
RESPONDENT	
NKUNGUGU FARMERS CO-OPERATIVE SOCIETY LIMITED.....	15 TH
RESPONDENT	
KANDIGI FARMERS CO-OPERATIVE SOCIETY LIMITED.....	16 TH
RESPONDENT	
RUGETU FARMERS CO-OPERATIVE SOCIETY LIMITED.....	17 TH
RESPONDENT	

(Before Hon. Justice Byram Ongaya on Friday, 27th May, 2016)

RULING

The court delivered the judgment in the suit on 30.09.2014 (Abuodha J). The court made findings and ordered as follows:

- a. That there seem to be no dispute that the plaintiffs were to be paid their terminal benefits by the defendant. Further the benefits had been computed and partly paid. The only issue and one which prompted the plaintiffs to bring the present suit is that the 1st respondent had failed or ignored to pay the plaintiffs the balance of their terminal benefits as had been agreed. The claim had been acknowledged by the liquidator and partially paid.
- b. The court declared that the plaintiffs be paid their terminal dues as computed and agreed by the management committee, the liquidator and the plaintiffs.
- c. The court further directed that the order be served on the 1st and 2nd respondents and that the 2nd

respondent do inquire into the circumstances that may have led to the delay or non-payment of the plaintiffs' terminal benefits and a report thereon be filed in the court within 60 days from the date of the judgment (30.09.2014) for that purpose.

The claimants took out 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 notice was given by the court on 14.04.2015. The claimants' claims in the case and the amount due to them are explained in the affidavit of Misheck Kirimi Mwithimbu filed on 02.11.2015. The explanation is as follows:

- a. The computed amount and agreed upon by the 1st respondent is a sum of Kshs. 24, 250, 679.25 per exhibit MKM4. That amount is exclusive Kshs. 6,772,882.30 which was paid out to the claimants per letter of 7.05.2001 exhibit MKM5 and because there were no further payments, the claimants moved the court in the present suit and the judgment issued.
- b. The claimants had not been paid a further Kshs.11, 046, 869.00 as was alleged by the 2nd respondent.
- c. The rightful amount of money owed to the claimants, inclusive accumulated interest, is Kshs. 53, 351, 491.05 per exhibit MKM6.
- d. The 1st and 2nd respondents have failed to pay the owed money and they should be committed to civil jail.

The 2nd respondent is one P.K.Gichuki and he filed his replying affidavit on 22.10.2015 to oppose the notice to show-cause. The salient grounds of opposition are as follows:

- a. The members of Nkuene Co-operative Society Limited were desirous and decided to dissolve their co-operative and the 2nd respondent facilitated that by appointing the 1st respondent as a liquidator for purposes of distribution of the assets and liabilities to the emerging new societies out of the original Nkuene Co-operative Society Limited.
- b. The liquidator together with the liquidation committee comprising the chairpersons of the emergent societies (being 3rd to 17th respondents) prepared a scheme of distribution which the 2nd respondent approved for implementation. The scheme is filed as exhibit PNG1 on the replying affidavit. Page 6 of the scheme of distribution states that the term liquidation means the process of settling up financial affairs of the society by means of satisfying legal debts and commitments, collection of accounts receivable and ensuring that the remaining assets and liabilities are equitably shared among the beneficiaries, in this case the new societies. The process is provided for under section 65 to 69 of the Co-operative Societies Act Cap 490 of 1997. The process commences after expiry of 60 days from the date of the cancellation order and at which stage, all the properties of the society under liquidation vests into the liquidator. Hence, the liquidator will literally manage the affairs of the deregistered society until such time when all the legal obligations are satisfied, all receivable accounts are collected, all claims and creditors verified and paid, and the remaining assets are distributed.
- c. At page 9 paragraph 2 of the scheme of distribution, the liquidator, the 1st respondent, states at paragraph 2 thus, **"2. When I took over the affairs of the society, the employees of the society were to be laid off and their terminal benefits paid in consistence with the terms and conditions of employment and union agreement. The benefits have been calculated and I have been able to pay all outstanding salaries, allowances, and arrears which had been agreed in an Industrial Court negotiations between the employer and the employees. The terminal benefits are to be paid after disposal of part of fixed assets."** In the replying affidavit, the 2nd respondent states at paragraph 8 that according to the scheme of distribution, the amount due to the employees was **Kshs.16, 801, 164.00** and not Kshs. 53, 351, 491.00 which is an exaggeration by

the claimants. Further Kshs.11, 046,869.00 has been paid to the claimants and the outstanding amount is Kshs. 5, 754, 295.00. The evidence of such payment is not before the court.

d. That the liquidation process is not yet completed and once it is completed the remaining assets will be sold and staff salaries and other liabilities will be considered for settlement.

e. The 2nd respondent cannot be liable to pay because the claimants are not employees of the government and being aware of the scheme of distribution, the claimants have not disputed the same.

f. The new co-operatives should pay the claimants and not the government because before the split, the employer determined the salary to be paid.

g. The scheme of distribution at page 11 states that it was approved by the liquidation committee on 09.11.2000.

The further replying affidavit of P.N. Gichuki filed on 09.11.2015 repeats the foregoing position and in both affidavits he states that he is the Commissioner for Co-operative Development and the 1st respondent hence competent to swear the affidavit; so that P.N. Gichuki is the embodiment of both the 1st and the 2nd respondents against whom the notice to show cause has been filed.

In view of the notice to show cause and the material before the court, the court makes the following findings:

1. The liability and duty to pay the claimants' terminal dues as found due in the judgment rests with the 1st respondent, the liquidator. While making that finding, the court has considered that in the scheme of distribution on record, it is clear that the liquidator is vested with that responsibility when he stated thus, **"2. When I took over the affairs of the society, the employees of the society were to be laid off and their terminal benefits paid in consistence with the terms and conditions of employment and union agreement. The benefits have been calculated and I have been able to pay all outstanding salaries, allowances, and arrears which had been agreed in an Industrial Court negotiations between the employer and the employees. The terminal benefits are to be paid after disposal of part of fixed assets."** Further at page 6 of the scheme of distribution the liquidator states, **"Hence, the liquidator will literally manage the affairs of the deregistered society until such time when all the legal obligations are satisfied, all receivable accounts are collected, all claims and creditors verified and paid, and the remaining assets are distributed."** It is clear that the liquidator must verify all creditors and pay them and only the remaining assets are to be distributed to the new societies. Thus the court has found that the 1st respondent must pay the claimants as creditors owed by the initial society that was subject of the liquidation process.

2. The court ordered in the judgment and as per the extracted order thus, **"1. THAT the court hereby declares that the plaintiffs be paid their terminal dues as computed and agreed by the management committee, the liquidator and the plaintiffs."** That amount as stated at page 35 in the scheme of distribution is **Kshs.16, 801, 164.00** being the liability for salary and benefits. The claimants on their part claim that the amount due is Kshs.24, 250,679.25 as per the exhibit MKM4 on the claimant's supplementary affidavit by Misheck Kirimi Mwithimbu filed on 02.11.2015 but which is not dated and whose source is not disclosed.

3. The court taking into account all the material on record finds that the amount due to the claimants from the 1st respondent is therefore a sum of **Kshs. 16, 801, 164.00** less any money shown to have been paid out to the claimants out of that sum.

As the court did not make orders on interest, the issue of interest on the amount due does not arise in this matter at this stage. Nevertheless, as time has run and continues to run, it is the opinion of the court that

the claimants are paid interest on all outstanding dues if the 1st respondent will fail to pay expeditiously. The court will therefore make appropriate orders on interest in the final orders in this ruling.

The court has considered all the circumstances of this case. The final orders in the judgment were directive and declaratory. It was the parties to act in accordance with the declarations and the directives. Strictly, there was therefore no money decree. In view of the order in the judgment that the 1st and 2nd respondents file a report to explain the delay in payment of the plaintiffs' terminal dues, and taking into account the material on record consequential to the filing of the notice to show-cause, the court returns that the 1st respondent is under duty to expeditiously comply by filing a scheme of arrangement on the payment of the claimants' final dues.

In conclusion, the notice to show-cause is hereby determined 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.

Signed, dated and delivered in court at **Nyeri** this **Friday, 27th May, 2016**.

BYRAM ONGAYA

JUDGE