



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.102 OF 2015**

**(Formerly HCCC No. 59 of 2009 at Nyeri)**

**JOHN GITHAIGA GACHUNGWA**

**WINFRED WANGECHI THEURI**

**MARTIN KANYEKI WAIHIGA**

**SAMUEL NDUNGU GICHURE (Suing on behalf of themselves and over three hundred and ninety five former workers of the defunct Tetu Coffee Farmers Cooperative Society Limited).....PLAINTIFFS**

**VERSUS**

**COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....1<sup>ST</sup>  
DEFENDANT**

**G.K.KARUGU.....2<sup>ND</sup>  
DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup>  
DEFENDANT**

(Before Hon. Justice Byram Ongaya on Friday, 23<sup>rd</sup> September, 2016)

**RULING**

The plaintiffs filed a notice of motion on 4.11.2014 and dated 30.10.2014 through Muthigani & Company Advocates. The application invoked Article 159 (2) of the Constitution, Section 228 of the Companies Act, Sections 1A and 1B of the Civil Procedure Act, Section 64 of the Co-operative Societies Act, Rule 16 of the Industrial Court (Procedure) Rules 2010, and all enabling provisions of the law. The plaintiffs prayed for orders:

1. That the applicant be granted leave to proceed with the instant suit against the Commissioner for Co-operatives, the Liquidator of Tetu Coffee Growers Co-operative Society Limited and the Honourable Attorney General for recovery of the sum of Kshs. 27, 718, 055.60 plus interest at bank rates from July 1999 to date.
2. That the leave granted be deemed to have been granted on or before 8<sup>th</sup> April 2009.

3. That costs of this application be provided for.

The application was supported by the affidavit of Samuel Ndung'u Gichure. The plaintiffs' case is that Tetu Coffee Growers Co-operative Society Limited was put under liquidation on 10.03.2000 and one Robert Mburu Mungai was appointed as liquidator and subsequently succeeded by the 2<sup>nd</sup> defendant. The liquidator prepared a schedule of 399 former staff of Tetu Coffee Growers Co-operative Society Limited and a scheme to settle the same was also prepared but the said debts and liabilities had not been settled to date. The plaintiffs filed the present suit to recover Kshs. 27, 718,055.60 out of the frustration caused by the delay in paying the plaintiffs their just entitlements. The liquidation process had taken over 14 years and the plaintiffs' claims. At the time of filing of the suit on 09.04.2009 the plaintiffs had not been aware of the need to seek leave of the court to file the suit hence the present suit to regularize the suit. The application is necessary because section 228 of the Companies Act apply to Co-operative Societies Act. The section provides that when a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

The defendants filed on 22.10.2015 the replying affidavit of P.N. Gichuki, the Commissioner for Cooperative Development. The affidavit sets out the defendants' line of defence to the plaint. The affidavit states that the defendants are not the proper parties to the suit because the liquidator set out a scheme on how the plaintiffs' claims would be settled and the Commissioner for Co-operative Development was not liable because the plaintiffs were not public servants but employees of a private entity, Tetu Coffee Growers Co-operative Society Limited.

The defendants also filed on 05.03.2015 the replying affidavit of Alex Muthuri Njagi stating that by reason of the ruling by Abuodha J in this matter delivered on 19.06.2014, if the suit had been filed without leave as provided for in section 228 of the Companies Act as read with section 64 of the Co-operative Societies Act, then the suit was incompetent and must fail.

The court has considered the material on record. It is not in dispute that a liquidator was appointed and the plaintiffs have a genuine claim against the defendants. The defendants in opposing the application appear to put forward their defence to the suit. Such are matters that are best left for the full hearing. The court has considered the provisions invoked by the plaintiffs in filing the application and finds that ends of justice will be served if the suit is regularized and parties to urge their respective cases at the full hearing. The court considers that grant of leave in the present case will serve to cure a procedural defect and discretion is hereby exercised in favour of the plaintiffs in line with the principles in Article 159 of the Constitution. The delays by the plaintiffs in bringing the present application would be balanced out by an appropriate order on costs of the application.

In conclusion, the plaintiffs' notice of motion dated 30.10.2014 is hereby allowed with orders as follows:

1. Prayers 1 and 2 are allowed.
2. The plaintiffs to bear the respondents' costs of the application in any event.
3. Parties to take directions on further steps in the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 23<sup>rd</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**