

V 19 R - 26 Stay JTC

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

MISCELLANEOUS APPLICATION NO. 32/93

DAN NAFUNA MAKABAYIAPPLICANT

VERSUS

THE CO-OPERATIVE BANK LTD., ...RESPONDENT

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU

R U L I N G:

This is an application by Chamber Summons supported by the applicant's affidavit deponed on 1.7.93. It is brought under O.19 r. 26 C.P.R. for stay of execution in H.C.C.S. No. 4/93 so that the applicant in Civil Prison be released pending the determination of the application to set aside ex-parte judgment and decree. The applicant also seeks an order for costs of this application. 5

In paragraph 2 of his affidavit, the applicant stated that he is the Chairman of Gisingo Growers Co-operative Society Ltd., Under paragraph 3, Gisingo Growers Co-operative Society Ltd., is a body corporate capable of entering contracts on movable and immovable property and capable of suing or be sued in any proceedings. This is embodied in section 27 of the Co-operative Societies Statute No. 8 of 1991. 15

According to Gower's Principles of Modern Company Law, 4th Edition at page 97, the learned author asserts that the fundamental attribute of a corporate personality is that the corporation is a legal entity distinct from its members. At page 100 of the same book, the learned author asserts further that members of a body corporate are not liable for its debts. 20 25

In paragraph 4 of the affidavit, Gisingo Growers Co-operative Society Ltd., applied and was granted a loan of 5m/-. Annextures A1 and A2 refer. The applicant as the Chairman of the said Society did not apply for and was not granted any loan by the respondent Bank in his personal capacity. 30

Before a loan can come into existence, it is submitted that there must be an agreement express or implied: Uganda Commercial Bank Vs. Sali Balaba (1982) HCB 145. In the instant case, there was no agreement between the applicant and the respondent.

In the absence of any agreement between the applicant and the respondent, the applicant cannot be personally held liable for a debt owed by the Society. It was therefore improper for the applicant to be committed to a Civil Prison for a debt incurred by the Society for which the applicant was not personally liable: Muwumba Kabire & Anor. Vs. H.H. Abdi & Sons Transporters Ltd., (1989) KALR 156.

In paragraph 6, the applicant has therefore deponed to the fact that he was wrongly sued for a loan for which he has not personally contracted. Under O.1 r.3 C.P.R., all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of facts or transaction is alleged to exist whether jointly, severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise. In this regard, under O.4 r 4 (b) C.P.R., judgment may be given without any amendment against such one or more of the defendants as may be found liable according to their respective liabilities.

Under Statute No. 8 of 1991, the Society can sue or be sued. There is no provision under the said Statute that officers of a registered Society can jointly sue or be sued in respect of a debt incurred by the Society. The loan in the instant case was applied for by the Society and not by the applicant in his personal capacity. It is the Society which should be sued for the debt and not the applicant who is an officer of the Society. It is further submitted that it was improper for the applicant and the Society to be sued jointly on a contract entered into by the Society.

Further, the applicant and the Society cannot jointly be held liable for the debt. As a result of the misjoinder, it would not be the principles of natural justice for the applicant to suffer imprisonment: Bishop Vs. Attorney General & Anor. (1967) E.A. 93.

Consequently, under paragraph 4 of affidavit in reply, the applicant cannot be sued together with the Society unless the debt incurred was incurred in individual capacities. That is, if the applicant got the loan with the Society. In paragraph 8, release of the applicant will not occasion any miscarriage of justice since the Society had deposited its security to the respondent Bank, which security can be disposed.

In the premises, an order for stay of execution should issue resulting into the release of the applicant from Civil Prison pending an application to set aside ex-parte judgment.

In the light of all that, Counsel for respondent argues that the application does not raise sufficient grounds for the release of the applicant. It is his contention that under section 69 of the Co-operative Societies Statute No. 8 of 1991, provides investigations into the conduct of the officials with regard to management of Society funds. Where they are found guilty of mismanagement for breach of trust, the same can be recovered from them. In the instant case, the Chairman now the applicant, Treasurer and Secretary mismanaged the funds of the Society. Under section 69 (2) of the said Statute, such money is recoverable in a competent civil court. Therefore the applicant was rightly sued.

Further, it is the contention of the learned Counsel that even if the applicant had not entered into a contract with the respondent, section 69 of the Statute still exposes him for investigations leading to possible civil prosecution. Therefore under paragraph 6 of the affidavit in reply, the applicant was rightly committed to civil prison. In that regard, Muwumba's case (supra) does not apply because section 69 of the Statute

excludes the application of the Company Act in regard to corporate personalities.

Under O.1 r.3 C.P.R., the applicant was properly joined as a party because it was him, Treasurer and the Secretary using the Society to borrow the money from the respondent Bank and failed 5 to pay it back. They were rightly joined and therefore there is no misjoinder of parties.

Consequently, under O.1 r.4 (b) C.P.R., judgment was rightly delivered against all of them as they borrowed but failed to pay back the money to the respondent Bank. Release of the applicant will occasion a miscarriage of justice and the respondent will not 10 recover its money. It is admitted that the security deposited is still with the respondent. However, it cannot be disposed of because it was given to the applicant by mere Power of Attorney. It does not belong to him but another person. In addition, the security is in a bad location. It is in the village where it is difficult and if not impossible to dispose. In view of that, the learned Counsel 15 submitted that this application for stay of execution be dismissed with costs to the respondent.

Having heard both sides, it is not in dispute that Gisingo Growers Co-operative Society Ltd., is registered under section 27 of the Co-operative Societies Statute No. 8 of 1991. That being the case, it is entitled to own movable and immovable property of every description. It can sue or be sued. It is a legal entity 20 distinct from its members. Being a body corporate, its members are not liable for its debts in their personal capacities.

Be that as it may, it is also not in dispute that Gisingo Groers Co-operative Society Ltd., had applied and was granted a loan of 5m/- as per annexures A1 and A2 by the respondent Bank. 25

The Society deposited a security (land) with the respondent which security is still in the custody of the Bank. First reaction for failure to repay the said loan would be for the respondent Bank to dispose of the said security to realise and extinguish the debt. This is not done. The fact that the security (land) in the instant case is located in a village where it is difficult or impossible to dispose is immaterial. Similarly, the fact that the said security belongs to another person who gave the Society by Power of Attorney does not hold water. The respondent Bank had satisfied itself before granting the loan that the said security was adequate and commensurate to the loan. It cannot be heard to say that the security is badly located in the village where disposing of it would be impossible. Similarly, it cannot be heard to say that the security is of another person and not of the Society. The respondent had ample time to guard itself against all that before granting the loan.

In addition, it is on record that the applicant did not enter into the contract for the said loan of 5m/- in his personal capacity nor did he do so jointly with the Society. In that context, he cannot be held liable for the loan which he did not get in his personal capacity. It is even improper for the applicant to be sued jointly with the Society. The Society can sue or be sued alone in the instant case. It was wrong to commit the applicant to civil prison. No good cause is shown why the applicant alone was committed to the Civil prison and yet the treasurer and Secretary of the Society with whom he is jointly sued are not also committed to civil prison. There is no provision under Statute No. 8 of 1991 that officers of a registered Society can jointly sue or be sued in respect of a debt incurred by the Society. As a result of the misjoinder, it is not in the interest of justice that the applicant should suffer imprisonment.

The contention of the learned Counsel for the respondent that this application does not raise sufficient grounds for the release of the applicant does not hold water in the light of what I have endeavoured to point herein-above. Section 69 of the Co-Operative Societies Statute No. 8 of 1991 does not apply in the present case. 5
The powers under that section are given to the Registrar to investigate the conduct of officials of a Society in regard to any mismanagement of funds. Under section 83 of the said Statute, "Registrar" is defined as Registrar of the Co-Operative Societies. It would be wrong for the respondent Bank to assume the powers vested in the Registrar under the Statute. 10

Having said all that, it is not in the interest of justice that to release the applicant would cause a miscarriage of justice for the sake that the respondent will not recover its money. Accordingly, stay of execution in H.C C.S. No. 4 of 1993 is granted. Applicant to be released from Civil prison forthwith pending the 15
determination of the application to set aside ex-parte judgment and decree. Respondent to meet costs of this application to the applicant.


S.G. ENGWAU

JUDGE


16.7.93.

16.7.93: Both parties absent.

Mr. Dagira holding brief for Mr. Natsomi for applicant.

Mr. Mudangha for respondent.

Ruling delivered in open court. 25


S.G. ENGWAU

JUDGE

16.7.93