



**Geta Farmers Cooperative Society Limited v Nyandarua County
Government & 2 others (Petition E011 of 2024) [2024] KEHC 14998 (KLR)
(Constitutional and Human Rights) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E011 OF 2024
CM KARIUKI, J
NOVEMBER 28, 2024**

BETWEEN

GETA FARMERS COOPERATIVE SOCIETY LIMITED PETITIONER

AND

NYANDARUA COUNTY GOVERNMENT 1ST RESPONDENT

NYANDARUA COUNTY ASSEMBLY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner /Applicant instituted an instant matter via petition and contemporaneously lodged a notice of motion dated 2/5/2024.
2. The petition was dated exactly 2/5/2024.
3. The core issue is the cess imposed on milk at a value of 30 cents per liter against milk sellers, including petitioners under the Finance Act 2023; thus, injunctive orders sought to stop enforcement of the cess recovery.
4. In the Finance Act 2023, the epicenter of the complainant was the introduction of the cess on milk. However, the court notes no relief in challenging the constitutionality of the Finance Act 2023.
5. The petition faces opposition by the first Respondent via affidavit of Stephen Kinja sworn on 18/9/2024, which raises an objection on motion and entered petition on the ground that there is no certificate of registration of Petitioner on Cooperative society limited to give it legal capacity to sue or be sued.



6. The Petitioner has not controverted that averment, nor has the affidavit used any document to confirm its registration.
7. In Nairobi HCC 6339/1990, the court held that.

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear that Legislature did not intend that suits be brought by or against those societies in their names.”
8. The above objection is enough to dispose of the entire matter; thus, the court will determine on that basis.
9. The parties were directed to file submissions, but only respondent submissions were on record at the time of drafting this ruling.

Respondent Submission

Does the Petitioner/ Applicant have a locus to institute the suit?

10. The preliminary issue for consideration is whether the Petitioner indeed has the locus standi to institute the instant suit. It is our submission that the Petitioner has no legal capacity to institute this particular suit. The Petitioner has brought this suit under a cooperative society and has further stated in its supporting affidavit that “it is a limited liability company duly registered under the Laws of Kenya.”
11. It is our submission that no proof of registration has been provided and/or shown to prove that the Petitioner is indeed a registered company. Moreover, Section 17 (1) of the Companies Act states,

“A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental to that.”
12. Additionally, the Cooperative Societies Act under Section 11 on Evidence of Registration states,

“A certificate of registration or a provisional registration signed by the Commissioner shall be conclusive Evidence that the society therein mentioned is duly registered or provisionally registered unless it is proved that such registration of the society has been canceled or has been terminated. (2) The certificate of registration bearing the number and date of registration shall be displayed at the head office of every cooperative society.”
13. Given that no proof of registration has been shown or adduced or presented, it is right to construe that the society is an unincorporated society and or unregistered company, In *Andrew Inyolo Abwanza V Board of Trustees of Pentecostal Assemblies of - God Kenya & 3 others* [2009] eKLR the court referred to Nairobi HC No, 6339 of 1990 *John Ottenyo Amwayi & Two others V. Rev. George Abura and Two others* where Bosire, J (as he then was) stated,

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the Legislature did not intend for suits to be brought by or against those societies in their names.”
14. Moreover, in the case of *Kaseve Welfare Society v Harp Housing Limited* [2020] eKLR, the learned judge referred to the case of *Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank* (1992)



eKLR, where Bosire, J. (as he then was) stated as position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. In the instant matter, the suit was instituted in the name of the religious organization. It is not a corporate body, which would mean it would sue as a legal personality. That being so, it could not institute proceedings in its name."

15. In the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No 464 of 2000, the court held as follows:

"Locus Standi signifies a right to be heard; A person must have a sufficiency of interest to sustain his standing to sue in a court of law."

16. Therefore, without locus standi, a party cannot be heard despite having a meritorious case. The legal capacity to be heard is so important that in its absence, a party has no basis to claim anything before the court.
17. It is the Respondent's submissions and prayer that the court dismisses the Petitioner's application and entire petition as the suit filed is a nullity as the entity suing does not have a legal personality.
18. Nevertheless, if the court finds that the Petitioner does indeed have the legal capacity to institute this application and petition, we urge the court to consider the issue discussed below.

Is the Petitioner deserving of a grant of the temporary orders sought?

19. The Petitioner seeks temporary orders to issue against the 1st Respondent from attaching, alienating, seizing, confiscating, or in any manner interfering with the Petitioners' assets or any other aspect of their business.
20. The Petitioner avers that the milk cess imposed is unlawful and illegal and that the 1st Respondent has been harassing and intimidating their employees in purported enforcement.
21. It is our submission that the milk cess imposed and put in place by the 1st Respondent is lawful and legally in place. To support this submission, Clause 12(1) of the Dairy Industry (Registration, Licensing, Cess and Levy) Regulations, 2021, governed under the *Dairy Industry Act* (CAP 336), states that;
- "a county government may impose cess not exceeding 0.5 percent of the farm gate price payable by a primary producer, which may be collected by the aggregator or the Board and remitted to the county department within Twenty-One days after the last day of the month during which the dairy produce in respect of which the cess is payable was aggregated."
22. Thus, guided by the above section of the law, the county government derived the imposition of the milk cess from the said Act and Regulations and, informed by this, introduced the said cess in its local law, that is, the Nyandarua Finance Act, 2023 and 2024 which in CODE 1015 imposes a milk cess.
23. Additionally, and as stated under Clause 12(1) of the afore-mentioned Regulations, the milk cess imposed must not exceed 0.5% of the farm gate price payable. It is our submission that the 1st Respondent imposes 30 cents per litre, which is below the prescribed 0.5% mark.
24. The County Finance Laws are/were lawfully and legally in place as they followed all the necessary and required legal procedures and processes that ought to have been undertaken. The Petitioner has not



in any way objected to the enactment and publication of the finance laws in his pleadings, and the 1st Respondent is lawfully required to enforce the law.

25. Additionally, the Petitioner aver that some county officials have been harassing and intimidating its employees and or servants. Also, the Petitioner alleges that the 1st Respondent has seized and or confiscated its assets. It is our submission that the said allegations are unfounded and untrue.
26. It is a trite law that he who alleges it must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Sections 109 and 112 of the same Act states;

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless any law provides it that the proof of that fact shall lie on any particular person.

"112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. Continually, it is our submission that the Petitioner has not met all the conditions required for granting the temporary/conservatory orders sought as elucidated in the landmark case of Giella vs Cassman Brown in which it was stated as follows,

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which an award of damages would not adequately compensate. Thirdly, if the court is in doubt, it will decide on an application based on convenience. (EA Industries v Trufoods, [1972] EA 420.)"

28. It is pretty straightforward and expresses that the Applicant's case has no probability of success as discussed above; the imposition of the milk cess is lawful and legally in place. Secondly, no irreparable damage shall /will be occasioned as the Petitioner could always be compensated the "cess" paid in case the court finds that the imposition of the same is illegal, and thirdly, the balance of convenience which is used if there is doubt on the first two conditions neither supports the Petitioners case.

Issues, Analysis And Determination

29. After going through the material before me, the pleadings, and the submissions on record, I find the issues are: whether the Applicant has established capacity to sue or be sued, if above in affirmative, can the Respondent be injuncted as prayed? And costs.
30. The Respondent, in reply to the motion and the petition, objects to both as follows;

"an objection on motion and petition is entered on the ground that there is no certificate of registration of Petitioner on Cooperative society limited to give it legal capacity to sue or be sued. Reliance is made on Nairobi HCC 6339/1990, where the court held that;



"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear that Legislature did not intend that suits be brought by or against those societies in their names."

31. The Petitioner has not controverted that averment, nor has the affidavit used any document to confirm its registration.
32. In the case of *Kaseve Welfare Society v Harp Housing Limited* [2020] eKLR, the learned judge referred to the case of *Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank (1992) eKLR*, where Bosire, J. (as he then was) stated as position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. In the instant matter, the suit was instituted in the name of the religious organization. It is not a corporate body, which would mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its name."
33. Thus, the court is urged to dismiss the Petitioner's application and entire petition as the suit filed is null and the entity suing does not have a legal personality. In the absence of the response to the aforesaid submission and the objection, the Petitioner is deemed to accede to the objection.
34. Article 22. of the constitution of Kenya stipulates that;
 - (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - (2) In addition to a person acting in their interest, court proceedings under clause (1) may be instituted by--
 - (a) a person acting on behalf of another person who cannot act in their name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest or
 - (d) an association acting in the interest of one or more of its members.
35. Part 22 (2) (d) needs to establish its existence in law before it can be able to lodge matters such as the instant. The suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. In the instant matter, the suit was instituted in the name of the Co-operative Society Ltd.
36. It would appear to be a corporate body, which would then mean it would sue as a legal personality; however, despite the Respondent raising the objection on its capacity, no evidence is furnished to controvert the same. That being so, it lacked the capacity to institute proceedings on its own without Evidence of its legal existence.
37. Thus, the court upholds the objection and makes the orders;
 - i. The motion and the petition are thus struck out with no orders as to costs

JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 28TH DAY OF NOVEMBER 2024.

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C. KARIUKI
JUDGE

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