



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 201 OF 2016

MARK EKAAL EKUAM & 24 OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

PETER WANJOHI KIAMA (Sued as the liquidator of Mawasiliano Sacco

Society Ltd).....1ST DEFENDANT/RESPONDENT

METHUSELA ONCHIRI (Sued as the liquidator of Mawasiliano Sacco Society

Ltd).....2ND DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants herein took out the Notice of Motion dated 28th September, 2016 supported by the grounds laid out on its face and the facts deponed to in the affidavit of the 1st applicant. The application is seeking for the orders hereunder:

i. Spent.

ii. Spent.

iii. THAT pending the hearing and determination of the suit, the 3rd defendant/respondent be ordered by this Honourable Court to release the sum of Kshs.23,387,321.25 and that the same be deposited in a joint fixed deposit account to be opened by the advocates for the 1st and 2nd defendants/respondents in a reputable bank other than the 3rd defendant/respondent.

iv. Spent.

v. THAT this Honourable Court be pleased to issue any further order as it deems fit to grant in the interest of justice.

vi. THAT costs of the application be provided for.

2. In his affidavit, the 1st applicant stated that he was at all material times a member of Mawasiliano Sacco Society Ltd (in liquidation) (“*the former society*”), having joined in 1995.

3. The applicant further stated that he and other members of the former society contributed towards purchasing the property known as LR No. 209/13958 (“*the subject property*”) located in South B, Nairobi and that by way of a resolution entered into on 19th December, 2009 it was agreed that the subject property would be disposed of to enable the society meet its obligations such as paying members’ dividends and advancing loans to its members.

4. It was the 1st applicant’s averment that the subject property was sold to P.J. Petroleum Equipment Limited at a consideration of Kshs.24,000,000/ out of which Kshs.23,387,321.25 was deposited with the 3rd respondent.

5. The 1st applicant contended that on following up on the sale proceeds of the subject property, he came to learn that the same were being

irregularly held by the 3rd respondent in a bid to recover loans purportedly owing from members of the former society.

6. The 1st defendant/respondent swore a replying affidavit on his behalf and on behalf of the 2nd defendant/respondent, stating that he was appointed and mandated to wind up the former society and that the subject property was purchased for the benefit of its members.

7. The 1st respondent went on to state that the loans owed to the 3rd respondent by members of the former society have no co-relation with the subject property and that in any event, the loan amount of Kshs.5,000,000/ advanced to the former society and on which the subject property was charged has since been cleared.

8. It was therefore the 1st respondent's assertion that the sale proceeds being held by the 3rd respondent should be released to the liquidators of the former society for distribution to its creditors.

9. On behalf of the 3rd defendant/respondent, *Jacquelyn Khadambi* also put in a replying affidavit averring *inter alia*, that the 1st applicant lacks *locus standi* to bring the proceedings and that by virtue of his joining membership with the former society in 2005, the 1st applicant had no shares in the subject property.

10. The deponent maintained that the subject property was charged to the 3rd respondent by the former society way back in 2001 for purposes of securing a loan, and that the sale proceeds of the subject property were to be applied in clearing part of the outstanding liabilities accrued by the former society, hence the sale proceeds are legally held by the 3rd respondent.

11. In rejoinder, the 1st applicant swore a supplementary affidavit maintaining that he joined the former society as a member in 1995 when it was formed and that he has all along contributed to the former society.

12. The applicant further maintained that save for an earlier charge made in respect to the subject property and which was later discharged, there is no evidence to show that the 3rd respondent obtained another charge on the subject property from the former society in respect to a separate loan.

13. When the Motion came up for hearing, this court invited the parties to file and exchange written submissions which their respective counsels later highlighted. On their part, the applicants submitted that the only loan advanced to the former society was in the sum of Kshs.5,000,000/ which loan the former society cleared in full and a discharge of charge was registered in respect to the subject property, thereby extinguishing any rights or interests by the 3rd respondent over the subject property or its sale proceeds.

14. The applicants reiterated that any loans given to members of the former society on a personal level are distinct from loans advanced to the former society itself, hence the 3rd respondent has no basis on which to hold the proceeds of sale of the subject property under the guise of securing the said loans.

15. It was therefore the applicants' view that it would be proper to have the sale proceeds transferred to a joint account to be held by the 1st and 2nd respondents to enable them gain access to and manage the funds therein.

16. *Mr. Arba* counsel for the applicants echoed his clients' written submissions, save to add that the 3rd respondent did not bring any evidence to show that the former society took out any other loan with itself or that the applicants took out any loans which were secured by the subject property.

17. The 1st and 2nd respondents associated themselves with the submissions made by the applicants, contending that liquidators are the appropriate administrators and managers of the society's assets and liabilities pursuant to the provisions of Section 66 (1) of the Co-operative Societies Act.

18. The aforementioned respondents submitted that any loans alleged to have been advanced by the 3rd respondent were unsecured loans, hence there was no ground on which the 3rd respondent could charge the proceeds of sale on such loans.

19. The respondents concluded by arguing that members with shares in the subject property are entitled to the proceeds of sale of the said property.

20. The 1st and 2nd respondents' advocate, *Mr. Getange*, opted to rely on the submissions filed. He added that pursuant to the provisions of Section 49 of the Co-operative Societies Act, a special resolution must be passed for a charge to be created on any asset belonging to a society and that all assets of the former society are vested in its liquidators.

21. The 3rd respondent in part echoed its position that the applicants have no *locus standi* to bring the application or commence the suit on the premise that a co-operative society is considered by law to be a separate legal entity with capacity to sue and be sued, or where in liquidation as is the case, to sue or be sued through its liquidators. The case of **George W M Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR** was cited, wherein the court held that:

“The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights.”

22. It was equally the 3rd respondent's contention that the applicants have not established the ingredients to warrant a granting of the mandatory interlocutory injunction being sought, as laid out in the authority of **Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR** where the Court of Appeal rendered that a mandatory injunction can only be granted at the interlocutory stage where special circumstances have been shown and in the clearest of cases.

23. *Mr. Kiplagat* learned counsel for the 3rd respondent equally adopted the submissions filed on behalf of the 3rd respondent, adding *inter alia*, that the 1st and 2nd respondent did not disclose when exactly they were appointed as liquidators of the former society, to which *Mr. Arba* rejoined by arguing that the amended plaint clearly indicates the manner in which the liquidators were appointed.

24. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits in support of and in opposition to the Motion, and the competing submissions both oral and written, as well as the various authorities relied upon.

25. Before I address my mind to the merits of the Motion, I will first consider the issue of *locus standi* which was raised by the 3rd respondent. I noted that the same issue was raised in the 3rd respondent's statement of defence. I also noted that neither the applicants nor the 1st and 2nd respondents submitted on this issue. I will consider it nonetheless.

26. The courts have interpreted *locus standi* to mean the right or entitlement by a party to lodge a legal claim or action.

27. In that case, my attention is drawn to the case of **Joseph Muthuri Ikunyua & 32 others v Co-operative Bank of Kenya Limited & 14 others [2018] eKLR** cited in the 3rd respondent's submissions. In this case, the High Court sought to define a sacco in the following manner:

“Under Section 2 of the Sacco Societies Act, a Sacco is defined as:

“... a savings and credit co-operative society registered under the Co-operative Societies Act, 1997 (No. 12 of 1997)” ”

28. The court went on to acknowledge thus:

“...a Sacco is a co-operative society governed by the Co-operative Societies Act, CAP 490 of the Laws of Kenya. Upon registration as a co-operative society, a SACCO enjoys certain privileges as set out in Section 12 of CAP 490 which provides that:-

“Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.”

29. It is not in dispute that the former society in the present instance was at all material times a separate legal entity registered under and consequently governed by the Co-operative Societies Act No. 12 of 1997, hence capable of suing and being sued in such capacity. Nevertheless, it is not in dispute that the former society is under liquidation. In such an instance, authority to sue or be sued would legally vest in the liquidators of the former society.

30. Suffice it to say that it is noteworthy that the liquidators of the former society herein are sued as the 1st and 2nd respondents. In that case, I am convinced that the only resort available to the applicants would be to sue in their individual capacities as past members of the former society, as they have. I therefore find that the applicants have *locus standi* in the matter for purposes of the suit.

31. Having settled the above, I now turn to the merits of the application. It is apparent that the subject of the Motion has to do with the release of the sum of Kshs.23,387,321.25 currently being held by the 3rd respondent. I noted that the issues arising in the present application relates to entitlement to the proceeds of sale and whether the subject property was to act as security for other outstanding loans (if any) *et al*, are equally raised in the main suit.

32. That said, this court cannot delve into the substantive issues at this point in time since those are issues that can only be suitably and adequately examined at trial; to do so now would be akin to determining the suit prematurely.

33. Consequently, the Motion is hereby dismissed with no order on costs.

Dated, Signed and Delivered at Nairobi this 30th day of January, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st and 2nd Defendants/Respondents

..... for the 3rd Defendant/Respondent