



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CIVIL CASE NO. 5 OF 2017

PAUL KIPKOECHROTICH.....PLAINTIFF

VERSUS

1. SKYLINE SACCO SOCIETY LTD.

2. BENARD MAKHATIANI

T/A BENWILL TRADERS AUCTIONEERS.....DEFENDANTS

RULING

1. This a ruling on a Preliminary Objection as to jurisdiction of the Court. The Defendants raised a preliminary point on jurisdiction of the Court by notice of Preliminary Objection dated 11th April 2017 as follows:

“Take Notice that the Defendants shall at the earliest opportunity possible raise a preliminary objection to the said suit on the ground that this honourable court lacks the requisite jurisdiction to hear and determine the suit.”

2. In raising the Preliminary Objection the Defendants are taken to have accepted the facts as stated by the plaintiff, and the Court does not therefore consider the replying affidavit filed by the Defendants but only looks at the plaint and the affidavits filed in support of the plaintiff’s case. The Principles for consideration of a Preliminary Objection are well settled in the case of ***Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Ltd.*** (1969) EA 696,701 as follows:

“A Preliminary point is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

3. The plaintiff’s cause of action as against the 1st defendant whom it describes as ***“a duly registered Sacco”*** and the 2nd defendant ***“trading as Benwill Traders Auctioneers”*** is set out in paragraphs 4 – 6A of the Amended Plaint as follows:

“4. On 1st April 2017, the 1st Defendant illegally gave instructions to the 2nd Defendant to “attach the plaintiff’s six (6) heads of cattle and the 2nd defendant in compliance with the instructions given by the 1st defendant illegally attached and took away the plaintiff’s cattle to an unknown destination....”

5. The Plaintiff's states that the 1st and 2nd defendants' action is illegal, unprocedural and unconstitutional.

6. The Plaintiff states that he had a debt with the 1st Defendant which he defaulted but was recovered from his guarantors thereby extinguishing the Plaintiff's relationship with the 1st defendant as far as the debt is concerned and the plaintiff shall further state that he made separate arrangements to repay the guarantors on favourable terms to which the guarantors agreed.

6A. The plaintiff states that the 2nd Defendant does not have jurisdiction to attach property at Eldama Ravine sub-County and is also not a qualified or licensed person to carry out attachment."

4. Section 76 of the Cooperatives Act, cap. 490, Act No. 12 of 1997, provides as follows:

"Cooperative Societies Act Cap 490

76. Disputes

(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society,

it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority. [Act No. 2 of 2004, s. 35, Act No. 14 of 2008, s. 71.]"

5. There is no dispute that there existed a debt between the plaintiff and the 1st defendant, what is contested is whether the 1st defendant is a cooperative society for purposes of the Cooperatives Act and whether any monies remained owing at the time of the attachment of the plaintiff's property, and the manner of the attachment of the plaintiff's property in realisation of the security for the debt. It is clear from the provisions of section 490 of the Cooperatives Act, that if the 1st defendant is a cooperative society within the meaning of that Act, the dispute between the parties herein is squarely a dispute governed by section 76 of the Act and, therefore, required to be referred to the Cooperatives Tribunal in accordance with the section.

6. Is the 1st defendant a cooperative society within cap 490? Counsel for the Defendants contended that it was not, and that it was governed by the Sacco Societies Act No. 14 of 2008, cap. 490B and that, therefore, the provisions of section 76 of the former Act (cap 490) did not apply to the dispute before the Court.

7. With respect, the distinction as to the Act under which the 1st defendant is registered (although documents produced by the defendants indicate that it was registered under the Cooperatives Act 1997 Act as a successor of Baringo Farmers Savings and Credit Cooperative Society registered under cap. 490 on 4th July 1989) is immaterial because both Acts have provisions for the reference disputes to the same Cooperatives Tribunal, which is established under the 1997 Act as the 2008 Act defines “Tribunal” as follows:

“**“Tribunal”** has the meaning assigned to it in the Co-operative Societies Act, 1997;”

8. Indeed, the latter Act, No. 14 of 2008, (cap. 490B) applies the former Act (cap.490) in clear language, with repetition of the stipulation for referral to the Tribunal as follows:

“67. Application of the Co-operative Societies Act, 1997

(1) For greater certainty, the provisions of the Co-operative Societies Act, 1997 (No. 12 of 1997) shall apply to a Sacco society carrying out deposit-taking business under this Act with respect to any matter, to the extent that the matter in question is not dealt with in this Act.

(2) In the case of a conflict between the provisions of this Act and the provisions of the Co-operative Societies Act, 1997 (No. 12 of 1997) with respect to Sacco societies to which this Act applies, the provisions of this Act shall take precedence.

(3) All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.”

9. In accordance with the Article 10 Rule of Law principle requiring compliance with statutory provisions unless they are declared unconstitutional, and the constitutional litigation policy of strict compliance with procedure for settlement of disputes as set out in **Speaker of the National Assembly v James Njenga Karume [1992] eKLR, (2008) 1 KLR (EP) 428**, that -

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

the Court is obliged to give effect to the relevant statutory procedure for dispute resolution consistent with the nature of the dispute before the Court.

10. The dispute herein, whether on the claim for return of the attached animals or for damages in compensation for the alleged wrongful attachment and sale thereof, as the case may be, and the objection to the competence of the 2nd defendant auctioneers to attach the said property, are **all matters arising from the dispute** between the plaintiff member and the 1st defendant Cooperative Society/ Sacco Society, which dispute by virtue of section 76 of the Cooperatives Act, cap. 490 and section 67 of the Sacco Cooperatives Act, cap. 490B, shall be referred to the Tribunal.

ORDERS

11. Accordingly, the Defendants’ Preliminary Objection on jurisdiction of the Court is upheld and the Plaintiff’s suit is struck out with costs to the defendants.

DATED AND DELIVERED THIS 16TH DAY OF MAY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipkenei for the Plaintiff

Mt. Mr. Nyarotso for the defendants.