



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL DIVISION**

**CIVIL CASE NO. 7 OF 2017**

**NELSON & FRANCIS ASSOCIATES.....PLAINTIFF**

**VERSUS**

**I.G. SACCO LTD.....DEFENDANT**

**RULING**

**Introduction**

1. By a notice of motion dated 02.05. 2017 the plaintiffs seek for orders of stay of execution of the award of the tender No. IG SACCO/AS/14/2017 EXTERNAL AUDITOR which included the notification of the award to the tenderer pending the hearing and determination of the application inter parties and the main suit and./or further orders of the court.

2. The defendant filed a Notice of Preliminary Objection of the 29.05.2017 on grounds that this honourable court lacks jurisdiction to hear and determine the plaintiff's suit for reasons set out on the face of the said Notice of Preliminary Objection. This ruling relates to the Preliminary Objection.

**Submissions**

3. Mr. Nandwa Advocate for the defendant submitted that this court has no Jurisdiction to hear this case at this stage because the matters sought to be adjudicated upon are matters touching on public procurement laws which are governed by Act No. 33 of 2015. He added that the procurer in this case is a co-op Society which is a public body and that Act No. 33 of 2015 establishes the Public Procurement Administrative Review Board under Sections 27 and 28 of the said Act where the complainant should first be heard before moving to the High Court.

4. He further submitted that the Act provides for administrative review of procurement and disposal proceedings at Section 167 – 175 thereof where an aggrieved party can be heard if not satisfied by the review process. Thereafter one can seek solace in Judicial Review Orders from the High Court. It was for alleged failure of the above procedure that counsel submitted this that stage matter does not belong to this court at this stage.

5. Mr. Nandwa also submitted that the plaintiff is seeking orders against two other persons who are not party to this suit, thus making both the suit and the application defective. He added that the entire suit has infact been overtaken by events since an Annual General Meeting was held on 21.04.2017 where an auditor under the co-operative Societies Act was appointed.

6. On his part Mr. Akenga, Counsel for the plaintiff submitted that the grounds save for ground No. 2 do not fall within the threshold of a Preliminary Objection. He relied on the case of Mukisa Biscuits case 1969. He maintained that this court has jurisdiction to hear and determine this matter since the IG Sacco is not a public body but only draws its membership from the public.

7. Mr. Akenga also argued that institutions which draw resources from public finance are the only institutions which can appeal to the review Board a position he submitted is clarified by the preamble to Act No.33 of 2015.

8. In reply, Mr. Nandwa brought in another twist in the defendant's arguments by making mention of the Commissioner of Cooperatives who supervises the activities of cooperatives Societies. He submitted that because of the superintendence of the Commissioner of Cooperatives over the defendant the defendant is a public body, and particularly so in light of the provision of Section 2 sub paragraph "t" of Act 33. He contended that the definition is wide and incorporates cooperative societies.

### **Determination**

9. The main issue for determination is whether this court has jurisdiction to hear and determine the Notice of Motion and the plaint as filed by the plaintiff on 2.05.2017. In determining this issue it will be enough if it is established whether the IG Sacco is a public entity or a private entity since the issues being contested are within the preview of the public procurement and Disposal Act No. 33 of 2015 which Act Specifically affects Public Entities and not private entities.

10. As correctly stated by counsel for the defendant a preliminary objection can only be raised on issues of law. See **Mukisu Biscuits CO. – vs – West End Distributors [1969] EA 696** where Sir Charles Newbold held at page 701: “ A preliminary objection 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. Once a party raises a preliminary objection he is taken to admit all the facts pleaded by the other side to be correct.”

11. In answering the question whether the defendant is a public entity or not this court is properly guided by the provisions of Section 2 of the Public Procurement and Disposal Act No. 33 of 2015 which clearly defines a public entity. The Saccos to my understanding are not part of the list of the bodies and or entities therein mentioned. Further and as properly stated by counsel for the plaintiff Saccos do not receive any funding from the government and therefore they do not fall within the definition of public entities. In a nut shell I find that the preliminary objection lacks merit and the same is dismissed with costs to the plaintiff.

### **Orders accordingly**

**Ruling delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of June 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Elung'ata for Akenga (present) for plaintiffs

Miss Khatashi for defendant

Mr. Polycap Court Assistant