



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 1 OF 2014**

**SHAURI MOYO FURNITURE MAKERS COOPERATIVE SOCIETY LTD .....**  
**.....PLAINTIFF**

**VERSUS**

**GEOFFREY WAIREGI NJUGUNA**

**MOSES OGOLA**

**STEPHEN KAMAU MUCHIRI**

**FRANCIS NGARUIYA NJOROGE**

**STEPHEN NJOROGE IRUNGU**

**JOSEPHAT MUTUKU MUSEMBI**

**STEPHEN MWANGI KAMAU.....**  
**DEFENDANTS**

**AND**

**SAMSON KIMEMIA MWANGI.....**  
**INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 6<sup>th</sup> January 2014 and filed on 7<sup>th</sup> January 2014 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 Rule 1, Order 40, Rules 1(a), 2, 3, 4, 5 and 6 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.
2. Spent.
3. **THAT an order does issue directing the Defendants to render accounts on all the documents,**

**instruments, assets and/or properties belonging to the Plaintiff held by them on account of the Plaintiff in trust for its members.**

- 4. THAT an injunction does issue restraining the Defendant/Respondents whether acting by themselves, their agents, employees, servants, officers or whosoever from selling, alienating, disposing and/or otherwise dealing and/or interfering with the documents, instruments, properties and/or assets of the Plaintiff and in particular Land Reference Number 209/1712 Nairobi pending the hearing and determination of this suit.**
- 5. THAT costs for this Application be provided for.**

2. The Interested Party's Chamber Summons application that was dated 1<sup>st</sup> July 2014 and filed on 3<sup>rd</sup> July 2014 in which he had sought to be enjoined as a party herein was allowed by consent of the parties herein. He was enjoined in the proceedings herein on 10<sup>th</sup> July 2014.
3. While the 6<sup>th</sup> Defendant filed a Replying Affidavit in opposition to the Plaintiff's present application, the court noted that the Statement of Defence dated 29<sup>th</sup> April 2014 and filed on 16<sup>th</sup> May 2014 was filed on behalf of the 3<sup>rd</sup> – 7<sup>th</sup> Defendants.

#### **THE PLAINTIFF'S CASE**

4. Jamin Malande, Chairman of the Plaintiff herein, swore an Affidavit on behalf of the Plaintiff on the 6<sup>th</sup> January 2014. His Supplementary Affidavit was sworn on 24<sup>th</sup> July 2014 and filed on 25<sup>th</sup> July 2014. The Plaintiff's Written Submissions were also dated 24<sup>th</sup> July 2014 and filed on 25<sup>th</sup> July 2014 while its Supplementary Written Submissions were dated 9<sup>th</sup> December 2014 and filed on 10<sup>th</sup> December 2014.
5. The Plaintiff stated that it comprised of over one hundred (100) members. It said that it held its Annual General Meeting on 17<sup>th</sup> October 2013 and the results had never been challenged and/or impeached through prescribed legal mechanisms or at all which essentially meant that the 3<sup>rd</sup> -7<sup>th</sup> Defendants and the Interested Party had no *locus standi* to impeach the membership of the Plaintiff.
6. It stated that its members were apprehensive that the Defendants were likely to dispose of and/or alienate that parcel of land known as Land Reference Number 209/1712 Nairobi (hereinafter referred to as "the subject properties"), where together with "jua kali" artisan members, it was conducting business because the said Defendants were still holding on to documents, instruments, properties and/or assets of the Plaintiff and in particular the Original Certificate of the subject property. It contended that the alienation and disposal of the subject property would cause it great irreparable harm and immense prejudice.
7. It was its averment that the continued holding of the said Original Title by the Defendants smacked of impropriety, illegality, injustice, arbitrariness and ill will as the Defendants had no superior claim over it and the members as the Defendants had only donated their names to be registered as trustees in circumstances it termed, suspicious.
8. It said that it was unable to pay rates, taxes and other charges in the absence of the said documents and urged the court to grant it the prayers it had sought in its application. It was emphatic that this court had the jurisdiction to determine the issues at hand as the matter was not *res judicata* and the dispute involved a corporate body and its members.

#### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS' CASE**

9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed Grounds of Opposition dated 23<sup>rd</sup> January 2014 on 24<sup>th</sup> January 2014 in opposition to the Plaintiff's present application. The said Grounds could be summarised as follows:-
  - a. **THAT the cause was defective as it belonged to a totally different jurisdiction.**
  - b. **THAT the application was defective the same orders had sought in the Plaintiff which would have the effect of irregularly and effectively determined through the backdoor.**
  - c. **THAT there had been several suits relating over the same subject matter to wit, HCCC No**

3279 of 1994 (O.S), HCCC No 352 of 2000, Co-operative Tribunal Case No 4 of 2002, Tribunal Case No 177 of 2003 amongst other cases.

- d. **THAT the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no intention of alienating the subject property and that in any event, the 1<sup>st</sup> Defendant had lodged a caveat on behalf of the Plaintiffs on 8<sup>th</sup> May 2009 which caveat was still in place.**
- e. **THAT the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not and had never had in their custody the items, property and/or instruments that had been described in the Plaintiff or at all.**

10. On 15<sup>th</sup> July 2014, the 1<sup>st</sup> Defendant also swore a Replying Affidavit on his own behalf and that of the 2<sup>nd</sup> Defendant. It was filed on 17<sup>th</sup> July 2014. Their Written Submissions were dated 30<sup>th</sup> July 2014 and filed on 31<sup>st</sup> July 2014.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants reiterated, in their said Replying Affidavit, the contents of their Grounds of Opposition and added that the elections alluded to in the Plaintiff's application were a sham and that the persons claiming thereunder were not elected at all. They therefore prayed for the dismissal of the Plaintiff's application.

### **THE 3<sup>RD</sup>- 7<sup>TH</sup> DEFENDANTS' AND INTERESTED PARTY'S CASE**

12. In response to the Application, on 29<sup>th</sup> April 2014, the 6<sup>th</sup> Defendant swore a Replying affidavit on his own behalf and that of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants. The same was filed on 16<sup>th</sup> May 2014. On 16<sup>th</sup> July 2014, he also swore a Further Affidavit on behalf of the same parties. The same was filed on 17<sup>th</sup> July 2014. The Interested Party's Replying Affidavit was sworn on 16<sup>th</sup> July 2014 and filed on 17<sup>th</sup> July 2014.

13. Both the 3<sup>rd</sup> – 7<sup>th</sup> Defendants' and Interested Party's Written Submissions were dated 31<sup>st</sup> July 2014 and filed on the same day. However, their List of Authorities dated 19<sup>th</sup> January 2015 did not bear a court stamp.

14. According to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, they were the registered owners of the subject property in trust for themselves and sixty eight (68) other members of the Plaintiff. They referred to the Plaintiff in plural form and averred that "they" had no registerable and/or proprietary interest, having not contributed to the acquisition of the subject property and were therefore occupying the said subject property illegally and also illegally renting it out without consulting them.

15. It was their contention that the Plaintiff had no *locus standi* to institute these proceedings on behalf of its members and that in any event, the matter was *res judicata* and an abuse of court process.

16. On his part, the Interested Party reiterated the 3<sup>rd</sup> – 7<sup>th</sup> Defendants' averments and added that a Vesting Order was issued by the High Court from the Plaintiff's name to clear the dispute as to the ownership of the subject property but that the Plaintiff was trying to grab the land from the registered owners.

17. The 3<sup>rd</sup>- 7<sup>th</sup> Defendants and Interested Party therefore urged the court to dismiss the present application and the entire suit with costs to them.

### **LEGAL ANALYSIS**

18. The Plaintiff identified the following as issues for determination:-

- a. **Whether the Defendants could be held to account for the documents, assets, properties and instruments they held in trust for the Plaintiff and/or members primarily by virtue of them being members and/or past officials thereof;**
- b. **Whether the Defendants could be restrained from selling, alienating, disposing off (sic) and/or otherwise interfering with the said documents, instruments, properties and/or assets held by them in trust of them being members and/or past officials thereof.**

19. It is important to point out right from the onset that the Plaintiff indicated in its Written Submissions that the Plaintiff was a Cooperative Society Limited duly registered and incorporated under the Co-operatives Societies Act Cap 480 (Laws of Kenya)(hereinafter referred to as “the Act.”). Under Section 4 of the Act, one of the objects is for the promotion of welfare and economic welfare of its members and may be registered with or without limited liability.
20. Section 17 of the Act also provides that no person shall be a member to such a co-operative society unless he has made payment in respect of his membership. The Act also provides for the holding of annual general and special meetings and that the Committee appointed under the provisions of Section 28 (3) shall have power to defend suit and other proceedings brought against the co-operative society.
21. Under Section 76 of the Act, it is provided that:-

**“(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.”**

22. Although the dispute herein involving it and its members was not strictly about collection of debt as was envisaged under Section 76 (1) (b) of the Act, the court was slow to make a definite conclusion as whether the dispute was excluded from the said scope of disputes contemplated under that Section. The court could only observe that **“A dispute for the purpose of this section shall include”** (emphasis court). It did not state the nature of disputes that would be excluded for determination under the said Act.
23. Notably, while Clause 99 of the Plaintiff’s By-Laws would be applicable where the Plaintiff’s Committee could not deal with a particular dispute as had been submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the same cannot not supersede the provisions of a statute and had to be read in context of what a dispute is under the said Act.
24. Indeed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ contentions regarding the number of the Plaintiff’s members, the issue of who was and who was not its member as had been contended by the Interested Party were outside the jurisdiction of this court. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ assertions that the elections alluded to in the Plaintiff’s application were a sham and that the persons claiming thereunder were not elected at all was also outside the jurisdiction of this court as the issues were well provided for under the said Act.
25. The court did not therefore wish to enter into the discourse as to who had *locus standi* to institute or defend the proceedings herein as the jurisdiction of this court was limited to dealing with disputes under the Companies Act Cap 486 (Laws of Kenya).
26. Having said so, what really appeared to the court to have been in contention was whether or not it

had jurisdiction to grant the prayer for injunctive orders and issue orders relating to the accounts the Plaintiff had demanded from the Defendants.

27. On one hand, the Plaintiff argued that this court was clothed with jurisdiction while the 3<sup>rd</sup> – 7<sup>th</sup> Defendants and the Interested Party submitted that the dispute squarely fell within the jurisdiction of the Environment and Land Court.

28. Article 162 (2) and (3) of the Constitution of Kenya, 2010 provides as follows:-

**“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:-**

- a. ....and
- b. **The environment and the use and occupation of, and title to, land,**
- c. **Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause 2.”**

29. Section 13 of the Environment and Land Court Act Cap 12 A (Laws of Kenya) further stipulates as follows:-

**13. (1) the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

1. **In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes:-**

- a. **Relating to environment planning and protection, climate issues, land use planning, title tenure, boundaries, rates, rents, valuations, mining, mining minerals and other natural resources;**
- b. **Relating to compulsory acquisition of lands;**
- c. **Relating to land administration and management;**
- d. **Relating to public, private and community and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- e. **Any other dispute relating to environment and land** (emphasis court).

30. The Plaintiff was apprehensive that the Defendants would dispose of the subject property. However, the Defendants were categorical that they could not dispose of the subject property without express authority of its members who they said were also rightful owners of the same. In fact, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had stated that they had lodged a caveat against the property to protect the Plaintiff’s interests and that there was therefore no possibility of the subject property being disposed of.

31. A letter dated 30<sup>th</sup> May 2011 from M/S Kahari & Kiai Advocates to the 3<sup>rd</sup> Defendant that was annexed to the Plaintiff’s Supporting Affidavit, Exhibit Marked “JM 4”, appeared to be what the Plaintiff had hinged its apprehension that the subject property would be disposed of.

32. Evidently, a central issue in this matter related to land. The tussle of who was or who was not the owner of the subject property went to the root of the use, occupation and title to land, a matter that is within the purview of the Environment and Land Court.

33. Bearing in mind that the instruments or documents that the Plaintiff was seeking related to land, this was a matter that fell within the provisions of Section 13 (1)( e) of the Environment and Land Act as was rightly submitted by the 3<sup>rd</sup>- 7<sup>th</sup> Defendants and the Interested Party. The court was therefore hesitant to make a conclusive determination as regards the prayer for the rendering of accounts on all documents, instruments, assets and properties of the Plaintiff as had been sought by the Plaintiff herein in view of its views on jurisdiction.

34. As the issue of jurisdiction goes to the root of this matter, the court must down its tools forthwith. In the case of **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters Of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

**“... Jurisdiction is everything and without it, a court has no power to make one more step...”**

35. Having considered the pleadings, the affidavit evidence, the written submissions and the case law in respect of the parties' case, the court came to the conclusion that it was unable to take any further step and could not delve into the issue of whether or not the matter was *res judicata*, if the Plaintiff was entitled to the injunctive reliefs or direct that the Defendants to render accounts on all the documents, instruments, assets and/or properties belonging to the Plaintiff held by them on account of the Plaintiff in trust for its members for the reason that these are issues that ought to be determined by the court clothed jurisdiction.
36. The court had, however, found it prudent to deal with the issue of whether or not the Co-operative Tribunal had jurisdiction to deal with the issues at hand with a view to establishing to which court this matter could be referred.
37. This application cannot be saved by the court invoking its inherent power as had been contended by the Plaintiff. There was no commercial element as was rightly submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Consequently, the court was persuaded by the 3<sup>rd</sup> -7<sup>th</sup> Defendants and Interested Party's submissions that this matter was wrongly filed and presented before this court and ought to be heard and determined by the Environment and Land Court as the substratum of this suit related to land, a matter that fell squarely within the jurisdiction of the Environment and Land Court.

### **DISPOSITION**

38. For the foregoing reasons, the court was not persuaded that it should determine the merits of the dispute herein and directs that the court file be transferred and placed before the Presiding Judge of the High Court of Kenya Milimani Law Courts Environment and Land Court Division on 4<sup>th</sup> May 2015 for her further orders and/or directions.
39. For the avoidance of doubt, the court will maintain the *status quo* order that it issued on 27<sup>th</sup> January 2014 and subsequently extended until 4<sup>th</sup> May 2015 to give the aforesaid court an opportunity to consider whether or not it will deem it fit and necessary to extend the said order.
40. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of April, 2015**

**J. KAMAU**

**JUDGE**