



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 11 OF 2014

NYAIGWA FARMERS CO-OPERATIVE

**SOCIETY LIMITED
PLAINTIFF**

-VERSUS-

**IBRAHIM NYAMBARE 1ST
DEFENDANT**

**JEREMIAH MATARA 2ND
DEFENDANT**

**JAMES MOGAKA MABUKA 3RD
DEFENDANT**

**GEORGE AKAMA SAMSON 4TH
DEFENDANT**

**ROBERT G. N MAINYA 5TH
DEFENDANT**

**JACOB MUGA 6TH
DEFENDANT**

**KERICHO STYLEX LIMITED 7TH
DEFENDANT**

**THE DISTRICT LAND REGISTRARKISII CENTRAL DISTRICT..... 8TH
DEFENDANT**

RULING

1. The plaintiff is a registered Co-operative Society established under the Co-operative Societies Act, Cap. 490 Laws of Kenya and the Companies Act, Cap 486 Laws of Kenya. The 1st, 2nd, 3rd and 4th defendants were at all material times the Chairman, Vice-chairman, Secretary and Treasurer respectively of the plaintiff. The 5th defendant was the general manager of Kisii Farmers Co-operative Society Limited of which the plaintiff was at all material times a member. The 6th defendant on the other hand was the District Co-operative Officer, Kisii Central District within

whose jurisdiction the plaintiff was operating. The 7th and 8th defendants would be introduced later in this ruling.

2. The plaintiff brought this suit against the defendants on 13th May 2014. In its plaint dated 7th May 2014, the plaintiff averred that at all material times, the plaintiff was the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block III/105** (hereinafter referred to as **“the suit property”**). The plaintiff averred that, sometimes in the year 2010, the 1st to 6th defendants sold and transferred the suit property to the 7th defendant without the plaintiff’s consent or authority. The plaintiff averred that the suit property was sold by the 1st to 6th defendants to the 7th defendant at a consideration of Kshs. 23,000,000/= without complying with the provisions of the Co-operative Societies Act, the rules, regulations and by-laws of the plaintiff, and the Public Procurement and Disposal Act, 2005. The plaintiff averred that the sale of the suit property to the 7th defendant was illegal, fraudulent and tainted with misrepresentation. The plaintiff accused the 1st to 6th defendants of among others; including the names of dead members in the list of the members who are said to have attended the General Meeting of 14th July 2010 at which the sale of the suit property was purportedly approved, failure to notify the 7th defendant that the tender had been awarded to him in accordance with the provisions of the Public Procurement and Disposal Act, 2005, failure to advertise the suit property for sale in accordance with the Public Procurement and Disposal Act, 2005 and failure to sell the suit property to the highest bidder.
3. The plaintiff averred further that the suit property was sold to the 7th defendant while there was a court order in force issued in Misc. Cause No. 115 of 2005 which prohibited interference with the suit property pending the hearing of the said cause. The plaintiff averred that the illegal sale of the suit property has subjected it to economic and financial loss. The plaintiff sought the following reliefs against the defendants jointly and severally:-
 - i. **An order for the 1st to 6th defendants to remit the purchase price of the suit property to the plaintiff together with interest.**
 - ii. **In the alternative to (i) above, an order compelling the 7th defendant to surrender the title deed for the suit property to the 8th defendant for cancellation so that the suit property reverts to the plaintiff.**
 - iii. **Further in the alternative to (a) above an order compelling the 8th defendant to cancel the title to the suit property held by the 7th defendant and the issuance of a new title for the property in the name of the plaintiff.**
 - iv. **Cost of the suit.**
4. The 1st, 2nd, 3rd and 4th defendants filed a joint statement of defence while the 5th and 7th defendants filed separate statement of defences to the plaintiff’s claim. The 6th and 8th defendants neither entered appearance nor filed statements of defence. In their statement of defence, the 1st to 4th defendants admitted that at all material times they were members and duly elected officials of the plaintiff. They admitted further that the suit property was sold to the 7th defendant but denied that the sale was without lawful authority or consent of the plaintiff. The 1st to 4th defendants denied that any dead member of the plaintiff was included in the list of members who attended the plaintiff’s General Meeting that was held on 14th July 2010. The 1st to 4th defendants averred that there was nothing illegal or fraudulent in the award of the tender for the purchase of the suit property to the 7th defendant and the subsequent execution of the agreement for sale of the suit property to it (the 7th defendant).
5. The 1st to 4th defendants averred further that the issue as to the legality of the meetings of the plaintiff through which the sale of the suit property was approved and subsequently carried out can only be determined by the Co-operative Tribunal established under the Co-operative Societies Act, Cap 490 Laws of Kenya. The 1st to 4th defendants denied that they breached the provisions of the Public Procurement and Disposal Act, 2005 in the sale of the suit property to the 7th defendant. The 1st to 4th defendants averred that in any event, a dispute over the disposal of the suit property

should have been lodged with the Public Procurement Appeals Tribunal for determination in the first instance. The 1st to 4th defendants denied the contents of paragraphs 16, 17 and 18 of the Plaintiff. They denied that the suit property was not advertised for sale before it was sold to the 7th defendant and that the property was not sold to the highest bidder. They averred that, contrary to the plaintiff's contention in paragraph 9 of the plaintiff that there is no suit pending between the parties, there is a case pending before the Co-operative Tribunal namely, Cause No. 143 of 2014 between the plaintiff and the 1st to 4th defendants. The 1st to 4th defendants denied the jurisdiction of this court to hear and determine this suit in the first instance.

6. In his statement of defence, the 5th defendant stated that he was at all material times the chief executive officer of Kisii Farmers Co-operative Society Ltd to which the plaintiff had subscribed as a member. The 5th defendant averred that the suit property was sold to the 7th defendant by the plaintiff through its lawful officials. The 5th defendant denied that there was any wrong doing in the sale of the suit property to the 7th defendant. The 5th defendant averred that his role in the sale of the suit property to the 7th defendant was merely that of an observer and as such the plaintiff's suit discloses no or any reasonable cause of action against him. The 5th defendant denied that this court has jurisdiction to determine this suit which jurisdiction he contended is with the Co-operative Tribunal in the first instance.
7. In its statement of defence, the 7th defendant admitted that it purchased the suit property from the plaintiff and that it is now the registered proprietor thereof. The 7th defendant denied that the suit property was sold to it illegally, fraudulently and through misrepresentation. It denied also that the suit property was sold to it in breach of a court order and contended that the case alluded to by the plaintiff had been dismissed prior to the sale of the suit property. The 7th defendant denied the jurisdiction of this court to hear and determine the issues raised by the plaintiff which the 7th defendant has termed "day to day affairs of a Co-operative society."
8. What is now before me is the 1st to 4th defendants' application dated 9th July 2014 in which they have sought the following reliefs;
 - i. **That the plaintiff's suit/pleadings be struck out on the ground that the same raises no triable issues and are scandalous, frivolous, vexatious and otherwise amounts to an abuse of the process of the court.**
 - ii. **That in the alternative, the plaintiff's suit be struck out.**
 - iii. **That the court do issue such other reliefs and orders that the court may deem fit and expedient to grant in the circumstances of the case.**
 - iv. **That the costs of this application be provided for.**

The 1st to 4th defendant's application was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 2 rule 15 (i), (b), (c) and (d) of the Civil Procedure Rules and all other enabling Provisions of the law. The same was supported by the affidavit of the 1st defendant sworn on 9th July, 2014 and the grounds set out on the face thereof. In the said affidavit, the 1st to 4th defendants contended that the suit property was sold to the 7th defendant lawfully through tender and whoever was aggrieved with the manner in which the suit property was put up for sale should have challenged the same at the Public Procurement Appeals Tribunal set up under the Public Procurement and Disposal Act, 2005 Cap 421A Laws of Kenya and at the Co-operative Tribunal established under the Co-operative Societies Act, Cap 490 Laws of Kenya. The 1st to 4th defendants contended that the plaintiff has in fact raised the same issues that it has raised herein before the Co-operative Tribunal in Cause No. 143 of 2014 which cause is pending hearing and determination. The 1st to 4th defendants have contended that the proceeds of sale of the suit property were remitted to the plaintiff and no loss of whatsoever nature was occasioned to the plaintiff arising from the said sale. The 1st to 4th defendants have contended that this suit has been brought at the instance of new office bearers of the plaintiff for collateral purposes. The 1st to 4th defendants have contended that the suit is an abuse of the process of the court and has no prospect of success.

9. The application was opposed by the plaintiff through grounds of opposition and replying affidavit sworn by one, Stephen Ogamba both dated 2nd September 2014. In its grounds of opposition, the plaintiff contended that the application is frivolous, misconceived, and incompetent and that the same has been brought in bad faith. The plaintiff contended further that it has raised several issues in the paint which should go for full trial the same having been denied by the defendants. The plaintiff contended that this court has jurisdiction to hear and determine this suit as it touches on land.
10. In his replying affidavit, Stephen Ogamba who is the plaintiff's current chairman reiterated that the plaint filed herein which the 1st to 4th defendants have sought to strike out raises several triable issues which can only be determined at the trial. He deposed that the sale of the suit property was not approved at the plaintiff's special general meeting and as such was illegal. He has deposed further that this suit has been brought solely for the purpose of recovering the suit property and the same is not intended in any way to embarrass the 1st to 4th defendants.
11. On 30th October 2014, the advocates for the parties agreed to argue the 1st to 4th defendants application by way of written submissions. The 1st, 2nd, 3rd, 4th and 7th defendants filed joint written submissions on 17th November 2014 while the plaintiff did so on 16th December 2014. The 5th defendant filed his submissions on 21st November 2014 in support of the application. I have considered the 1st to 4th defendants application that was supported by the 5th and 7th defendants. I have also considered the grounds of opposition and replying affidavit filed by the plaintiff in opposition thereto. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support of their respective cases. I have at the beginning of this ruling set out the plaintiff's claim against the defendants. In summary, the plaintiff has contended that the 1st to 4th defendants who were the officials of the plaintiff colluded with the 5th and 6th defendants and caused the suit property that was registered in the name of the plaintiff to be sold and transferred to the 7th defendant. The plaintiff has contended that the sale of the suit property to the 7th defendant was unlawful in that the transaction was not approved by the bona fide members of the plaintiff in accordance with the provisions of the Co-operative Societies Act and the rules and regulations made thereunder and the plaintiff's by-laws. The plaintiff has also contended that the 1st to 4th defendants did not comply with the Public Procurement and Disposal Act, 2005 while disposing of the suit property. The main relief that the plaintiff has sought in the plaint is an order to compel the 1st to 6th defendants to remit the purchase price that was realized from the sale of the suit property to the plaintiff. The plaintiff has sought two additional reliefs in the alternative.
12. In the application before me, the 1st to 4th defendants have contended that the plaintiff's suit raises no triable issues, is scandalous, frivolous, vexatious and amounts to an abuse of the process of the court. The 1st to 4th defendants have urged me to strike out the suit on that account. The 1st to 4th defendants application has been brought under Order 2 rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules. Order 2 rule 15 of the Civil Procedure Rules gives the court power to among others, summarily strike out suits on any of the grounds set out thereunder. What I need to determine in the application before me is whether this is a fit and proper case for striking out under order 2 rule 15 of the Civil Procedure Rules. The 1st to 4th defendants as I have stated above have contended that the plaint filed herein discloses no reasonable cause of action or triable issues against the 1st to 4th defendants. They have also contended that the plaint contains matters which are scandalous, frivolous and vexatious which may embarrass or delay the fair trial of this suit. Finally, they have contended that this suit is otherwise an abuse of the process of the court.
13. While considering whether the plaint raises any reasonable cause of action, the court would only look at the pleadings on record. Affidavit evidence is not admissible. In the court of appeal case of **D. T Dobie & Company (Kenya) Ltd -vs- Muchina [1982] KLR 1**, Madan J. A stated as follows at page 9:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of

the court. At this stage, the court ought not to deal with the merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the normal way.” (Sellers, L. J. (supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.”

Madan J. A stated further that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

14. On the material before me, I am not satisfied that the plaint filed herein discloses no reasonable cause of action. The plaintiff's complaint as I have stated above, is that, the 1st to 4th defendants who were officials of the plaintiff colluded with the 5th and 6th defendants to fraudulently and illegally sell the suit property to the 7th defendant. The plaintiff has claimed that the 1st to 4th defendants did not adhere to the provisions of the Co-operative Societies Act and the rules and regulations made thereunder. The 1st to 4th defendants have also been accused of failing to comply with the plaintiff's by-laws and the Public Procurement and Disposal Act, 2005. The defendants have denied these claims maintaining that the sale of the suit property to the 7th defendant was above board and that all necessary legal procedures were followed to the letter while conducting the sale. It is obvious from the foregoing that this court will have to determine whether the suit property was lawfully sold to the 7th defendant or not. As I have stated above, the 1st to 4th defendants have been accused of; failing to obtain the approval of the bonafide members of the plaintiff before selling the suit property, failing to advertise the suit property for sale, failing to sell the suit property to the highest bidder and failing generally to comply with the Public Procurement and Disposal Act, 2005. These issues in my view are not frivolous, scandalous or fanciful. The determination of these issues would no doubt require evidence. The 1st to 4th defendants have in their submission invited me to consider the evidence that has been placed before me through the affidavit filed herein in support of the application and the 1st to 7th defendant's bundle of documents. As I have stated above, this kind of evidence is not admissible when the court is considering whether or not a pleading discloses a reasonable cause of action. The court must restrict itself to the pleadings. On the pleadings filed by the parties, I am unable to determine the issues that I have framed above. The same will have therefore to await plenary hearing of this suit. Consequently, it is my finding that the plaint filed herein discloses reasonable cause of action.

15. Although the plaint raises triable issues, I am in agreement with the 1st to 4th defendants that as far as the plaintiff's claim against them is concerned, this court is not the right forum where the issues raised by the plaintiff should be tried and determined. It is not in dispute that at all material times the 1st to 4th defendants were members and officials of the plaintiff. It is also not in dispute that the 1st to 4th defendants sold the suit property in their capacity as officials of the plaintiff. The plaintiff has accused the 1st to 4th defendants of failure to discharge their duties as officials of the plaintiff in accordance with the law and the plaintiff's by-laws. The dispute that has arisen between the plaintiff and the 1st to 4th defendants therefore concerns the business of the plaintiff and it is a dispute between the plaintiff and its members. As I have stated above, the plaintiff's main claim against the 1st to 4th defendants is for the recovery of the proceeds of sale of the suit property. Section 76 of the Co-operative Societies Act Cap 490 Laws of Kenya provides as follows:-

Section 76;

1. If any dispute concerning the business of a Co-operative Society arises:-

- a. among members, past members and persons claiming through members past 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 nominee or personal representative of the deceased member for any debt or demand due from a Co-operative society whether such debt or demand is admitted or not.

16. I am in agreement with the submissions by the 1st to 4th defendants advocate that the plaintiff's claim herein in which he is seeking the recovery from the 1st to 4th defendants of the purchase price that was paid by the 7th defendant for the suit property, should have been instituted in the first instance in the Co-operative Tribunal established under section 77(1) of the Co-operative Societies Act, Cap 490 Laws of Kenya. I am of the view that this is what informed the decision of the plaintiff to lodge a claim against among others the 1st to 4th defendants before the Co-operative Tribunal at Nairobi in Tribunal Case No. 143 of 2014 which claim was lodged on 31st March 2014 before the filing of this suit. It is instructive to note that the plaintiff's claim against the 1st to 4th defendants at the Tribunal relates to the sale of the suit property and seeks the recovery of the proceeds of the said sale which the 1st to 4th defendants and other persons who comprised the plaintiff's committee members at the material time are said to have misappropriated.

17. I am not in agreement with the plaintiff's contention that merely because its claim against the 1st to 4th defendant's relates to sale of land, this court has jurisdiction over the same. Save where it is expressly stated in the Environment and Land Act, 2011 or any other Statute to the contrary, the establishment of this court did not take away the jurisdiction of specialized tribunals and courts that had been established by various statutes to deal with particular disputes even if such disputes touches on environment and land. In any event, the plaintiff's claim herein as against the 1st to 4th defendants does not strictly relate to environment and land. The plaintiff's claim against the 1st to 4th defendants is set out in paragraph (a) of the reliefs sought as **"An order to issue compelling the 1st – 6th defendants to remit the purchase price of the plot to the plaintiff together with interest from the date of sale."** The plaintiff's claim against the 1st to 4th defendants simply put is for the 1st to 4th defendants to remit to the plaintiff the purchase price of the suit property which came to their possession in their capacity as officials of the plaintiff. This is the same claim that the plaintiff has lodged against the same parties at the tribunal. It is my finding that this court has no jurisdiction to determine the dispute between the plaintiff and the 1st to 4th defendants. To institute a suit in a court with no jurisdiction to determine the same renders the suit incompetent and a candidate for striking out. It is also my finding that it amounts to an abuse of the court process for the plaintiff to lodge a claim against the 1st to 4th defendants at the tribunal and before this court in respect of the same subject matter. A suit which is an abuse of the process of the court is also liable to be struck out by the court under order 2 rule 15 of the Civil Procedure Rules.

18. In conclusion, it is my finding that this suit is incompetent as against the 1st to 4th defendants for having been brought in a court that has no jurisdiction to entertain the same. It is also my finding

that the suit is an abuse of the process of the court the same having been brought while a similar claim against the 1st to 4th defendants is pending before Co-operative Tribunal. In the circumstances, I find merit in the 1st to 4th defendants' application dated 9th July 2014. I allow the same in terms of prayer 2 thereof. This suit is accordingly struck out as against the 1st to 4th defendants. The 1st to 4th defendants shall have the costs of the application and the suit.

Delivered, Dated and Signed at Kisii this 24th day of April, 2015

S.OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Bogi for the 1st, 2nd, 3rd, 4th and 7th defendants

N/A for the 5th defendant

N/A for the 6th and 8th defendants

Mobisa Court Clerk

S.OKONG'O

JUDGE