



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. CIVIL APPLICATION NO. 215 OF 2015**

**IN THE MATTER OF:** *The Co-operatives Tribunal at Nairobi Tribunal Case No. 60 of 2007*

**BETWEEN**

**ROBERT GITHAIGA MWANGI**

**JOHN KANGARA NJOROGE**

**FELISTA WANJIKU KIBATHI**

**KENNETH KAMURA KIARIE**

**ATHANUA KIHUNGI MAINA.....PLAINITFFS/APPLICANTS**

**AND**

**KIAMUMBI FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT**

**AND**

**IN THE MATTER OF:** *Civil Miscellaneous Application No. 215 of 215*

**BETWEEN**

**ROBERT GITHAIGA MWANGI**

**JOHN KANGARA NJOROGE**

**FELISTA WANJIKU KIBATHI**

**KENNETH KAMURA KIARIE**

**ATHANUA KIHUNGI MAINA.....APPLICANTS**

**AND**

**KIAMUMBI FARMERS CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

## RULING

1. The Plaintiffs herein filed three applications. The first application was a Notice of Motion where they sought leave of the court to commence contempt proceedings against the officials of the Defendant. The said leave was granted by Gikonyo J. on 15<sup>th</sup> March, 2015. That left the substantive application for contempt of court proceedings against the Respondents and the Application for security of costs of the suit.

2. The parties agreed and canvassed the Notice of Motion dated 14th May, 2015. The same motion is brought under **Section 1A, 1B, 3, 3A, 63(b), (c), & (e) and 100 of the Civil Procedure Act Cap 21 Laws of Kenya as well as Order 39 Rule 5, Order 40 Rules 1, 2, 3 and 4 together with Order 51 of the Civil Procedure Rules** and all the enabling provisions of the law. The same sought the following orders:-

1. *Spent*

2. *Spent*

3. **THAT this Honourable Court be pleased to issue an order to the Respondent to show cause why it should not furnish security for production of its Bank Accounts in K-rep Bank Yes Acc No. 036050000281/K-Rep Contractual Saving Account No. 001190001462/K-Rep SME Current Account No. 0010200006404/K- Rep Loan Account No. LD0915500006 & Co-operative Bank account Number 01132000566600 to the tune of Kenya Shillings 35 Million and the same amount be deposited in a joint interest earning account of both advocates on record for the applicants and respondents and/or in the alternative to be deposited in court pending the hearing and determination of Tribunal Case No. 60 of 2007 Robert Githaiga Mwangi and four others-vs- Kiamumbi Farmers Co-operative Society Ltd.**

4. **THAT pending the hearing of this application inter-parties that this Honourable Court be pleased to issue an order to the Respondent to show cause why it should not furnish security for cost of the suit.**

5. **THAT this Honourable Court be pleased to make any other or further orders as the justice of the case may demand.**

6. **THAT costs of this application be borne by the defendant.**

3. The application was based on the grounds listed in the application as well as the supporting affidavit of John Kangara Njoroge sworn on 14th May, 2015. In it, the Applicants contend that a dispute exists between the Applicants and the Respondent in the Tribunal Case No. 60 of 2007, Robert Githaiga Mwangi and 4 others –vs- Kiamumbi Farmers Co-operative Society Limited. That in willful disobedience of the Tribunal's orders issued on 8th June, 2009, the Respondent went ahead to dispose off the land known as Kiamumbi/Municipality/Block 5 (Kiamumbi) 737 for about Kshs. 200,000,000/= and the proceeds therein are likely to be held in K-rep Bank Yes Acc No. 036050000281/K-Rep Contractual Saving Account No. 001190001462/K-Rep SME Current Account No. 0010200006404/K- Rep Loan Account No. LD0915500006 & Co-operative Bank account Number 01132000566600. That in view of the foregoing the same can be attached to secure the sum of Kshs. 35,000,000/= which the Applicant's claim.

4. It was further deponed that the Applicants claim consists of 8 plots against the Respondent at the current market valuation of Kshs. 4,000,000/= each making a total of Kenya Shillings 32,000,000/=, dividends of Kshs. 200,000/= each making a total of Kshs. 1,000,000/= and the cost of the suit of about Kshs. 2,000,000/= making a grand total of Kshs. 35,000,000/=. That the reason the Applicant has sought this court's intervention is due to the fact that the Tribunal lacks quorum and therefore the hearing of the claim by the Applicants cannot proceed.

5. In response to the application, Respondent filed a Replying affidavit and two further affidavits sworn by Leonard Ndungu Mbugua dated 19<sup>th</sup> June, 2015, 2<sup>nd</sup> July 2015 and 14<sup>th</sup> July 2015 respectively.
6. It was contended that the listed accounts in the Applicants' application are used solely for the purpose of running a water trust that has the mandate to supply water to the residents of Kiamumbi area in Kiambu County. That if the said orders are granted, the same will cause undue difficulty in the management and supply of water services to a multitude of people thus denying them rights accruing to them. That at no one time, did the respondent deposit in the said accounts any other monies other than those concerned with the running of the water trust.
7. The deponent clarified that it did indeed advertise and sell Kiamumbi/Municipality/Block 5 (Kiamumbi) 737 for about Kshs. 200,000,000/= and the proceeds therein are currently placed in an escrow account held in the advocates that were involved in the transaction; that the said account was a fixed Deposit Account No. 01132000566600 Co-operative Bank of Kenya; that upon the sale and handover of the property, a third party, that is, Kenya Prisons Authority laid claim to the property an issue now under investigations.
8. The Respondents therefore asserted that the Application for security of costs before the court has no basis and the same should be dismissed.
9. The application was canvassed by way of written submissions which were orally highlighted in court. In a nutshell, it was the Applicants' submission that the Respondent has almost exhausted all its known assets; that only one asset known as Kiamumbi/Municipality/Block 5 (Kiamumbi) 737 is known and the same was sold off for about Kshs. 100,000,000/=; that the said monies are currently in a fixed deposit account in Co-operative Bank Ac No. 01132000566600 under the account name of the Respondent; that therefore, the same should be attached to secure the Applicants' claim of Kshs. 35,000,000/=.
10. With regard to the issue of the other accounts belonging to a water trust, it was submitted that the said Trust was a subsidiary of the Respondent and therefore the court can lift the corporate veil so that the Respondent cannot be shielded from its creditors. The Respondent reiterated the contents of its affidavits. In conclusion the court was urged to dismiss the application for security of costs as there is an operating tribunal presently. That therefore the Applicant can fast track its case in the Tribunal.
11. Having considered the application, the supporting Affidavit and the Replying Affidavit together with the further affidavits of the respective parties, I hold the following view of the matter.
12. As noted earlier on in this ruling, it is vital to address the issue of whether the court is properly seized of this matter. Again, neither of the parties raised this issue. Canvassing the record before the court and from the various dispositions made by the parties, it is clear that there is an existing case in the Co-operatives Tribunal. This is **Tribunal Case No. 60 of 2007, Robert Githaiga Mwangi and 4 others –vs- Kiamumbi Farmers Co-operative Society Limited**. The Applicants are former members of the Respondent Co-operative and want to be reinstated as members of the said society. They further seeks various orders including the compensation of Kshs. 35,000,000/=.
13. In determination whether this court has jurisdiction to hear the Applicants' claim, this court must have regard to the provisions of Section 76 of the Act and to the nature of the claim and to the prayers sought in the application. Section 76 of the Act stipulates 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 license or any other due, from the Authority.”**

The provision calls for all disputes falling within the section to be determined by the Co-operative Tribunal.

14. The issue of determination herein is whether this court is seized with the jurisdiction to issue for an order for the security of costs given the provisions of section 76. I have carefully analyzed the nature of the claim and the prayers sought.

15. I have come to the conclusion that the claim does not fall within the ambit of this court. Given that the dispute at hand is one with regard to a claim or demand due from the Respondent by its past members, then it goes without saying that the dispute lies with the Tribunal. There is indeed pending proceedings at the said Tribunal. The legislature intended that the Co-operative Tribunal be the first level of dispute resolution with appeal lying in the High Court.

16. If parties were permitted to lodge claims covered by Section 76 of the Act to the High Court, this will deny them their day in the High Court at the appellant level.

17. I therefore find that the intervention of the High Court by granting the orders sought is not warranted. Further, if the orders are not granted by the court, the applicants are not likely to suffer any prejudice which cannot be compensated by way costs as they still have an opportunity to canvass their application before the tribunal. Though the tribunal proceedings may have been temporarily suspended until a quorum is established, the same does not donate powers to this court to usurp the jurisdiction of the Tribunal. I rely on the case of **KINOGERANA FARMERS CO-OPERATIVE SOCIETY LTD VS MURATA FARMERS SACCO LIMITED [2006] eKLR** where it was held that the High Court did not have jurisdiction to entertain the suit relating to a dispute between the two co-operative societies.

18. From the foregoing conclusions, I hold that the application for security of costs be struck out with liberty to parties to go to the Co-operative Tribunal for hearing and determination. Parties should bear their own costs.

**Dated, signed and delivered in court at Nairobi this 23<sup>rd</sup> day of October, 2015.**

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**C. KARIUKI**

**JUDGE**