



REPUBLIC OF KENYA

High Court of Kisii

Petition 84 of 2011

**IN THE MATTER OF: CHAPTER 5 ARTICLES 60,64, CHAPTER 10 ARTICLE 159; ARTICLE 40(1); ARTICLE 165(3), (6), OF THE CONSTITUTION OF KENYA
-AND-**

IN THE MATTER OF: ALLEGED CONTRAVENTION OF BILL OF RIGHTS AND FREEDOMS OF THE INDIVIDUALS UNDER ARTICLES 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 33, 35, 36, 37, 40, 41, 50, OF THE CONSTITUTION OF KENYA

-BETWEEN-

PETER ONGWENYI OCHOKI.....1ST PETITIONER
DAVID O. NYAKUNDI.....2ND PETITIONER
CHARLES B. SUNDA.....3RD PETITIONER
NAHASHON N. MBIGISI.....4TH PETITIONER
MUSAREMU MOCHAMA.....5TH PETITIONER
GWARO ONCHARI.....6TH PETITIONER
NEMWELI OSIEMO.....7TH PETITIONER
SIMON OKWOYO.....8TH PETITIONER
ORINGO MATENGO.....9TH PETITIONER
GIDION GISIORA.....10TH PETITIONER
CHARLES N. MAKINI.....11TH PETITIONER
TAI GESORA.....12TH PETITIONER
MAGOMA MONYANCHA.....13TH PETITIONER

PASKALIA MORAA TAI.....	14 TH PETITIONER
SOSPHTHER N. TAI.....	15 TH PETITIONER
MARITIN GETENGA.....	16 TH PETITIONER
FRANCIS M. KERUNDU.....	17 TH PETITIONER
NAYGOCHI NYAANGA.....	18 TH PETITIONER
SAMSON NYAMBARORA.....	19 TH PETITIONER
ASIAGO OKIAGO.....	20 TH PETITIONER
KWAMBOKA OKEROSI.....	21 ST PETITIONER
ONYANCHA MOGAMBI.....	22 ND
PETITIONER	
RAEL K. ATIKA.....	23 RD PETITIONER
NAOMI KENYA.....	24 TH PETITIONER
CHRISTOPHER N. NYAKORA.....	25 TH
PETITIONER	
WILFRED OKIOMA.....	26 TH
PETITIONER	
SAUL S. OMOSA.....	27 TH PETITIONER
BERSON NYABUTO.....	28 TH PETITIONER
ZABLON NYAMBARORA.....	29 TH
PETITIONER	
SIMBAB ONYANGO.....	30 TH PETITIONER
ELIJA OROO.....	31 ST PETITIONER
ZACHARIA ONDITI.....	32 ND
PETITIONER	
MAANYA OKONGO.....	33 RD PETITIONER
JAMES OTISO.....	34 TH PETITIONER
HERBERT ORINA.....	35 TH
PETITIONER	
NAOMI GESISI.....	36 TH
PETITIONER	

NYAKUNDI KERONGO.....	37TH
PETITIONER	
BATHSHEBA MUSIKIN OMARE.....	38TH
PETITIONER	
OCHORI KENYANYA.....	39TH
PETITIONER	
SIMONI AYIECHA.....	40TH
PETITIONER	
KERUBO AGWERA.....	41ST
PETITIONER	
JAMES OTISO.....	42ND
PETITIONER	
STEPHEN M. OIGO.....	43RD
PETITIONER	
GICHANA AKAMA.....	44TH
PETITIONER	
SAMUEL OTERO.....	45TH
PETITIONER	
BENSON BASWETI.....	46TH
PETITIONER	
JAMES NYAMBEGA.....	47TH
PETITIONER	
MOSOMI SIGINI.....	48TH
PETITIONER	
JEREMIAH N. NYAKWERE.....	49TH
PETITIONER	
DORCAS MOGAKA.....	50TH
PETITIONER	
THOMAS RATEMO.....	51ST
PETITIONER	
PETRO SOMONI MOTOKI.....	52ND
PETITIONER	
PETERSON ONCHIRI.....	53RD
PETITIONER	
OMARI ONDERI ROSANA.....	54TH
PETITIONER	
NDEGE MOCHORWA.....	55TH
PETITIONER	
FAITH MORAA.....	56TH
PETITIONER	

CAROLINE KERUBO.....	57 TH
PETITIONER	
PATRICK MATIKA OMBASA.....	58 TH
PETITIONER	
JOHN OMWATA.....	59 TH
PETITIONER	
MESHACK CHWEYA.....	60 TH
PETITIONER	
KERUBO OMayio.....	61 ST
PETITIONER	
ZADAKIA OBARE.....	62 ND
PETITIONER	

-VERSUS-

KISII FARMERS CO-OPERATIVE UNION LTD.....	1 ST
RESPONDENT	
THE COMMISSIONER FOR CO-OPERATIVES.....	2 ND
RESPONDENT	
THE COMMISSIONER FOR LANDS.....	3 RD
RESPONDENT	
THE ATTORNEY GENERAL.....	4 TH
RESPONDENT	

RULING

1. The application before the court is the Notice of Motion dated 29th December, 2011 seeking inter alia for orders:-

i. *THAT the Honourable court grants a temporary injunction restraining the 1st defendant from transferring, misusing and/or continuing to sell, transfer misuse of all the properties that belong to the 25 societies that form the KISII FARMERS CO-OPERATIVE UNION LTD and from causing damage, carrying out acts of waste, hindering the plaintiffs quiet enjoyment of and/or alienating the suitland called SIMBAUTI FARM and other plots, Bank Accounts, animals farm produce pending the inter parties hearing of this application .*

ii. *THAT the Honourable court be pleased to grant a permanent injunction restraining the 1st defendant, his agent from transferring and/or continuing to sell, transfer misuse, causing damage, carrying out acts of waste, hindering the plaintiffs quiet enjoyment or and/or alienating the suitland NO. L.R.NO.7487/2; Kisii Town/Block/11/88; Kisii/Block/11/21, Kisii Town/Block/11/23; Kisii Town/Block/11/113; Kisii town/Block/11/130, Kisii Town/block/11/131 until the determination of this suit.*

iii. *THAT the costs of this application be provided for.*

2. Application is premised on the grounds set out on the face of the application which for now I will not enter into as the 1st respondent has filed a preliminary objection which objection the parties by consent agreed to canvass first.

3. On the 17th January, 2012 the parties by consent agreed as follows:-

i. *The parties to file and exchange all the documents intended to be relied on as regards the preliminary objection raised by the respondent within 7 days.*

ii. *The parties shall file and serve their written submissions within 14 days after exchange of the documents.*

iii. *Mention on 28th February, 2012 for further orders and directions.*

iv. *Costs to be in the cause*

4. On the 28th February, 2012 parties confirmed having complied with the directions above.

5. By the Notice of Preliminary Objection dated 11th January, 2012 the 1st Respondent listed the following points in objection to the entire petition dated 29th December, 2011 and the Notice of Motion of the same date:

i. *That this court lacks jurisdiction to entertain the petition herein and*

ii. *That the petition is incompetent and the petitioner(s) lacks locus standi.*

6. In his submissions in support of the Preliminary Objection on the issue of jurisdiction of this Honorable Court counsel has cited section 76(1) of the Co-operative Societies Act which he submits is explicit in its provisions. It states as follows “*If any dispute concerning the business of a co-operative society arised:-*

i. *Among members, past members and persons claiming through members and deceased members;*
or

ii. *Between members, past members or deceased members, and the society, its committee or any officer of the society; or*

iii. *Between the society and any other co-operative society it shall be referred to the tribunal”*

7. Counsel for the 1st Respondent submits that the property referred to in the petition is registered in the name of the 1st Respondent and includes Land, cash, projects profits and alleged dividends which are all within the 1st Respondents business within the meaning of **Section 76(1)** above quoted.

8. He further submits that since petitioners claim to be members of member societies of the 1st Respondents, the petitioners position themselves among the categories of protagonists contemplated by **Section 76(1)** of the **Act**. Counsel therefore contends that any dispute(s) between the petitioners and the 1st Respondent as the one in the petition before court would be a “dispute” within the meaning of section 76(1).

9. It is counsel’s contention that the petitioners ought to have gone to the co-operative tribunal as established pursuant to section 77 of the Act whose decision thereon would then be appealable to this court as per the Act. That in the circumstances, and because the Co-operative Tribunal is alive and vibrant, the petitioners came to the wrong court.

10. He further submits that the 1st Respondent has neither a judicial nor quasi-judicial function as to render it subject to this court’s jurisdiction under **Article 165(6)** of the **Constitution** yet the petition is expressed to be pursuant to the same article. That this court’s supervisory jurisdiction under article 165(6) is therefore improperly invoked as against the 1st respondent. Counsel also contends that the other

provision the petitioners have relied on to lodge their petition in court being **Article 165(3)** of the **Constitution** is not absolute as the same is subject to sub-clause(5) there under which provides that

“165(5) the High Court shall not have jurisdiction in respect of matters.

(a).....

(b) *Falling within the jurisdiction for the courts contemplated in article 162 (2)”*

The said Article 162(2) clearly stipulates as follows:-

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to.

(a) *Employment and labour relations; and*

(b) *The environment and the use and occupation of and title to Land”*

11. He submits that parliament has since complied with the above constitutional requirement by enacting the **Environment and Land Court Act 2011 (Act No.119 of 2011)** whose Commencement date was 30th August, 2011 effectively creating the Environment and Land Court itself a superior court, tasked with matters of Land.

12. Counsel for the 1st Respondent further submits that the petition herein dated 29th December, 2011 was filed a whole four months from the commencement of Act No. 119 of 2011. Counsel also submits that even if the court were to construe the petition herein in any other way as an application for redress for a right of fundamental freedom unrelated to what is aforesaid the court would still be bound by the requirements of Article 23(1) which states:

“23(1) The High Court has jurisdiction in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom under the Bill of Right.

*“Clearly in requiring the strict observation of **Article 165, Article 23** does not exclude **clause(5) of Article 165”.***

13. In his conclusion, counsel for the 1st Respondent submits that the petition is a camouflage for a dispute under the co-operative societies act. Otherwise and to the extent that it relates to land, the subject matter would fall within the exclusive jurisdiction of the Environment and land court pursuant to **Article 165(5)** as read with **Article 162(2) (b)** of the **Constitution**.

14. He therefore submits that this court lacks jurisdiction. On the second issue counsel submits that as against the 2nd to 4th Respondents, the petition is bad for non-compliance with the provisions of **Section 13A** of the **Government Proceedings Act** Cap 40 laws of Kenya.

15. He prays that the court upholds the objection and strikes out the petition with costs. On their part counsel for the petitioners in opposing the preliminary objection submits that the preliminary objection is meant to escalate costs, delay the case, belittle the real issues and is likely to confuse the legitimate matter and that it is the type discouraged by article 159 of the constitution. In summary, counsel for the petitioner has addressed the issue raised in the preliminary objection under two heads i.e jurisdiction and locus standi. Counsel submits that the petitioner brought the Constitutional petition protesting the grabbing of their land acquired as members of the primary societies of the 1st respondent union. It was an infringement of their rights as enshrined in Chapter Four of the Constitution-Bill of Rights.

16. He submits that the 1st Respondent was mandated by the petitioners to sell 300 acres of their Land

by way of open tender system but its officials/agents fraudulently sold more than 900 acres depriving them of their property arbitrarily and against the spirit of the **Bill of Rights Article 40**. It is his submission that the petitioners had to move this court which has both original and appellate jurisdiction under **Article 165(3)(b)** of the **Constitution**.

17. He submits that the argument that the matter should have been filed before the Co-operative Tribunal is untenable as it cannot adjudicate Constitutional Petition and further the issues raised by the petitioners are both facts and law to be ascertained by the High Court. He submits that the mandate of the Co-operative tribunal has clearly been spelt out in **Section 76(1)** of the **Co-operative Societies Act**.

18. He submits further that the officers the petitioners employed to care for their property are using the co-operative Societies Act technicalities to infringe and deprive them of their fundamental rights. He has quoted article 159 of the

Constitution and cited a number of authorities on the same which I have gone through.

19. In MUKISA BISCUIT MANUFACTURING CO. LTD –vs- WEST END DISTRIBUTORS LTD(1969) E.A. 696 at P.700 Law J.A. of the East African court of Appeal observed “**so far as I am aware, PRELIMINARY OBJECTION consists of a POINT OF LAW which has been pleaded or which arises by clear implication out of pleadings and which if argued as a PRELIMINARY OBJECTION may dispose of the suit e.g. an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration**”.

20. Counsel has also quoted the words of **Sir Charles Newbold P** in the **Mukisa Biscuit case**, (above) who added: “*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 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*”.

21. Counsel submits that the matters raised by learned counsel for the 1st respondent cannot be dealt with as a preliminary objection because it is not on point of law but one involving facts to be ascertained by the court; that the preliminary objection advanced cannot dispose off this petition without ascertaining facts raised by the petitioner and respondent such as the exact value of the land sold by ordering a forensic audit of the same.

22. Counsel for the petitioner has relied on other authorities to emphasize the point above stated. I have carefully read the authorities.

23. On the second issue counsel for the petitioners submits that the petitioners gave consent in writing to the petitioner to act on their behalf and a list of the names attached behind the petition filed in court and that in the circumstances, they have locus standi.

24. In concluding his submissions counsel asks this court to dismiss the preliminary objection with costs as it is brought in bad faith to belittle the constitutional issues raised by the applicants and escalate the costs unnecessarily. Further the respondent will not suffer any prejudice if this matter is left to proceed on merit.

25. Having set out the rival submission by counsel, read through the authorities cited and the arguments filed herein, I take the following view:- This is an objection that challenges the jurisdiction of this Honourable court and the locus standi of the petitioners herein.

26. On the issue of jurisdiction issues raised in the petition concern a Co-operative Society and its members. The issues are also land related although the petitioners are claiming alleged contravention of their fundamental human rights under Chapter Four of the Constitution when they aver that they have been restricted in the enjoyment of their property. I am therefore persuaded that Section 76(1) of the Co-

operative Societies Act, is applicable in the circumstances of this case.

27. The very constitutional provisions which the petitioners seek to rely on are the same provisions that have tied the hands of this court as more particularly provided in Article 162(2) to the effect that “parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

(a).....

(b) *the ENVIRONMENT and the USE and OCCUPATION of and TITLE to LAND*”

28. Secondly and as was held in the MUKISA BISCUITS case (above) the Preliminary objection raised by the 1st Respondent herein raises a pure point of law touching on the jurisdiction of this court. It is a well known principle of practice that jurisdiction is everything and without it, a court cannot make one more step. This instant case is one for the Co-operative Tribunal although it is camouflaged as a Constitutional matter. What this court is being asked to do is not to exercise judicial discretion, but to decide whether on the basis of the Co-operative societies Act, this court has jurisdiction to hear this matter at first instance. This court does not have such jurisdiction.

29. Last but not least I do not think that the 1st respondent’s Preliminary Objection is a matter that can be so easily disposed off under the provisions of article 159(2)(d). The issues raised by the 1st respondent touching on the jurisdiction of the court cannot be said to be mere procedural technicalities. I am of course alive to the principles set out by the court of Appeal in the case of **D.T.Dobie & Company(Kenya) Ltd –vs- Muchira [1982] KLR 1**, but the scenario in the instant case is not one of amendment. The scenario is one in which a party has come to seek redress in a wrong court despite the fact that petitioners herein have locus to institute these proceedings being members of the various societies that make up the 1st respondents union.

30. Having said the above that and having considered the authorities cited I find that the preliminary objection raised by the 1st respondent has merit and consequently the preliminary objection is upheld. Accordingly, this court finds that it has no jurisdiction to entertain the petition herein, the petition and having been filed before the wrong court. The petition is also incompetent, as against the 2nd to 4th Respondents for non-compliance with the provisions of Section 13A of the Government Proceedings Act Cap 140 Laws of Kenya. The Petition is accordingly struck out with costs to the Respondents.

Dated and delivered at Kisii this 31st day of October,2012.

**RUTH NEKOYE SITATI,
JUDGE.**

In the presence of:-

Mr. Ondieki (present) for the Petitioners.

Mr. Migiro holding brief for Mr. Nyatundo for 1st Respondent

Mr. C.K. Maina (Absent) for 2nd -4th Respondents

Mr. Bibu Court Clerk.

**RUTH NEKOYE SITATI,
JUDGE.**