



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 534 of 2012

JOHN KIMANI NJOROGE.....PLAINTIFF

VERSUS

JOSEPH MUTHIORA WAINAINA..... DEFENDANT

RULING

The plaintiff herein **John Kimani Njoroge**, instituted this suit against the defendant seeking orders for permanent injunction restraining the defendant from interfering with the operation of his matatu business as well as damages. Together with his plaint, the plaintiff filed Chamber Summons dated 31st October 2012 seeking the following orders:

- (i) THAT this application be heard ex-parte in the first instance for expediency as the same is urgent.**
- (ii) THAT the Defendants jointly and severally, their agents, and/or servants be temporarily restrained from unlawfully interfering with the Applicant/Plaintiff rights of operating Matatu business alongside the Likana Sacco Ltd in Limuru Municipality pending the hearing and final determination of this suit.**
- (iii) THAT the Officer commanding the Tigoni Police Station be directed to serve the order to avoid any public chaos.**
- (iv) THAT the costs of this application be provided for.**

The application is supported by an affidavit sworn by the Plaintiff/Applicant on 31st October 2012 in which he deposes that he owns motor vehicle registration KAN 134G which plies Limuru/Flyover route in his capacity as member no. 24 in the Lingana Sacco Ltd. (hereinafter referred to as the SACCO). When the said SACCO introduced Lingana Savings and Credit Society to man the day to day operation within the said route, the applicant sought an explanation from the chairman of the SACCO but none was forthcoming. According to him the said action is meant to deny him his lawful rights of operating under the SACCO alongside other members despite his being a lawful member. According to him his natural beliefs do not allow him to join Lingana Savings and Credit Co-operative Society and is thus denied his rights under Article 36(2) of the Constitution hence the orders sought herein.

In opposition to the application, the respondents filed an application sworn by **Joseph Muthiora Wainaina** in which he deposed that the respondents as well as the applicant and other members are in matatu business plying the said route and that it is a requirement by the government that for one to run

matatu business one has to join a group hence the registration of the SACCO with 100 members including the applicant. According to the deponent there are set rules which govern the said group which rules the members are obliged to follow. However, the applicant failed to adhere to the said rules including paying of daily service charge and instead started overcharging passengers who decided not to board the applicant's motor vehicle. In the deponent's view the applicant is the author of his own misfortune and hence it is in the interest of justice that the application be dismissed.

In his submissions, the applicant reiterated the contents of the said supporting affidavit and urged the Court to grant the orders sought because he is suffering yet he has taken out all the necessary licences. He, however admitted having not sought the help of the Co-operative Tribunal.

In his submissions, **Mr. Mburu Macua**, learned counsel for the respondents while reiterating the contents of the replying affidavit submitted that since it is admitted that the applicant and the respondents are members of the SACCO and the said Tribunal has the same powers as the Court, the Court has no jurisdiction to entertain the suit. He, however, submitted that the respondents are not and have no intention of interfering with the applicant's business as long as the applicant does not interfere with the operations of the SACCO.

Since the issue of jurisdiction of the Court has been questioned, as was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1:**

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

I therefore have to deal first with the issue of jurisdiction of the High Court to deal with disputes between members of a Co-operative Society. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that 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. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in **all** matters as it used to have in the old Constitution. However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution, is in my considered view, is null and void.

I, however, agree that for the purposes of specialization, Parliament is within its powers to legislate on the manner in which certain disputes are to be determined. This is a recognition of the fact that in certain areas specialized bodies are better placed to arbitrate between the parties in those sectors and such decisions ought to be respected. That, however, does not deprive the Court of jurisdiction to entertain such disputes. What it means is that the Court may decline to entertain such disputes until such time as the specialized body or Tribunal has been moved to sort out the dispute. The High Court may therefore stay any proceedings filed before Court pending such determination. However, where it is clear that the filing of the proceedings in the High Court is meant to dodge or go round or mischievously evade the procedure set out by the Legislature the Court has wide powers to strike out the proceedings before it as to entertain such proceedings may amount to abuse of its process. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009:**

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal

process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

Section 76 of the Co-operative Cap 490 Laws of Kenya provides:

(1) If any dispute concerning the business of a co-operative society arises:-

(a)

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c); it shall be referred to the Tribunal.

It is therefore clear from the foregoing that Parliament in its wisdom deemed it fit that dispute as between members of a Co-operative Society and the society, its committee or any officer of the society be referred to the Tribunal. It is not in dispute that the dispute herein is between a member of a co-operative society and the society and/or its officials. Accordingly, the dispute herein falls squarely within the jurisdiction of the said Tribunal. The Court of Appeal in **David Kamau Njoroge vs. Edgewood Farmers Co-operative Society & 2 Others Civil Appeal No. 174 of 1992** held that under the said provision, a member of a co-operative society is not entitled to bring a suit but should pursue his rights as set out thereunder.

In the foregoing premises since I am not satisfied that in filing this suit the plaintiff sought to dodge the provisions of the aforesaid Act hence embarked on a process of abusing the process of the court, I hereby direct that these proceedings be stayed pending the institution of appropriate proceedings by the applicant before the Co-operative Society Tribunal.

The costs will be in the cause.

Dated at Nairobi this 30th day of November 2012

G.V ODUNGA
JUDGE

Delivered in the absence of the parties.