



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 139 OF 2008

JAMES NG'ANG'A KIBAYA

(Suing as the Chairman, Athara Farmers Shareholders complaints committee).....PLAINTIFFS

MWANGI CHEGE

VERSUS

HON. ATTORNEY GENERAL.....1ST
DEFENDANT

MURANG'A DISTRICT LAND REGISTRAR.....2ND
DEFENDANT

PROVINCIAL COOPERATIVE AUDITOR- CENTRAL PROVINCE.....3RD
DEFENDANT

JORAM NJUGUNA MBURU

(Sued as Managing Director JENEM COFFEE LIMITED).....4TH
DEFENDANT

RULING

The subject matter of this ruling is the amended Summons dated 24th August 2009 in which JAMES NGANGA KIBAYA, the Plaintiff herein, has sought for the following orders:

1. ***That the Plaintiffs be allowed to amend their Complaint dated 21st October 2008 and filed on the same date.***
2. ***That leave be granted for this matter to be heard as a representative suit and the same be advertised through one of the Daily newspapers.***
3. ***That the Plaintiffs be allowed to enjoin Mitithiru Company Limited as a 5th Defendant, the Co-operative Bank of Kenya and former officials of Athara Farmers Co-operative Society in this matter.***
4. ***That the draft amended Complaint annexed hereto be deemed as duly filed upon payment of the requisite court fee.***
5. ***That costs of this application be in the cause.***

The aforementioned Summons is supported by two affidavits of the Plaintiff. When served, Joram Njuguna Mburu, the 4th Defendant herein, filed a replying affidavit in which he supported the application. The firm of Masese & Co. Advocates, filed a notice of preliminary objection dated 30th March 2010 on behalf of the 4th Defendant to resist the Summons. The Honourable Attorney General also raised a preliminary objection against the application. The rule of practice is to the effect that the preliminary objection ought to be disposed of first before considering the merits of the application.

Miss Munyi, learned Provincial Litigation Counsel, argued the preliminary objection against the amended Chamber summons. She informed this Court that there is no known applicant in law. It is pointed out that the Applicant is said to be a complaints committee which body is not recognized under the Cooperative Societies Act of 1997. Miss Munyi argued that the Applicant has no *locus standi* to sue on behalf of the purported complaints committee. Mr. Kinyua, learned advocate holding brief for Mr. Mandala, learned advocate for the 4th Defendant, adopted the arguments of Miss Munyi and urged this Court to strike out the application and the entire suit. Mr. Oguwe, learned advocate for the Plaintiff, urged this court to reject the preliminary objection and find that the Plaintiff is properly before this Court. He stated that the Plaintiff is before this Court on behalf of the Complaints Committee members who signed the necessary documents to authorize him file this suit and the application. Mr. Oguwe beseeched this court to note that the suit was initially filed by a layman hence whatever defects which have arisen should be countenanced and excused.

Upon the consideration of the rival submissions, it is clear that the main issue which this Court has been called upon to determine is whether or not there is a proper plaintiff before this court. Miss Munyi has pointed out that the Cooperative Societies Act does not recognize what is called the complaints committee, hence there is no proper Plaintiff before court. There is no dispute that the Plaintiffs herein namely James Ng'ang'a Kibaya and Mwangi Chege, have stated in paragraph 1 of the amended complaint that they have filed the suit in their capacity as the representatives of Athara Cooperative society Ltd. Shareholder Complaints Committee. The question which must be answered here is whether the creature called Shareholder Complaints Committee is a body capable of suing or being sued. I have perused Section 28 of the cooperative Societies Act, 1997 and it is clear that the Cooperative Society Management Committee is the body authorized by law to *inter alia* institute and defend suits and other legal proceedings brought in the name of or against a Cooperative Society. Before concluding the writing of this ruling, I took the liberty to peruse the court file. My perusal revealed that the preliminary objection was previously raised to resist the Plaintiff's summons dated 21st October 2008. The preliminary issue was heard by Lady Justice Kasango who in her ruling delivered on 26th February 2009 made the following observations at pages 10-11:

“The plaintiff in instituting this suit stated in the complaint that he did so on his behalf and on behalf of Athara Farmers Cooperative Society Ltd. Shareholders Complainant Committee. As rightly submitted by counsel for the third defendant the plaintiff did not state that he is a member of the management committee of that cooperative society. In my view failure to state so in the pleadings is not indicative

that there is no management committee as required by that section. There may very well be a management committee which has mandated the plaintiff to bring this present action. The objection raised by the third defendant will fail for that reason and also because in raising it the third defendant is inviting the court to enter into inquiry as to whether or not the plaintiff has such a management committee. Such an inquiry cannot suitably be entered into at the hearing of a preliminary objection. See generally MUKISA BISUIT CO. -v- WESTEND DISTRIBUTORS (1969) E.A. For that reason the objection raised by the third defendant does fail.”

I do not intend to depart from the findings of my sister Judge. The issue raised if upheld will obviously lead to the striking out of the application and the entire suit. In my view, that is an issue which should be determined by the filing of a substantive application and not by a bare notice of preliminary objection. I dismiss the preliminary objection but leave it open to whoever is aggrieved to file a substantive application if need be.

Dated and delivered at Nyeri this 25th day of February 2011.

J. K. SERGON

JUDGE

In open court in the absence of parties with notice.