REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO 72 OF 2011

TOM MBOYA ONYANGO (Suing on behalf of Registered Officials of KABALA WELFARE ASSOCIATION.....PLAINTIFF/APPLICANT

VERSUS

HON. FREDRICK OTIENO OUTA.....1ST DEFENDANT / RESPONDENT

STANLEY OMEGA.....2ND DEFENDNAT / RESPONDNET

AMOS OSIEKO.....3RD DEFENDANT / RESPONDNET

GEOFFREY YOGO.....4TH DEFENDNAT / RESPONDENT

RULING

The back ground information to this ruling is that the plaintiff describing himself as Tom Mboya Onyango suing on behalf of Registered Officials of Kabala Welfare Association moved to the seat of justice by way of a plaint dated and filed on the 18th May 2011.

The salient features of the plaint in a summary form are as follows:-

- Vide paragraph 4 that the plaintiff members belong to Nyando Constituency and have all along been participating in poverty eradicating projects in the said constituency.

- Vide paragraph 5 that the defendants sued are the ones charged with the implementation of the objectives of the constituency development Fund Act 2003 with a mandate to ensure that a specific portion of the national annual budget devoted to Nyando Constituency is fully used for purposes of development in the fight against poverty.

- Vide paragraph 6 they stand aggrieved because between the years 2008 - 2011 the first defendant has single handedly drawn his own list of development priority projects for implementation without any consultation.

- Vide paragraph 7 further grievance is that the defendants have caused the opening of several bank accounts for individual projects in the name of the CDF in various financial institutions contrary to the requirements of the Act.

- Vide paragraph 8 and 9 there is also failure neglect refuse and or decline to convene periodic meetings to discuss development matters and also failed to identify priority projects.

- Vide paragraph 10 that by reason of the above complaints, the plaintiffs feel that their constitutional rights have been violated in that, they have been discriminated against on the basis of clan, gender, local connection and political opinion in the allocation of funds by according privileges and preferential treatment to different location and or region to the advantage of others in Nyando Constituency.

- Vide paragraph 11, that they have knowledge that the government allocated Kshs. 47,841,591/= to their CDF which funds they allege to have been mismanaged, unaccounted for embezzled, misappropriated and or misapplied by the defendants; Proof of the above is based on allegations of allocation of funds to non existent or ghost projects, used funds on abandoned projects bodily built projects, incomplete projects, with poor quality structural designed and work manship which actions have led to wastage of public funds.

- Vide paragraph 12 that the report presented by the defendants on the status of the projects in the constituency has been falsified in an effort to conceal facts from the public and the taxpayers which action amounts to breach of a public duty resulting in loss and damage to the public and tax payers in general and Nyando Constituency members in particular.

In consequence thereof the plaintiff sought a declaration that the first defendant is unfit to hold any public office for having violated the public Ethics Act, and for orders that the defendant do complete all incomplete and abandoned CDF projects, avail audited accounts and records of the CDF projects plus bills of quantities and refund monies misappropriated, misused and or misapplied. Restraint orders to issue to restrain the defendants, their agents, employees and or servants from entering into any contracts, dealing and or committing the residents of Nyando constituency to any further financial expenses and further to be restrained from dealing in any way with funds held in account number 0112001543600 at Co-operative Bank of Kenya Limited Kisumu branch in the name of Nyando Constituency Development Funds.

On the plaint was anchored an interim application simultaneously filed with the plaint. It is brought under order 40 rules 1, 2 (i), (2), 4 (i) 10 (i) and order 51 Civil procedure Rules Section 3 A of the CPA and all other enabling provisions of the law. Six reliefs are sought and these are that:-

(1) Spent

(2) and 3 that the defendants/respondents, their servants, employees and or agents or otherwise howsoever be restrained from dealing in any way whatsoever with the funds held in account number 0112001543600 at Co-operative bank of Kenya limited, Kisumu branch in the name of

Nyando Constituency Development Fund, pending the hearing and determination of this application inter partes as per prayer 2 and pending the hearing of the suit as per prayer 3 or until otherwise ordered by the court.

(4) **and 5 That the defendant/respondent by themselves, their agents, employees and or servants be restrained by way of an injunction from entering into any contracts, dealings and/or committing the residents of Nyando Constituency to any further financial expenses pending the hearing and determination of this application inter partes as per prayer 4, and pending the hearing and determination of the suit as per prayer 5.**

(6) That costs be provided for.

The interim application is supported by grounds in the body of the application and supporting affidavit as well as annextures. The applicant came ex-parte before this court on the said 18-5-2011, and was granted prayer 2 and 4 for 14 days, and this matter was fixed for hearing inter partes on 31-5-2011 with directions that the paper work be served forthwith on to the defendants. But before this was done, the defendants/respondents allegedly got to know the existence of the proceedings, accessed the file presumably took copies of the paperwork, entered appearance and then filed 4 separate preliminary objections both to the suit, interim application and the interim orders granted. The content of the preliminary objections reads:-

(a) That the application and the suit offends the provision of section 52 of the Constituencies Development Fund Act, 2007 as an essential step of arbitration has not been complied with.

(b) That the suit is fatally defective as it contravenes Section 52 of the Constituency Development Fund Act 2007, as the defendants as sued or incapable of being sued.

(c) That the application and orders as sought cannot be granted as they intend to prevent implementation of government projects and the law does not permit issuance of injunctions against the government by virtue of section 16 of the government proceedings Act and section 30 of the Constituencies Development Fund Act 2007.

(d) That the suit as filed offends the provision of Order 3 Rules 2 the Civil Procedure Rules 2010 in so far as the witness statement and list copies of documents to be relied on is filed with the plaint as mandatorily required by law

(e) That the application and the entire suit is an abuse of court the process and ought to be struck out.

Parties made oral representations in court M/s S. M. Onyango on behalf of the 2nd defendant had this to say:-

- **Reiterates that Section 52 of the parent Act which lays down in mandatory terms on the procedures for seeking remedies by aggrieved parties has not been complied with. It requires the aggrieved parties to submit themselves to arbitration procedures under the said Act and it is only after exhausting those procedures that parties can seek redress in a court of law.**

- **That since this procedural step has not been undertaken by the plaintiffs / applicants, their**

coming to court in the manner done is premature and renders the suit a nullity abinitio and for this reason interim orders in respect of the same should not have been issued.

- **Contends that the defendants are wrongly sued in their individual capacity.**

- **The reliefs sought cannot hold as the defendants are being called upon to act outside the law.**

- **Since it is evident that the activities complained of by the plaintiffs are deemed to be government activities, there is no way an injunctive relief can issue against the government under section 16 of the governments proceedings Act.**

- **They also seek to fault the verifying affidavit in that there is no authority for the many residents of the Nyando Constituency to the plaintiff to file the suit in question on their behalf.**

M/s Pascal Odhiambo on behalf of the 3rd defendant associated himself with the earlier submissions and then stressed the following:-

- **The suit is a non starter as it has no merits or legs to stand on.**

- **Since it is government department which is mandated to implement the CDF projects, then the activities of the defendant fall into the activities of a government department and for this reason no injunctive relief can be sought against the defendants in the manner sought.**

- **Reiterates that it is mandatory to exhaust the remedies available under the Act before coming to court.**

- **Contends that complaints relate to a period of time when the defendant were not in office and as such they have been wrongly sued.**

- **The activities of the CDF are conducted by a committee and for this reason it was wrong for the plaintiff to isolate a few and hold them accountable for the activities of the entire committee.**

- **Contends that there is sufficient material before this court to demonstrate that this court lacks mandate to entertain the suit in the form in which it has been presented.**

Mr. Ojuro for the 4th defendant associated himself with the earlier submissions and then stressed the following:-

- **The plaint is further defective for failure to comply with the provisions of order 3 Rule 2.**

- **The plaintiffs / applicants right to come to court is premature as the same can only arise upon the applicants exhausting the inbuilt disputing resolution mechanisms.**

In response Mr. Nying'uro counsel for the plaintiffs/ applicants leading Mr. Amondi had this to say:-

- **Of primary consideration by this court should be the reasons and purposes as to why the CDF funds was created which should not be defeated.**

- **The court also to take note of the various modes aggrieved parties approach the seat of justice over a dispute arising under the same legislation i.e. plaint, judicial review and arbitration. Their approach is one of by way of plaint and they contented that they are properly before this court.**

- **Contends that they are properly before the seat of justice because the prayers sought cannot properly be determined through arbitration.**

- **Contends that Section 52 of the CDF Act did not take away the powers of the court to adjudicate over dispute arising from the said legislation more so when the matter is not a dispute between CDF members but is challenging illegalities and irregularities.**

- **Contends that the defendants cannot hide under the umbrella of the government to escape responsibility as the government does not promote violation of its own laws.**

- **Any defect under order 3 rule 2 is curable under the provisions as the statements can be furnished after the requisite stipulated.**

- **The verifying affidavit verifying the correctness of the plaint is proper because the Association is registered with officials who have the mandate to sue on behalf of the entire membership and as such, they are properly before the seat of justice.**

- **Further that the suit is a public interest matter and for this reason it is properly before this court.**

In response to the plaintiff/applicants submissions the following were stressed globally:-

- **A suit predicated a wrong provision of law cannot stand.**

- **The court to be guided by the provision of the amendment of the CDF Act 2007 which used the allotments from the basis of the applicant complaints.**

- **There is no dispute about the court's jurisdiction over the same matter but contend that the court's jurisdiction has been prematurely invoked.**

- **The plaintiff should comply with the provisions of filing action on behalf of a large group.**

The court was also invited to be guided by case law submitted to it. It is agreed that these touch on subject matters other than the CDF Act but principles of law highlighted by the said decisions are alleged to be relevant to the rival arguments herein.

There is the case of **John Onyango Oyoo & 5 Others –VS- Zadock Syongo & 2 Others Kisumu**

HCCC Misc. App. No. 352 of 2004 decided by Warsame J on the 11th day of April 2005 before the amendment of the Act. A perusal of the same reveals that at page 6 – 8 of the judgment while construing Section 23 of the repeated version other Act opined that "**such unfettered discretion which the Section gave the MP to appoint CDF Committee members absolutely without checks and balances could create grave injustice but then that was the law and it had to be observed as such until amended".**

The case of **Kipkalya Kiprono Kones and Republic and the Electoral Commission of Kenya exparte Kimani Wanyoike and 3 others Nairobi Court of Appeal 94 of 2005** decided by the Court of Appeal on the 10th day of November 2006. Scheming through the decision provides the following guidelines:-

(i) At page 18 that though the electoral commission is a creative of the constitution it is still available to the supervisory jurisdiction of the high court, which jurisdiction can be exercised by the high court by way of judicial review. The jurisdiction is clearly to ensure that the rule of law which is the primary duty of the courts to enforce is complied with by all agents of the state, and no state organ is permitted to state that the constitution confer on it powers the exercise of which cannot be questioned by courts.

(ii) At page 24 line 13 from the bottom that the jurisprudence underlying these decision is that the constitution itself and the National Assembly and Presidential Elections Act,set out detailed procedures of challenging elections and nomination to the National Assembly which procedures ought to be followed……..

The case of **Kandara Farmers Cooperative Society Ltd and 9 others =vs= Joseph Kanyua and Eighteen (18) others Nairobi HCC No. 2646 of 1998** decided by Onyango Otieno J as he then was now J A on the 21st day of December 1998. A perusal of the decision reveals that the issue at hand was the original jurisdiction of the high court over a dispute involving members of a cooperative society in the wake of a provision of the applicable law which vested the high court with only appellate jurisdiction arising from such disputes

At page 10 line 8 from the bottom the learned judge opined that "**Parliament could not have intended the high court to have original jurisdiction in disputes between co-operatives members or cooperation and their societies and at the same time make the high court the last appellate court in such matters".**

The case of **James Muiruri and three others =vs= Francis Ndindu and three others Nairobi HCC No. 3240 of 1997** decided by Musagha Mbogholi J on the 19th day of May 1998 in which the learned judge upheld a preliminary objection on the ground that **"since there was in place a provision that suits emanating under the co-operative Act first be referred to a commissioner and since one such dispute had been referred but a decision not given on the same a suit filed in court over the same issue was declared premature"**.

Lastly, Kisii **HCC Petition No. 3 of 2011 Peter Ochara Anam and 2 others =vs= CDF Development Fund Board decided by Asike Makhandia J** on the 31st day of March 2011, where the learned judge observed at page 14 of the ruling that "**the issue raised goes to jurisdiction which has to be confronted from the outset once raised and where the objection is successful, then the court must down its tools. The learned judge went further to make observation that under articles 165 (3) 2 3(i) the court had jurisdiction to determine applications to redress a denial, of or violation or infringement of or threat to a right or fundamental freedom in the bill of rights, but was also aware of statutes which provide procedures through which proceedings founded under the statutes are to be handled such as section 52 of the CDF Act which had nothing unconstitutional about it as in the judge's opinion that section is not in conflict with articles 22, 23, 48 and 50 of the constitution as it simply grantees the right of access to justice".**

Further that the sole reason as to why this section 52 was inserted in the CDF Act may have been to weed out frivolous suits more so when allegations of grand corruption and misappropriation and misuse of funds which are criminal in nature had not been reported to police for investigation and action.

On behalf of the plaintiff/ applicant there is the case of **Paul Nyabare Onukoh & 17 others-VS- Joel Omagwa Onyancha & 2 Others Nairobi HCCC Petition 204 of 2007** decided by Anyara Emukule J on the 2nd day of October 2007. Under construction were the provisions of the CDF Act 2004 and provisions of the constitution and the learned judge's concluding remarks were that there was nothing unconstitutional about the CDF Act and that the status of the individuals mentioned in section 23 of the said Act had not been defined.

The case of **Mombasa HCCC No. 499 of 2009 Republic –VS- A.G & 3 Others Ex-parte Elias Kalama Tsori & 6 Others** decided by F. Azangalala on the 25th day of August 2010, where the learned trial judge declined relief of judicial review because there was proof that the employer principles had reported criminal activities to the police and investigation were ongoing with regard to the activities for which employees had been terminated and in respect of which judicial review was being sought.

This court has given due consideration of the above rival arguments in the light of the principles of case law cited to this court as well as provisions of law relied upon and in this court's opinion the following are own framed questions for determination in the disposal of the preliminary objections raised herein

(i) In view of the fact that the preliminary objectors moved to court to intervene before summons to enter appearance were served, is there locus standi on their part to raise these preliminary objections?.

(ii) What ingredients are the preliminary objectors required to demonstrate to exist before the relief sought can be granted?.

(iii) Are the four consolidated preliminary objections within the ambit of those ingredients?

(iv) What in this courts view is the general observation of the preliminary objectors complaints against the facts presented by the plaintiff's case as laid?

(v) In this courts opinion, do those complaints hold or do they stand ousted?.

In response to own framed questions, it is clear that the suit is at its infancy and in fact as at the time the defendants / respondents intervend, summons to enter appearance had not been served, but the defendants on their own entered appearance but not under protest and then availed themselves of the provisions of Order 51 Rule 14 Civil Procedure Rule by filing preliminary objections. Since summons to enter appearance had not been served, the defendants should have entered appearance first under protest and then regularized later on. Although this was not raised on record by the plaintiff / applicant, this court has gone into it for purpose, of regularizing the record. It is an irregularity curable by the provisions of Article 22 (2) (d) and 159 (2) (d) which enjoins this court to render justice without recourse to technicalities. These read:-

"Article 22 (3) (d), the court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities. 159 (2) (d) justice shall be administered without in due regard to procedural technicalities"

This court therefore makes a finding that the defendants / respondents procedurally intervened in this matter and have locus standi sufficient to curable this court deal with the 4 preliminary objections raised on their merits.

Turning to the ingredients for raising of preliminary objections this court has judicial notice of the fact that the law on this has been crystallized by the land mark decision in the case of **Mukisa Biscuit Manufacturing Co Ltd =vs= West End Distributors Ltd [1969] EA 696. LAW J A** as he then was in the said case at page 700 paragraph D – F had this to say " **So far as I am aware, a preliminary objection consists of a point of law which has been pleading or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on 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……"**

Sir Charles Newbold P, in the same decision at page 701 paragraph A – C added the following:-

"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 the 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…."

This court has applied these ingredients to the identical preliminary objections raised and finds that objection (a) (b) and (d) are purely on points of law objection c is based partly on facts and partly on law issues of there being no jurisdiction to issue an injunctive relief against the government is an issue of law, where as move, to prevent implementation of government projects are issues of facts which require to call evidence on the said government projects, and the applicants activities which are aimed at preventing the implementation of the said projects. Objection (e) is not on a pure point of law as it calls for adduction of facts to determine what actions of the plaintiff /applicant in so far as they go to affect the presentation of the case herein amount to an abuse of the due process of the court. The foregoing being the position it means that the court will only confine itself on the issues of law and leave out issues of facts when assessing the merits of the preliminary objections laid.

In response, to own framed question 4, the defendant / respondents complaints against the plaintiff / applicants' suit and interim application in a summary form are as follows:-

(a) The proceedings offend the provisions of Order 3 Rule 2 Civil procedure Rules.

(b) The verifying affidavit is defective

(c) There is no valid authority for the plaintiff to sue on behalf of the many others.

(d) The suit itself is a non starter in so far as it has been presented in law contravention of the provision of section 52 of the CDF Act as amended.

(e) The suit is also a non starter as there is no jurisdiction on *locus standi* in the plaintiffs to present the same in the manner presented on the one hand, and also no *locus standi* on the defendants to be sued in their individual capacities as well.

(f) The injunctive relief is not available as the activities sought to be restrained are activities of the government.

This court has given due consideration to the afore setout complaints in the light of the applicable principles of law and the court proceeds to answer them as here under order 3 rule 2 reads:-

"Order 3 rule 2 all suits under rule 1 (1) including suits against the government, except small claims shall be accompanied by:-

(a) The affidavit referred to under order 4 rule 1 (2).

(b) A list of witnesses to be called at the trial.

(c) Written statements signed by the witnesses excluding expert witness and

(d) Copies of documents to be relied on at the trial including a demand letter before action provided that the statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to pre-trial conference under order 11".

This court has duly construed this provision and applied it to the plaintiff/applicants paperwork on the record and in this court's opinion the plaintiff/appellants failure to comply with all the requirements of order 3 rule 2 CPR does not fault the suit to the extent of it being declared a nonstarter. There is a saving clause in the provisal where by compliance can be done 15 days to the pre-trial conference the suit. As mentioned, the suit the suit is at its infancy and has not even reached the pre trial conference stage. This complaint is therefore ousted.
As for the verifying affidavit and the authority to sue and depone a verifying affidavit on behalf of others, this falls under the provisions of order 4 rule (1) (2) (3) and (6). Thereof these reads:-

"Order 4 rule 2. The plaint shall be accompanied by an affidavit sworn by the plaintiff, verifying the correctness of the averments contained in rules 1 (1) (f) above.

(3) Where there are several plaintiffs one of them with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of others.

(6) The court may of its own motion or on the application by the plaintiffs or the defendant, order to be struck out any plaint or counter claim which does not comply with sub rule (2) (3) (4) and 5 of this rule".

This court has given due construction of this provision in the light of construction of similar provisions by case law emanating from the court of appeal, that this court had judicial notice of and in this court's opinion, failure to so comply does not render the suit totally fatal . There is an in built saving provided for in sub rule 6 where by the court has discretion to allow a party time to comply, secondly, under the faulting will attach only to the others on whose behalf the suit is purportedly brought, but not on the suit of the deponent. Apart from saying that there is no proper authority to depone on behalf of the others, there is no objection raised on the said deponement in so far as it relates to the named plaintiff. This means that the faulting of the deponement will operate to shut out only those on whose behalf the suit has been brought until such a time that they seek leave of the court to regularize their status. This objection too does not oust the plaint.

With regard to lack of compliance with the requirements of section 52 of the CDF Act 2007 there is no dispute that the plaintiff has not exhausted this procedure before coming to court. The argument of the defendants/plaintiffs as stated above is that failure to follow this procedure is fatal where as the argument of the plaintiff / applicant is that their complaint falls outside the ambit of that section. It is not disputed that this section was introduced by the 2007 amendment it reads:-

"Section 52 (1) All complaints shall be forwarded to the board.

(2) Disputes shall be refereed to the board in the first instance, and where necessary an arbitration panel shall be appointed by the minister who shall consider and determine the matters before the same is referred to court.

(3) Subject to this Act, no person in the management of the fund shall be held personally liable for any lawful action taken in his official capacity or for any dispute against the fund".
This court has construed this provisions and in its opinion, in order for this section to operate, the following have to be present namely:-

(a) There must be complaints in place.

(b) There has to be a disputes which has arisen.

(c) These should be in relation to action other than lawful actions of the respondents undertaken in their official capacity

The foregoing being the position it is necessary to determine what amounts to a complaint, dispute and a lawful or unlawful action under the said Act. A revisit to the Parent Act the Constituency Development Fund Act 2003, does not define those terms. Neither does the amendment Act define those terms. They are not also defined by the interpretation and general provisions Act Cap 2 laws of Kenya.
The court has no alternative but to turn to Blacks Law Dictionary for assistance. At page 302 a **complaint refers to a party who brings a complaint against another** i.e the plaint against the defendant. At page 505 a **dispute is defined as conflict or controversy**. At page 902 **lawful is defined as not contrary to law or permitted by law**.

This court has given due consideration to these legal definitions and applied them to the complaints herein and it is of the opinion that in the absence of specifications as to what section 52 means by **complaint, dispute** and **lawful action**, the parent Act leaves it open the courts approached in their original jurisdiction to determine what is within the ambit of section 52 on the one hand. Alternatively on

the other hand to take it in a blanket form and state that any complaint, dispute and issues of lawfulness or unlawfulness of any action done under the Act should be referred to arbitration under the said act.

Alongside this, the court has to bear in mind what was raised by the plaintiffs/applicants counsel with regard to the arbitrarily of the complaints raised. This takes the court back to the principles of case law cited starting with the latest being a decision of a court of concurrent jurisdiction **Kisii HCCC Petition No. 3 of 2010**. It is clear that this decision is not binding on this court, in the first instance. In the second instance, what weighed heavily on the mind of the learned judge if I am right, is the fact that allegations were criminal, in nature and yet the said action had not been reported to the police for investigation and were in that state incapable of forming a basis for a civil action.

As for the court of appeal decision in **CA No. 94 of 2005** (Supra) this is related to a legislation which had a clearly laid down procedure of what was expected to be done. The same thing applies to the **Kandara Farmers Co-operative case (Supra)** where the Co-operatives Act un like the CDF Act spells out clearly the nature of disputes that are required to be submitted to the in built mechanism. The foregoing being the position, then it means that in the case of the CDF Act 2007, its upon the court to determine either to reject the exercise its original jurisdiction in a blanket form or determine issues which are arbitrable and which ones are not arbitrable .

Applying the reasoning to the scenario herein, it is clear that indeed there is an avenue through which disputes arising under the Act can be sifted outside the court room, refined and then brought back to court for purposes of redressing the injury allegedly done to the aggrieved party. The question that arises now is whether the dispute as presented herein is one which requires further inquiry or one which is ready for redressing of the wrong allegedly done. In this court's opinion, considering the complaints raised in paragraph 11 of the plaint, and the reliefs sought in the prayers, this is not a dispute which is ready for the redressing of the injury allegedly done, but one which requires inquiry to be carried out to establish the violation of the public Ethics Act which makes the 1st defendant to be un fit to hold a public office and the establishment of existence of embezzlement misappropriation and mis application of public funds as well as availing of audited accounts. There is nothing to show that these were demanded for and not availed before coming to court.

Having found that an inquiry is required before a relief can be sought then issue arises as to the forum to carry out the said inquiry and in this, courts opinion, it is none other than the body mandated under the said section. The justification for this is that courts of law as we know them are to settle disputes on agreed pleaded facts, on which to apply the law and then make conclusions in one way or another. It is not the business of the courts to establish the facts for the parties first before moving on to assess those facts and then draw out conclusions.

Herein the plaintiff/ applicant was referred to establish proof of embezzlement of funds, misapplication and misappropriation of funds before moving to court for redress. This applies both to past activities as well as anticipatory activities.

Turning to the injunctive relief it is trite as submitted by the defendants / respondents that the relief is not available against the government. Herein however what is sought is against individuals and not a government body. There is no deponement so far on the record to show that it is not the defendants holding funds but a government department in the absence of that the relief of an injunction cannot be withheld save on account of the faulting of the suit.

For the reason given in the assessment the court proceeds to make the following findings on the preliminary objections raised.

(i) Objection with regard to failure to comply with order 3 Rule 2 Civil Procedure Rules fails because failure to so comply is not fatal, considering that the provisal allows compliance within fifteen (15) days to the pre-trial conference which period has not arisen as the suits is still at its infancy .

(ii) Likewise failure to annex authority to act for the many plaintiffs interested in the suit does not fault the entire suit in terms of orders 4 Rules (1) (2) (3) and 6 Civil Procedure Rule, what is faulted in such a case is the case of the other interested plaintiff and not that of the participating plaintiff. The fatality for the other plaintiffs is also curable. Upon application by the affected party, to seeking leave of court to comply a procedural step which can be undertaken.

(iii) As explained in the assessment, the participating plaintiff has locus standi to present the suit on his own behalf and for the other interested plaintiffs subject to regularization of the authority to act on their behalf. Further being a society and this court bearing in mind judicial notice of the provisions of the society's Act Cap 108 of the laws of Kenya that registration under this law does not vest a society with a clock of a right, to sue and being sued, and also having judicial notice of case law on the that this court has judicial notice of, litigation of such bodies is undertaken on its behalf by officials of such societies.

(iv) The defendants' failure to enter appearance under protest before being served with summons to enter appearance has not faulted their locus standi as this is a technicality which is curable and have therefore properly raised preliminary objections.

(v) Subject to the sustainability of the suit, the injunctive relief as laid is not faulted because there is no deponement that the account sought to be protected is not held by the named individuals but by a government deponement in order for it to receive protection under the government proceedings Act.

(vi) With regard to non compliance with the provisions of Section 52 of the CDF Act 2007, the court makes a finding that as explained in the findings, this is sustainable because of the following reasons

(a) The Act does not define what amounts to be a complaint dispute or a lawful act ion under the Act. The position in number (a) above being the case, the Act leaves it open to a court of law approached in its original jurisdiction, to determine whether to give a blanket order of requiring compliance with section 52 of the Act with regard to complaints raised or determine which of the complaints fall under the section 52 procedures, and which one fall outside it and therefore judiciable in a court of law.

(vii) The complainants raised in paragraph 11 of the plaint and the reliefs sought fall under the section 52 procedure because:-

(a) They touch on criminal activities which are best inquired into through the criminal procedures or through the section 52 of procedures established first before seeking redress in a court of law. For example once criminal investigation or some other inquiry establishes

embezzlement, misappropriation and misapplication of the finds there is justification on the plaintiffs to move to court and seek protection of the remainder of the funds.

(b) The suit was anchored on an alleged falsified report whose falsity also needs to be inquired into and established.

(c) (a) and (b) above being the position then the proper mechanism to inquire into those complaints is the mechanisms set up under section 52 procedures.

(viii) By reason of what has been stated in number 6-7 above the plaintiff's suit stands faulted and the same is struck out with costs to the defendants limited to the procedural steps taken herein upto the stage of striking out.

Dated, signed and delivered at Kisumu this 26th day of May 2011.

R. N. NAMBUYE

JUDGE

RNN/aao