



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 115 OF 2011

**MASIMBA FARMERS CO-OPERATIVE SOCIETY
LIMITED.....PLAINTIFF**

-VERSUS-

JAMES NGARA

OSANO.....1st DEFENDANT

**JARED N. OMOKE.....2nd
DEFENDANT**

**JAMES MATOKE.....3rd
DEFENDANT**

**SIMON NJUGUNA MACHARIA.....4th
DEFENDANT**

**DON BOSCO OOGA GICHANA.....5th
DEFENDANT**

RULING

The plaintiff commenced this suit against the defendants jointly and severally on 15th June, 2011 challenging the propriety of a lease agreement entered into between the 1st, 2nd and 3rd defendants on one part and the 4th and 5th defendants on the other part, in respect of the premises known as **Kisii Municipality/Block III/108** hereinafter “*the suit premises*”. Apparently the suit premises are registered in the name of the plaintiff. Pursuant to the lease agreement executed on 5th January, 2011, the 4th and 5th defendants were conferred with the mandate to demolish the suit premises and redevelop it by constructing a three storey permanent building at an estimated cost of kshs. 20 million. In consideration thereof the 4th and 5th defendants will during the construction period of two years not pay any rent to the plaintiff and that upon completion of construction of the suit premises, they would recover their cost of construction and investment in the suit premises within a period of fourteen years with effect from 1st March, 2013 by levying rent from prospective tenants.

The plaintiff's contention is that it did not authorize the 1st, 2nd and 3rd defendants who were its chairman, secretary and treasurer respectively at the time to enter into such lease agreement with the 4th and 5th defendants with such far reaching consequences, over and in respect of the suit premises. To the plaintiff the lease agreement was nothing but a fraud and the 1st, 2nd and 3rd defendants had abused their respective mandates, on its behalf. It is on this basis that it mounted the instant suit seeking to annul the lease agreement, eviction of the 4th and 5th defendants from the suit premises, permanent injunction against the defendants, general damages for trespass and costs of the suit.

Upon filing the suit and serving the suit papers on the defendant, the 1st, 2nd and 3rd defendants filed a joint statement of defence through **Messrs C. A Okenye & Co. Advocates**. They all denied allegations made against them by the plaintiff. As far as they were concerned they entered into the lease agreement validly in their capacity as officials of the plaintiff. That the lease agreement was properly sanctioned by the plaintiff pursuant to its minutes and resolutions. Accordingly there was no fraud or illegality committed by them in the transaction.

Similarly, the 4th and 5th defendants put in a joint statement of defence and counterclaim through **Messrs Nyamori Nyasimi & Co. Advocates**. Their case simply put is that their interest in the suit premises is only a lease hold, which was genuinely and validly entered into with full authority, sanction and permission of the plaintiff. They are therefore not trespassers into the suit premises. They committed no fraud in executing the lease. Nor were they party to or guilty of any impropriety as alleged or at all concerning the said lease agreement between them and the plaintiff and that allegations of fraud stated in the plaint were false, malicious and a creation of the plaintiff's chairman to discredit the defendants. By way of counterclaim, they prayed for an order of specific performance to enforce the lease agreement as they were likely to lose their entire investment in the suit premises worth over 50 million which the plaintiffs cannot be able to compensate them.

Along with the defence, the 1st, 2nd and 3rd defendants filed a Notice of Preliminary objection in terms that the court lacked jurisdiction to entertain the claim against the 1st, 2nd and 3rd defendants pursuant to the provisions of the **Co-operative Societies Act**, that there is other pending similar case in court on the same subject matter being Kisii HCCC No. 25 of 2011 and another one pending before the Co-operative Societies Tribunal.

Prior to this the plaintiff had on 15th July, 2011 filed an application seeking injunctive orders against the defendants on the same grounds as already set out in the plaint. The application was the subject of the preliminary objection aforesaid.

On 7th July, 2011 when application for injunction was scheduled for hearing interpartes it was agreed between the parties that the preliminary objection be canvassed and determined beforehand. Parties agreed to canvass the same by way of written submissions. Subsequently, respective parties filed and exchanged written submissions together with cited authorities which I have carefully read and considered.

Time and again, it has been stated that a preliminary objection must raise 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. See **Mukisa Biscuit Manufacturers Co. Ltd –vs- West End Distributors Ltd (1969) E.A.** Applying the foregoing to the circumstances obtaining in this case, can it be said that what the 1st, 2nd and 3rd defendants have raised

are pure points of law? I do not think so. The issue as to whether this court has jurisdiction to entertain the suit as opposed to co-operative tribunal turns on the interpretation of section 76(1) of the **Co-operative Societies Act** as amended. That section provides inter alia:-

“...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...”.

However, what is the kind of dispute that should be entertained by the tribunal? The answer is to be found in section 76(2) which provides:-

“...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 from the nominee or personal representative of the deceased member for any debt or demand entitled due from a co-operative society, whether such debt or demand is admitted or not...”***

From the above provisions, it is apparent that the only kind of dispute that are capable of being referred to and determined by the Co-operative’s Tribunal, must relate to the business of the Co-operative Society and the dispute must be in the nature of a debt or demand either by the Co-operative Society or its membership. Is the entry into a lease agreement between the 1st, 2nd and 3rd defendant as officials and members of the plaintiff and 4th and 5th defendants whether legally or otherwise be deemed as a dispute capable of being canvassed before the tribunal. The plaintiff thinks no. The 1st, 2nd and 3rd defendants think otherwise. Therefore as it stands, the issue of jurisdiction raised by the 1st, 2nd and 3rd defendants is not a pure point of law argued on the premise that facts as pleaded are correct. At this point in time both parties appear to have merit in their respective positions on the issue of jurisdiction. This must therefore call for interrogation of the pleadings and the evidence that may be led in support thereof at the plenary hearing. Besides the acts or omissions complained of does not only touch on the previous committee members being the 1st, 2nd and 3rd defendants but also involves the 4th and 5th defendants who were neither members, past or present or committee members of the plaintiff. In view of the foregoing the presence of the 4th and 5th defendants who are the beneficiaries of the lease agreement sought to be impugned, it is doubtful whether the dispute is referable to the Co-operatives tribunal.

With respect to the pending suits elsewhere with regard to the suit premises, again this is not a pure point of law. The purpose of preliminary point is dispose off the suit and or matter in limine. A preliminary objection raised on the basis of pending suits does not have the effect of disposing of the suit. At best what will happen is either to consolidate the suits and or stay one of them. That cannot be the purpose of a

preliminary objection. Again the determination of whether the other pending suits are similar to the instant suit, will entail investigations by court by perusing various pleadings and or documents, with a view to ascertaining the similarity and or otherwise of the pleadings filed in the two suits.

I have looked at the authorities cited by the defendants in support of their preliminary objection. However, it is instructive that the same relate to the provisions of section 80(1) of the **Co-operative Societies Act** which has since been substantially amended. They may thus not be helpful.

The preliminary objection fails. Accordingly, it is dismissed with costs to the plaintiff.

Ruling dated, signed and delivered at Kisii this 23rd day of September, 2011.

ASIKE-MAKHANDIA
JUDGE