



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 296 of 2009

KENYA FARMERS ASSOCIATION LTD & 3 OTHERS.....PLAINTIFFS
VERSUS
DISOLVED BOARD OF DIRECTORS OF K.F.A. & 16 OTHERS...DEFENDANTS

RULING

The initial four (4) plaintiffs filed the first plaint in this matter of 14th October, 2009. On 18th December, 2009 an amended plaint in which the first plaintiff was removed as plaintiff and brought in as the 18th defendant together with five defendants bringing the number of defendants in the matter to twenty three (23). Of course, there were also amendments in the body of the plaint as well as in the prayers. According to the amended plaint, the plaintiffs seek the following orders:

- i) injunction against all the defendants restraining them from intermeddling with the assets of the 18th defendants (Kenya Farmers Association Ltd.)
- ii) an order directed at the 18th defendant to compel it to convene and conduct an extra-ordinary general meeting
- iii) an order to compel all the defendants to restitute the assets and/or funds of the 18th defendant illegally alienated
- iv) the 1st and 12th defendants to be restrained from holding themselves out as board members of the 18th defendant
- v) the 1st to 12th, 14th, 21st and 23rd defendants to be compelled to render account of all funds illegally and irregularly paid to them in various court cases; that they be barred from acting for the 18th defendant in any matter and further that the 21st to 23rd defendants be compelled to file their annual licences since 1997
- vi) the 18th defendant to be enjoined with the plaintiffs, the 12th and 13th defendants to prosecute criminal frauds contained in the March/April, 2003 Inquiry Report by the 12th defendant
- vii) the 1st -11th defendants (specifically the 3rd and 4th defendants) be compelled to surrender two motor vehicles in their possession and their salaries withdrawn
- viii) costs of the suit.

Together with the original plaint, the plaintiffs brought chamber summons dated 15th October, 2009 in which they sought, on a temporary basis pending the hearing of the suit orders (i), (ii), and (iii) above and the consolidation of this suit with other suits in Nairobi, Nakuru and Eldoret.

Subsequently, on 18th December, 2008, the plaintiffs brought a similar application as that of 15th October, 2009 save for the amendments in terms of the amended plaint of the same date (18th December, 2009). It also seeks that the 21st to 23rd defendants be ordered to file their individual annual licences since 1997; that the Commissioner of Police be ordered to assist in the execution of the orders. It is this application that was slated for hearing *interpartes* on 4th February, 2010. Three notices of preliminary objection were filed by the defendants challenging both the application and the suit while the plaintiffs also filed a notice of preliminary objection challenging the first three notices. The court directed that the three preliminary objections be argued and at the same time, the plaintiffs' points in their notice be

taken in opposition or reply to the three preliminary objection. The mix-up approach noted above can only be attributed to the fact that the 1st plaintiff is acting in person.

The first preliminary objection was filed on 16th January, 2010 by counsel for the 12th defendant. The second objection on behalf of the 3rd to 11th, 18th, 21st to 23rd defendants was also filed on 6th January, 2010. While the objection for 14th defendant was filed on 11th January, 2010. The points raised in the three preliminary objections may be summarized thus:

- i) the suit is incompetent for want of verifying affidavit from some of or all the plaintiffs
- ii) the plaintiffs have no *locus standi* to litigate on behalf of KFA (the 18th defendant)
- iii) the issues being canvassed in the suit are *res judicata* and/or *sub judice* in so far as they relate to the 14th defendant, the same issues being the subject in Nakuru HCCC No.106/2004 and Nakuru HCCC No.185 of 2009
- iv) that the court has already ruled on the capacity of the plaintiffs in HCCC No.106 of 2004
- v) that the applicants are busy bodies, vexatious litigants out to waste court's and parties' time
- vi) that some defendants are incapable of being sued
- vii) that the suit contravenes **section 13A and 16** of the **Government Proceedings Act**
- viii) that the suit does not disclose reasonable cause of action

The plaintiffs' fifteen (15) paragraphed objection are strictly speaking not based on pure points of law. However, upon listening to the 1st plaintiff's submissions, only a single point emerge, namely, that the pleadings by counsel for the defendants are in contravention of **section 35(1)** of the **Advocates Act**.

The plaintiffs have in the same breath denied that they have no *locus standi*; that the suit is *res judicata*; that the plaint does not disclose a reasonable cause of action; that the suit is defective for lack of verifying affidavit by some of the plaintiffs; that notice to Attorney General was not given.

I have considered these averments and arguments. I have also considered the authorities relied on by the parties. In terms of **Mukisa Biscuits Manufacturing Co. Ltd. Vs. West End Distributors Ltd.** (1969) EA 696 only pure points of law can be raised as preliminary objection. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Applying these strictures to the eight points raised by the defendants, I can straight away overrule the following objections as not being pure points of law – or as being matters that will require ascertainment:

- i) Lack of verifying affidavit: This argument is based on **Order 1 rule 12 (1)** and **Order 7 rule 1(2)** of the **Civil Procedure Rules**. The former requires any plaintiff purporting to bring a suit on behalf of others to obtain those others' authority to do so in writing. The latter requires that the plaint must be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint. **Sub-rule 3 of rule 1** aforesaid provides that the plaint which does not comply with the above requirement may be struck out. The language of **sub-rule 3 of rule 1** is permissive, thereby donating a discretion to the court either to strike out or not. It has been held that even where the verifying affidavit is found to be defective and is truck out, the plaint does not suffer the same fate and with court's leave, another affidavit may be sworn and filed. see **Josphat Kipchirchir Siglaj Vs. Gotab Sanik** – Civil Application No.98 of 2003. Therefore this objection fails in so far as it seeks the court's discretion and also for the reason that it is not capable of disposing of the suit.
- ii) That same defendants are incapable of being sued; this alone is not capable of disposing the whole suit. This can only be raised in an application and not as a preliminary objection
- iii) That the suit does not disclose reasonable cause of action. This cannot be a pure point of law as the court will only arrive at the conclusion that the plaint does not disclose a reasonable cause of action by considering evidence.
- iv) Notice to the Attorney General under **section 13A and 16** of the **Government Proceedings Act**, will only affect the 12th and 13th defendants leaving the suit against 21 defendants intact. That is not a matter to be raised by way of preliminary objection, in the circumstances.

That leaves only two points which are of pure law and which if successfully argued are capable of disposing of the suit.

- (i) *Locus Standi* and
- (ii) *Res judicata*.

The issue of *Locus Standi* is argued to show that in terms of **section 12** of the **Co-operative Societies Act**, the 18th defendant is a body corporate capable of suing and being sued. Similarly, **section 28(3)(b)** of the **Co-operative Societies Act** establishes a committee with powers to institute and defend suits and other legal proceedings brought in the name of or against the 18th defendant. A suit to protect the

assets or the integrity of the 18th defendant can only therefore be brought by the committee. The plaintiffs have not demonstrated their membership or capacity in the committee.

The plaintiffs have asserted that they have brought this suit in their person individual capacities as members of the 18th defendant. Rights of members of a co-operative society under **section 21** of the **Co-operative Societies Act** does not include the right to sue on behalf of the society for the preservation of its assets. In my considered view, the plaintiffs' grievances belong to the Tribunal established under **Part XIV**. See **section 76** also. The point regarding the plaintiff's capacity was adequately dealt with by Hon. Mr. Justice Maraga in his ruling of 27th May, 2009 in H.C. Misc. Civil Application No.284/03 and one would have hoped that the plaintiffs would take the queue.

On *res judicata*, it was submitted that the issues being raised in this suit were also raised in Nakuru HCCC No.106 of 2004 and Nakuru HCCC No.185 of 2009. Both matters are between the 18th defendant and National Bank of Kenya Limited, which is not a party to this suit. The plaintiffs are not parties to those cases. Secondly, the issue in dispute in the two matter are different from those being pursued by the plaintiffs in this matter. It follows from what I have said in the previous paragraphs that the objection will be sustained only on the ground of *locus standi*.

In result, the suit in its entirety (together with applications arising from it) is struck out with costs to the defendants.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO
JUDGE