



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Civil Case 8 of 2008

WAKENYA PAMOJA SACCO SOCIETY LTD PLAINTIFF

VERSUS

STEPHEN OGAMBA DEFENDANT

RULING

This ruling is in respect of a Preliminary objection taken by the District Co-operative Officer, Kisii Central, through Mary Nyamichaba, State Counsel. The Preliminary objection is to the effect that this court does not have jurisdiction to hear and determine the defendant's application seeking to restrain the plaintiff from selling one of its properties and also from conducting elections for its committee members. The dispute is between a Co-operative Society, (the plaintiff) and one of its members, (the defendant) who is also a former chairman of the plaintiff.

In the plaint, the plaintiff averred that vide elections held on 3rd and 4th June, 2004, the defendant was removed as chairman of the plaintiff Co-operative Society, then known as Gusii Farmers Rural Sacco Society Limited. That notwithstanding, the defendant continued to hold himself out as the chairman and on 5th March, 2008 he went to Nyaigwa farmers Co-operative Society and broke the padlocks to the Offices and forcefully gained entry thereto. He announced to the Officers there that he was the rightful Chairman of both the plaintiff as well as the said Nyaigwa Farmers Co-operative Society. The Plaintiff sought an order of injunction to restrain the defendant from gaining access to any of the plaintiff's premises in his assumed capacity as chairman of the plaintiff.

The defendant denied the plaintiff's claim and alleged that he had wrongfully been removed as the chairman of the plaintiff.

Subsequent to the filing of the said suit, the defendant filed an application seeking to restrain the plaintiff, its agents and/or servants from disposing of land Parcel No.Kisii Municipality/Block II/233 or conducting elections on 8th and 9th April, 2008. The court granted interim orders as prayed. The defendant stated that on 8th April, 2008 the orders were served upon Mr. Richard Maranga, the plaintiff's General Manager, Mr. Naftali Onkoba, the Plaintiff's Secretary and Isaiah ChepKwony, the District Co-operative Officer. The defendant alleged that on 9th April, 2008 the District Co-operative Officer conducted the elections, in spite of the court order that had been served upon them.

On 16th April, 2008 the defendant filed an application seeking to have the aforesaid three persons committed to civil jail for a period not exceeding six months for contempt of court.

The plaintiff's General Manager and the District Co-operative Officer filed their respective affidavits and denied having been served with any court order as alleged by the defendant.

Before the defendant's application for injunction and contempt were heard, the preliminary objection was argued. The grounds listed therein are as follows:

- “1. THAT this honourable court does not have jurisdiction to hear and determine this matter.
2. THAT the applicants have not exhausted the available machinery provided in settlement of disputes concerning the business of a Co-operative Society under the provisions of Section 76 of the Co-operative Societies Act.
3. THAT the applicant lacks capacity to bring this application as it offends section 28 of the Co-operative Societies Act.
4. THAT the application is misconceived, premature, vexatious, frivolous, and bad in law and abuse of court process and the same is non suited.
5. THAT this application is incompetent and fatally defective as it cannot stand the test of law and should be dismissed with costs.”

Arguing the Preliminary Objection, the learned State Counsel submitted that pursuant to the provisions of Section 76 of the Co-operative Societies Act Cap 490 (herein after referred to as “the Act), the defendant should have referred his claim to the Co-operative Tribunal established under section 2 of the Act. Counsel further submitted that the defendant did not have capacity to seek to restrain the plaintiff from entering into contracts for sale of its property or to conduct elections. She referred to Section 28 of the Act which sets out the powers of a committee of a Co-operative Society.

Mr. Omariba for the plaintiff supported the submissions by Mrs. Nyamichaba as far as they related to the defendant's application seeking to restrain the plaintiff from holding its annual general elections and selling one of its properties.

Mr. Bosire for the defendant opposed the Preliminary Objection and submitted that this court had jurisdiction to hear and determine the defendant's application. In his view, the nature of disputes that ought to be referred to the

Co-operative Tribunal is as set under Section 76(2) of the Act. He added that Section 60 of the Constitution of Kenya gives the High Court unlimited original jurisdiction in civil and criminal matters.

As far as the provisions of section 28 are concerned, Mr. Bosire submitted that the defendant ought to be a committee member of the plaintiff but had been removed from office unlawfully.

I have considered the submissions made by all the advocates herein.

The starting point in determination of this application is consideration of Section 76 of the Act. The same provides as hereunder:

“76.(1) 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;

(c) between the society and any other Co-operative Society;

It shall be referred to the Tribunal.

(2) 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 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.”

The defendant’s application dated 4th April, 2008 sought to restrain the plaintiff from disposing a parcel of land known as Kisii Municipality/Block II/233 or from conducting elections for its committee members.

Section 76(1) of the Act is clear that any dispute concerning the business of a Co-operative Society that may arise, inter alia, between the society and any of its members or a past member should be referred to the Co-operative Tribunal.

Section 27(2) of the Act mandates every Co-operative Society to hold an annual general meeting

within four months after the end of each financial year. One of the businesses that is supposed to be transacted in such a meeting is election of the Co-operative Society's office bearers for the ensuing year, see subsection (5) thereof. It is also in such a meeting that members of a Co-operative Society may pass a resolution to sell any of the assets of the society.

Under Section 28 of the Act, the elected Committee is empowered to enter into contracts.

It is thus clear that the dispute that is the subject matter of the defendant's application dated 4th April, 2008 concerns the business of a Co-operative Society and not otherwise.

Mr. Bosire's narrow interpretation of the nature of dispute that ought to be referred to the Co-operative Tribunal as being in terms of subsection (2) of Section 76 only is wrong. The words "*shall include*" in that subsection do not particularise the only kind of disputes that ought to be referred to the said Tribunal, the words should be understood to refer to the inclusive nature of the dispute rather than exclusive nature. I am therefore persuaded that the defendant's claim ought to have been referred to the Co-operatives Tribunal. As was held by the Court of Appeal in THE SPEAKER OF THE NATIONAL ASSEMBLY VS THE HON. JAMES NJENGA KARUME, Civil application No.Nai.92 of 1992, "*where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*" Section 60 of the Constitution, which Mr. Bosire referred to, is clear that this court's unlimited original jurisdiction is subject to the powers conferred upon it by the Constitution or any other law. Section 76 of the Co-operative Societies Act is one of the many provisions of the law which gives original jurisdiction to other bodies other than the High Court to hear and determine certain or specified disputes. Other examples are the Rent Restriction Act and the Landlord and Tenant (Hotels, Restaurants and Catering establishments) Act which have not given original jurisdiction to the High Court to hear certain tenancy disputes but have instead created specialised Tribunals. Needless to say, appeals from such Tribunals lie to the High Court.

In view of this court's holding that the defendant's application ought to have been filed at the Co-operative Tribunal, it will be superfluous to consider whether the defendant had capacity to file the application.

In conclusion, the preliminary objection is upheld with the result that the defendant's applications are struck out with costs to the plaintiff.

DATED, SIGNED and DELIVERED at KISII this 28th Day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Omariba & Otiso for the Plaintiff

Mr. Bosire for the Defendant.

Mr. Kemo HB for Mrs. Nyamichaba State Counsel, for the District Co-operative Officer.

D. MUSINGA

JUDGE.