



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO 429 OF 2018

KTTC SHAMBA INVESTMENT.....1st PLAINTIFF

OYARO MWAMBA.....2nd PLAINTIFF

ZABLON M MUKHAYA.....3rd PLAINTIFF

CHARLES KENYATTA ONKUDI.....4th PLAINTIFF

GILBERT OWELE OTIENO.....5th PLAINTIFF

AGNES RUGURU NGUNJIRI.....6th PLAINTIFF

ANNE MBANDA.....7th PLAINTIFF

VERSUS

KENYA TECHNICAL TEACHERS COLLEGE WORKERS CO-OPERATIVE .

SAVINGS & CREDIT SOCIETY (KTTC).....1st DEFENDANT/APPLICANT

THE COMMISSION OF CO-OPERATIVES.....2nd DEFENDANT

RULING

1. Before this court for determination is the 1st Defendant's/Applicant's Notice of Motion Application dated 14th February, 2019 seeking for the following orders:

a) That the Plaintiffs suit against the 1st Defendant be struck out.

b) That the costs of the suit and of this application be awarded to the 1st Defendant.

2. The Application is based on the grounds on the face of the Motion and supported by the affidavit of Nancy Kinyanjui, the chairperson of the 1st Defendant dated 14th February, 2019.

3. The chairperson of the 1st Defendant deponed that the 2nd to 7th Plaintiffs are former officials of the 1st Defendant who were involved in fraudulent conduct; that investigations were carried out which found them culpable of misappropriating the 1st Defendants funds; that subsequent to the investigations, an Inquiry Report was published setting out their fraudulent conduct and that the 1st Defendant filed Co-operative Tribunal Case No 815 of 2017 against the 2nd to 7th Plaintiffs seeking *inter alia* to enforce the Inquiry Report, release of the original Title Deeds, payment of extra surcharges and refunds of the misappropriated funds.

4. According to the Deponent, all the persons named in the Inquiry Report, including the Plaintiffs herein, filed Co-operative Tribunal Appeal No 1 of 2017 against the findings of the Inquiry Report authored by the 2nd Defendant; that the Plaintiffs have instituted this suit seeking similar orders as those sought in the appeal before the Tribunal, which include a declaration that the Inquiry Report and its findings be declared illegal, unconstitutional, null and void; that the appeal has yet to be determined by the Tribunal and that there is a likelihood of

two conflicting outcomes.

5. In response to the Application, the Plaintiffs, through the 2nd Plaintiff, deponed that the 1st Defendant's application is incurably defective for purporting to have been brought pursuant to **Sections 3A of the Civil Procedure Act and Order 1 Rule 10(2) and 14 of the Civil Procedure Rules**; that the 1st Defendant seeks to have the application struck out on technicalities contrary to **Article 159 of the Constitution**; that the dispute herein is with respect to the Plaintiff's proprietorship of the suit land and is unrelated to the claims before the Tribunal; that the issues in this case relate to land and that this court is vested with jurisdiction to determine the suit.

6. The 1st Defendant submitted that the 1st Plaintiff described itself as a self-help group, which is an unincorporated body that lacks a legal personality and therefore cannot sue. Reliance was placed on the case of **Kipsiwo Community Self Help Group vs Attorney General and 6 Others [2013] eKLR**.

7. Counsel submitted that this suit is an abuse of court process as the orders sought by the Plaintiffs herein are similar to those being addressed at the Co-operative Tribunal in Appeal No 1 of 2017 and that there is a further similar ongoing matter being Nairobi Co-operative Tribunal Case No 815 of 2017 in which injunctive orders have been issued restraining the Plaintiffs from interfering with the suit property.

8. It was submitted that one of the circumstances under which the court is empowered to strike out a suit pursuant to Order 2 Rule 15 of the Civil Procedure Rules includes where the suit is an abuse of the process of the court as espoused in the cases **County Council of Nandi vs Ezekiel Kibet Rutto & 6 Others [2013] eKLR** and **Satya Bhama Gandhi vs Director of Public Prosecutions & 3 others [2018] eKLR** where abuse of process was defined to mean *inter alia* a proceeding wanting in *bona fide* and which is frivolous, vexatious and oppressive.

9. Counsel also relied on the Nigerian case of **Sarak vs Kotoye (1992) 9 NWLE 9pt 264 156 at 188-189(e)** where the court laid out instances constituting abuse of court to include instituting multiplicity of actions on the same subject matter against the same opponent on the same issue or a multiplicity of actions on the same subject matter between the same parties even where there exists a right to begin action.

Analysis & Determination

10. This Application is premised on **Order 1 Rule 10(2) and 14 of the Civil Procedure Rules** which deals with substitution and addition of parties. Due to the nature of the 1st Defendant's Application, the court opines that the most appropriate order under which the Application should have been brought is **Order 2 Rule 15** and not **Order 1 Rule 10 (2) and (14)**. **Order 2 Rule 15** provides as follows:

“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

11. The above notwithstanding, **Article 159 (2) (d)** of the Constitution, mandates this court to consider the merits of the application and deliver substantive justice to the parties irrespective of the procedural technicality of not citing the appropriate provision of the law. In any event, **Section 3A of the Civil Procedure Act**, under which the application is also expressed to have been filed grants this court a wide discretion to grant orders as may appear to be just and convenient.

12. It is the 1st Defendant's case that the 1st Plaintiff being a Self-Help Group has no capacity to institute this suit in its own name. The issue of *locus standi* has been widely discussed. In the case of **Alfred Njau vs City Council of Nairobi [1983] eKLR** the Court of Appeal held thus;

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

13. The 1st Plaintiff, in this case KTTC Shamba Investment, has described itself in the Plaint as “a duly registered Self-Help Group under the Ministry of Gender, Children and Social Development.” Indeed, the certificate of registration attached to the Plaint shows that the 1st Plaintiff was duly registered as a self-help group/project on 10th August 2015 under certificate number 3612624.

14. The question of the legal personality of a Self -Help Groups was considered by the court in **Kipsiwo Community Self Help Group vs Attorney General And 6 Others [2013] eKLR** where the court stated thus:

“It is clear that Self- Help Groups are not incorporated bodies. In fact I know of no law that recognizes them or incorporates them. They were probably the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the Government has not put in place any legal framework under which they can be registered and managed....”

15. Having determined that the 1st Plaintiff is a Self-Help Group which is an unincorporated body, the question then becomes whether it can sue in its own name. While considering this question, the court in *Senti Kumi Community Self Help vs Kenya Maritime Authority & another [2019] eKLR* held as follows:

“Senti Kirui Self Help Group has no capacity to institute this action in its namea person recognised in law had to sue on behalf of members of the Group and as such members had to be named and identified with precision. The person bringing action has to demonstrate that he had permission to bring the action on behalf of the members of the Group.”

16. The Court of Appeal in *Kenya Power & Lighting Co. Ltd –vs- Benzene Holdings Ltd t/a Wyco Paints (2016) eKLR*, in discussing the institution of suits by non-juristic persons stated thus;

“This principle was emphasized as long ago as 1923 by Bankes L.J in *Banque Internationale De Commerce* (supra), which was subsequently in 1959 cited with approval by Templeton, J of then Supreme Court of Kenya in *Fort Hall Bakery Supply Co. V Fredrick Muigai Wangoe* (1959) EA 474, who said:

“The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence.....A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed..”

17. Undoubtedly, the 1st Plaintiff has no legal capacity to sue or being sued, being a non-juristic person. However, it is not clear to this court if the other Plaintiffs are officials of the 1st Plaintiff. If they are, I do not see any legal incapacity of the suit proceeding as it is. I say so because a self-help group can sue or be sued through its officials. That being so, and subject to the evidence that shall be adduced at trial, the Plaintiffs should be retained on record as they are.

18. The 1st Defendant contends that this suit is an abuse of process because the orders sought by the Plaintiffs in this suit are similar to those being ventilated at the Co-operative Tribunal in Appeal No 1 of 2017 and further that there is an ongoing matter being Co-operative Tribunal case No 815 of 2017 relating to the Inquiry Report made against the Plaintiffs and that there are injunctive orders issued in Tribunal Case No 815 of 2017 aforesaid restraining the Plaintiffs from interfering with the suit property.

19. In discussing the concept of abuse of court, the Court of Appeal in *Maureen Waihera Mwenje & another vs David Kinyanjui Njenga & 2 others [2021] eKLR* placed reliance on its earlier decision in *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd and 2 Others [2009] eKLR* where it stated thus;

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

20. In setting out situations that constitute abuse of court, the Court of Appeal in the *Muchanga Investments Limited* case (supra) whilst quoting the Nigerian case of *Sarak vs Katoye (1992) (NWL 9pt 264)* held that:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It is one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice....” The same court gave examples of the abuse of Judicial process to wit:

- a) Instituting multiplicity of actions on the same subject matter against the opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
- b) Instituting different actions between the same parties simultaneously in different courts even through on difficult grounds.**
- c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a Respondent’s notice.**
- d) Where there is no iota of law supporting a court process or where it is premise d on frivolity or recklessness.”**

21. The court has analysed the Plaintiff *vis a vis* the pleadings adduced by the 1st Defendant with respect to Co-operative Tribunal case No 815 of 2017 and the Co-operative Tribunal Appeal No 1 of 2017. In the Plaintiff, the Plaintiffs seek against the Defendants a declaration that the inquiry commissioned by the 1st Defendant and the resultant report dated 5th December, 2014 are illegal, unconstitutional, null and void; a permanent injunction restraining the Defendants from acting on or implementing the report of 5th December 2014; an order directed to the 1st Defendant to restrain them from removing the 1st Plaintiffs beacons on the suit properties and damages for trespass.

22. Briefly, the Plaintiffs case is that the 1st Plaintiff is the registered owner of L.R No 9363/199/200(the suit property herein) which it holds in trust for its members; that at the time of purchase, the 1st Plaintiff was not registered and that it was agreed that the property would be registered in the names of the 1st Defendant, a registered entity.

23. According to the Plaintiffs, the title deeds to the property were subsequently handed over to the 1st Plaintiff; that the 1st Defendant instigated the 2nd Defendant to commission an inquiry whose report alleged that the 1st Plaintiff was fraudulently holding the title to the properties belonging to the 1st Defendant and that the 2nd -7th Plaintiffs had misappropriated the members' funds.

24. On its part, the 1st Defendant averred that the Plaintiffs were its officials in charge of a land buying project; that they used their status to fraudulently purchase the property and mismanage members' funds; that an inquiry was undertaken by the 2nd Defendant which found the Plaintiffs culpable of mismanagement of funds and recommended that they be surcharged for the loss and that the Inquiry Report also recommended that the Plaintiffs release the Title Deeds of the suit property to the 1st Defendant.

25. In the claim before the Tribunal, the 1st Defendant herein, who is the Claimant therein, instituted a case against the Plaintiffs as its former officials allegedly implicated in the inquiry. The 1st Defendant is seeking for the release of the Title Deeds to the suit properties, payments of unaccounted sums and enforcement of the Inquiry Report.

26. Vide an Appeal to the Tribunal, the Plaintiffs herein sought for a declaration that the Inquiry Report and its recommendations are null and void, declarations that the surcharge orders against the 1st to 9th Plaintiffs are null and void and orders setting aside the surcharge orders issued against the Plaintiffs.

27. As can be seen from the above narrative, the present suit as well as the Claim and the Appeal at the Co-operative Tribunal are majorly concerned with the Inquiry Report of 5th December, 2014 which the Plaintiffs are seeking to have both in this court and the Co-operative Tribunal declared null and void. Indeed, the issue of who is entitled to the suit property is the main issue in the claim filed by the 1st Defendant in Tribunal Case number 15 of 2017, which claim was filed before this suit was filed.

28. The Inquiry Report complained of was commissioned and undertaken pursuant to the Co-operative Societies Act, and the Co-operative Tribunal is mandated to determine its propriety. In any event, nothing prevents the Plaintiffs from awaiting the outcome of the Co-operative Tribunal in both cases and if dissatisfied approach this court by way of an appeal

29. As persuasively stated by the court in Satya Bhama Gandhi vs Director of Public Prosecutions & 3 others [2018] eKLR;

“It’s settled law that a litigant has no right to pursue pari passu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

30. The Plaintiffs seeks to have two different courts determine the same issues, a clear abuse of the court process. From the foregoing, the court finds that the application dated 14th February, 2019 is merited and proceeds to strike out this suit in its entirety with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF MARCH, 2022.

O. A. Angote

Judge

In the presence of;

Mr. Mageto for the Plaintiff

No appearance for the Defendant

Court Assistant- Okumu