



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 1 OF 2020

JOSEPH ONKWARE ONGANGA (suing on his own behalf and on behalf of

245 other members of Nyabomite Farmers Co-operative Society Limited)...PLAINTIFF/APPLICANT

=VRS=

KENNEDY ONYAMBU.....DEFENDANT/RESPONDENT

RULING

Before me for ruling are the **plaintiff/applicant's Notice of Motion dated 25th November 2020** brought under Order 10 Rule 3 of the Civil Procedure Rules seeking to strike out the defendant/respondent's defence filed herein on 20th May 2020 for being filed out of time without leave and the **defendant/respondent's Preliminary Objection** to the suit on the grounds that it is fatally defective, vexatious, frivolous and an abuse of the court process; that it does not disclose a cause of action and that this court has no jurisdiction to hear and determine the same.

In the Notice of Motion, it is averred that the defendant/respondent's defence ought to be struck out for being filed out of time; that having entered appearance and filed his memorandum of appearance on 10th March 2020 the respondent ought to have filed his defence fourteen days thereafter but did not do so until 20th May 2020 hence 58 days out of time and that as no leave was sought the defence is not properly on record and it ought to be struck out.

The respondent filed grounds of opposition to the application the gist of which is that this application is an abuse of the court process and that it is in the interest of justice not to grant it.

In the preliminary objection, it is argued that jurisdiction is everything and that the dispute herein is one touching on a Co-Operative Society and by dint of **Section 76 of the Co-operative Societies Act** jurisdiction lies with the Co-operative Societies Tribunal but not this court.

On 11th February this court directed that the application and the preliminary objection would be heard together by way of written submissions. This court received submissions from Counsel for the defendant/respondent both on the notice of motion and the preliminary objection.

On his part Counsel for the plaintiff/applicant intimated that in respect to the application he preferred to rely on the application as drawn and would not file any submissions. He however indicated that he was waiting to be served with the defendant/respondent's submissions on the preliminary objection so that he could file his but to-date his submissions have not been received.

I have considered the application, the grounds thereof, the supporting affidavit, the grounds of opposition, the preliminary objection, the submissions of Counsel for the defendant/respondent and the law.

It would be best to begin with the preliminary objection because it raises an issue of jurisdiction without which this court cannot take another step. In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] 14 Nyarangi JA** stated: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

On this issue of jurisdiction, it is argued that this being a dispute concerning a Co-Operative Society by dint of **Section 76 (1) of the Co-operative Societies Act** this court has no jurisdiction to hear and determine it. The said section states: -

“76 Disputes

(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;
or**
- c. between the society and any other co-operative society, it shall be referred to the Tribunal.”**

The term dispute is defined in **subsection (2)** as—

“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 of personal representative of a deceased member whether such debt or demand is admitted or not.....”

The dispute herein is between members of a Co-Operative Society and Kennedy Onyambu the Nyamira County Co-operatives Officer. While it is a dispute by members of a society it is not a dispute among members, past members or persons claiming through them and neither is it a dispute between members, past members or deceased members and the society, its committee or any officer of the society. It is also clearly not a dispute between the society and any other co-operative society. Strictly speaking therefore, it does not fall within the disputes which by dint of **Section 76 (1)** of the **Co-operative Society Act** must be referred to the Co-operative Disputes Tribunal. I made the same observation in my ruling dated 14th February 2019 in the case of **Samuel Marak & 6 others v the Commissioner of Co-operatives & others Nyamira HCCC 1 of 2018** from which this case arises when I held: -

“Secondly, although strictly speaking this is not one of the cases that must be referred to the Co-operative Tribunal under Section 76 of the Co-operative Societies Act, it is clear from the cases cited by Mr. Nyauma that the trend by the courts is to consider all such matters as disputes concerning the business of a co-operative society and hence refer them to the Tribunal.”

I did also make a similar finding in a ruling delivered in the same matter on 23rd April 2020 where I stated: -

“As stated in the impugned ruling this court recognized that the dispute between the parties was not one of those that it was mandatory to refer to the Co-operative Tribunal. Nevertheless, this court referred the dispute there given that its nature was one that can broadly be regarded as “one concerning the business of a Co-operative Society” and the Tribunal being the best adjudicator of such disputes and in view of this court’s obligation to promote alternative dispute resolution under Article 159 of the Constitution it was in the interest of justice to do so.”

It is therefore my finding that this court has jurisdiction to hear and determine the dispute between the parties herein and that the preliminary objection on the issue of jurisdiction has no merit and it is dismissed.

On the notice of motion, it is not disputed that the defence was filed out of time without leave. I am however prepared to indulge the respondent given that this happened at a time when the services at the court had been scaled down due to the Covid-19 pandemic. The application to strike it out is therefore rejected and the defence on record shall be deemed as duly filed and served. The respondent shall however bear the costs of the application. It is so ordered.

RULING SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.

E. N. MAINA

JUDGE