



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC CAUSE NO. 26 OF 2019**

**LAWRENCE KITONYI.....APPLICANT**

**VERSUS**

**JAMES NJUGUNA GACHANGA (Sued as the Liquidator of**

**COFFEE WORKERS COOPERATIVE**

**SAVINGS & CREDIT SOCIETY LIMITED).....RESPONDENT**

**RULING**

What is before me for determination is the Applicant's Notice of Motion application dated 2<sup>nd</sup> April, 2019 brought pursuant to Section 64(1) and 228 of the Companies Act, Section 66 of the Cooperative Societies Act, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act. The Applicant is seeking leave to institute and prosecute proceedings against JAMES NJUGUNA GACHANGA in his capacity as the Liquidator of COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.

The application is premised on the summarized grounds that the Applicant was a member of the COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED that went into liquidation and the Respondent was appointed its Liquidator. The Applicant purchased two parcels of land from the liquidated Sacco. That the liquidated Sacco through its officials conspired with third parties to defraud the Applicant of the said properties. The Applicant has a claim against the Respondent. No prejudice will be suffered by the Respondent if the application is allowed.

The application is supported by the affidavit of the Applicant LAWRENCE KITONY where he avers that on 24<sup>th</sup> October, 2002, he accepted an offer from the COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED to purchase two (2) plots referred to as Numbers 395 and 396 situated in Kitengela. He confirms paying for the said plots which payment was accepted on 4<sup>th</sup> October, 2014. He contends that after making the final payment, he discovered that the said plots had been subdivided and allocated title numbers Kajiado/ Kitengela/ 15895 and Kajiado/ Kitengela/ 15896 respectively. He explains that in 2016 in the company of the Chairman for COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED and the Land Surveyor, they visited the plots and he was shown the extent of his plots including beacons. Further, he proceeded to secure the plots and in 2017 re established his fence. He claims to have been in constant communication with the said Chairman who reassured him the title deeds to his plots were being processed. He states that in 2018, he discovered the two plots had been fraudulently transferred to third parties without his knowledge. Further, on 29<sup>th</sup> May, 2018 through his advocates, he learnt that the COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED was under liquidation and the Respondent was appointed.

The application is opposed by the Respondent JAMES NJUGUNA GACHANGA where he deposes that the application should be dismissed as it lacks merit. He contends that the alleged land transaction was conducted on 4<sup>th</sup> October, 2014 long before he was appointed a liquidator on 30<sup>th</sup> July, 2015. He denies being a party to the said transaction. Further, that the Letter of Offer and Cash Voucher were all signed by the Chairman of the COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED. He insists granting the orders sought in the application will lead to the intended suit being instituted against the wrong person. Further, that the issues in dispute cannot be fully adjudicated unless the Applicant files suit against the proper parties. He denies executing any documents regarding the suit property and had no knowledge of the transaction. He explains that upon his appointment as a Liquidator on 30<sup>th</sup> July, 2015, he never actively took over the liquidation duties of COFFEE WORKERS COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED and to date and he is not a signatory in the Sacco's bank accounts. He reiterates that obtaining leave to file a suit against him will not assist in solving the issues in dispute as they are not within his knowledge. Further, that the suit should be filed against officials of the Sacco who were parties to the transaction giving rise to the suit.

Both the Applicant and Respondent filed their respective submissions that I have considered.

## Analysis and Determination

Upon consideration of the Notice of Motion application dated the 2<sup>nd</sup> April, 2019 including the respective affidavits and submissions, the only issue for determination is whether leave should be granted to the Applicant to institute a suit against the Respondent.

The Applicant in his submissions relied on section 64 and 66 of the Cooperative Societies Act, Section 228 of the Companies Act as well as the case of **Charles Mbatha Suing as the Liquidator of Steel Sacco Society Limited (in liquidation) V Kenya United Steel Company (2006) Ltd (2017) eKLR** to buttress his argument for application for leave. The Respondent in opposing the application for leave contended that he is not a necessary party to be sued and relied on the case of **Green Square Limited V Sheladia Associates & 2 Others (2017) eKLR and Eltex Sacco Limited V Rift Valley Textiles Limited & Another (2009) eKLR**. Further that the Applicant has not exhausted the available statutory dispute resolution mechanisms so as to warrant seeking redress from the Court and relied on section 68 (1) (k) of the Cooperative Societies Act as well as the following cases: **Non Governmental Organizations Board V EG & 5 others (2019) eKLR; Night Rose Cosmetics (1972) Ltd V Nairobi County Government & 2 others (2018) eKLR; and John Githaiga Gachungwa & 3 others V Commissioner for Cooperative Development & 2 Others (2014) eKLR** to buttress their argument.

Section 64 of the Cooperative Societies Act stipulates the process to be adhered to in the winding up of Cooperative Society and refers to section 228 of the Companies Act where it provides that in instances where a winding up order has been made in respect to a company and an interim liquidator appointed, no action shall commence against the said company except by leave of court.

Section 66 of the Cooperative Societies Act makes provisions on the powers of the Liquidator with section 66(b) stipulating that the Liquidator can institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society.

In the current case, the cooperative society is already under liquidation with the 1<sup>st</sup> Respondent appointed as a liquidator. Section 64 of the Cooperative Societies Act in making reference to section 228 of the Companies Act makes it mandatory that for a company under liquidation, no action shall commence against the said company except by leave of court.

The Applicant herein has sought for leave to institute a suit against the liquidator of the Sacco Society which is currently under liquidation. At this juncture, as a Court, there is no need to delve into merits or demerits of the case as this will be canvassed in the substantive suit. The Respondent insists that the Applicant should have referred the dispute to the Cooperative Tribunal first. I note section 76 of the Cooperative Societies Act makes provisions on disputes to be referred to a tribunal. From a reading of this section, it is clear that it refers to an existing and running cooperative society and not one under liquidation as the case herein. I hence disagree with the Respondent's argument on referring the dispute herein to the Tribunal first. The Respondent further claimed that he has not fully participated as a liquidator and hence should not be sued. I however, note that he did not provide proof that he is no longer the liquidator of the said society.

In associating myself with the decision of **Charles Mbatha Suing as the Liquidator of Steel Sacco Society Limited (in liquidation) V Kenya United Steel Company (2006) Ltd (2017) eKLR** where the learned Judge held that: ' **at this point in time the duty of this court is not to look into the merits or demerits of a case that is yet to be filed as counsel of the respondent would seem to suggest .. is a matter to be canvassed in the main suit if leave is granted.** '

I find the application dated 2<sup>nd</sup> April, 2019 merited and will proceed to allow it. I grant the Applicant leave of 60 days from the date hereof to commence proceedings against the Respondent.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 29th day of January, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**