



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL SUIT NO. 7 OF 2017

KINATWA GROUP CO. LIMITED.....PLAINTIFF

VERSUS

FRANCIS MULWA MUTISYA.....1ST DEFENDANT

GEORGE KIMOTH O ILEVE.....2ND DEFENDANT

GEORGE MUNYAO KAWAYA.....3RD DEFENDANT

CYRUS MUATHA KANYALU.....4TH DEFENDANT

MARY NYAMBURA MAINA.....5TH DEFENDANT

DAVID KIMWELE KAVUKU.....6TH DEFENDANT

RULING

1. The Plaintiff, a Co-operative Society duly registered under the **Co-operative Societies Act, Chapter 490 Laws of Kenya** (hereinafter “Sacco”) approached this Court by way of Plaintiff seeking a declaration that the Defendants are not members of the Sacco and issuance of permanent injunction to restrain the Defendants whether by themselves, their agents and/or servants from representing themselves as members and/or servants of the Plaintiff and from calling, convening, participating, attending any meeting of the Plaintiff.
2. Contemporaneously with filing of the Plaintiff, the Plaintiff Sacco filed a Notice of Motion seeking an interlocutory order of an injunction to restrain the Defendants from convening a meeting of the Sacco or interfering with its affairs which orders were issued on the **22nd day of June, 2017** pending hearing and determination of the application interparte.
3. Subsequently, on the **29th June, 2017**, the 1st – 5th Defendants filed a Notice of Motion seeking stay of orders issued save for the calling, convening or attending the meeting requisitioned on the **24th June, 2017**; that they together with other 60 members of the Sacco be allowed to operate the transport business under the Sacco without interference of the Plaintiff or the police who had been hired by the Plaintiff’s officials pending hearing and determination of hearing of the case.
4. The application was certified as urgent and the orders issued stayed save for calling, convening or attending the meeting of **24th June, 2017** on interim basis pending hearing on the **20th day of September, 2017**.
5. Eventually, the Defendants filed a defence to the claim and raised the issue of jurisdiction of the Court and by a Notice of Preliminary Objection dated the **4th day of December, 2017** the 1st – 5th Defendant’s urged that this Court lacks the jurisdiction to entertain the Plaintiff’s entire suit in view of the express provisions of **Section 76 of the Co-operatives Societies Act (Act)**. That the proceedings did commence contrary to the law.
6. During pendency of the matter the Respondent/Plaintiff filed a Notice of Motion dated the **12th day of September, 2017** seeking the 1st – 5th Defendants together with **Aggrey Jumba** (Ministry of Industry, Trade and Co-operatives), **P. A. K’oremo** (Ministry of Industry, Trade and Co-operatives), **Gladys Kivoto** (Kitui County), **Francis Mutuku** (Principal Co-operative Office, Kitui County), **Hensen Kiuva** Chief Co-operatives Officer, Nyeri County), **Richard Masinde** (OCS Kitui) to be punished for contempt of Court for purportedly colluding and convening a meeting on the **9th September, 2017** where elections of office bearers of the Plaintiff were conducted.
7. Some of the alleged contemnors instructed Advocate who filed Replying Affidavits.

8. The Applicants (1st – 5th Respondents) represented by **Japheth K. Mwalimu**, learned Counsel submitted that from the Plaintiff's own pleadings and especially annexure **SMM – 6** filed in support of the application dated **19th June, 2017**, all the Defendants are stated to be members of the Plaintiff. That the 1st to 5th Defendants are stated to have been in attendance of the Plaintiff's Special General meeting held on the **24th March, 2017** as numbers 17, 37, 39, 40 and 42 respectively, who participated and contributed to deliberations, therefore, pursuant to the provisions of **Section 76** of the **Co-operative Act**, the dispute between the parties ought to be referred to the Co-operative Tribunal.

9. **Mr. Mulu**, learned Counsel for the 3rd and 4th alleged contemnors supporting the application submitted that this Court lacks jurisdiction to determine the matter. That the Plaintiff seeks a declaration that the Defendants be declared not to be members of the Sacco having left it and later rejoined therefore the body mandated to deal with questions of membership is the Co-operative Tribunal.

10. **Ms. Githua Doris**, learned Principal State Counsel for the Commissioner for Co-operatives Development representing the 6th, 7th and 10th alleged contemnors supported the application. She submitted that the dispute before Court being a dispute concerning business between the parties in dispute, that the action of the Plaintiff and Defendant should be resolved by the Co-operative Tribunal as provided by **Section 76** of the **Act** and the matter be dealt by the High Court at the appellate stage.

11. **Mr. E. K. Mutua** learned Counsel for the Plaintiff and Respondent submitted that the Defendants have never been members of the Sacco before therefore the matter does not come before the jurisdiction of the Co-operative Tribunal. That the Court should not countenance the argument of the Defendants that they are now members and officials of the Sacco due to the illegal meeting of **9th September, 2017** and that the Preliminary Objection raised did not amount to an objection on a point of law.

12. I have considered rival submissions by parties herein alongside the authorities cited.

13. The issue to be determined is therefore: whether this Court has the jurisdiction to deal with the entire suit.

14. In the celebrated case of **The Owners of Motor-vessel "Lillian S" vs. Caltex Oil (Kenya) LTD (1989) KLR 1**, Nyarangi J. (as he then was) stated that:

"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....."

By jurisdiction is meant authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

15. I do appreciate that it is trite law that a Preliminary Objection must be on a point of law and for it to be a competent point of law the facts should not be in dispute. This was well put in the case of **Mukisa Biscuits Manufacturing Co. LTD vs. West End Distributors (1969) EA 696** where it was stated that:

"...a Preliminary objection consists of a point of law argued as a preliminary point may dispose of the suit....' It is clear to me that the issue raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained."

16. **Section 76** of the **Co-operative Societies Act** provides thus:

"(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.

(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 a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority."

17. Looking at the pleadings, it is averred that the Defendants have associated themselves with the Plaintiff but have never been its

members. That they are members of a competitor co-operative society known as **Nakimu Travellers Sacco Ltd.** That the Defendants have only represented themselves as members of the Plaintiff. Annexures to the Supporting Affidavit of the application are affidavits deposed by the Defendants where they stated that they had resolved to rejoin **Kinatwa Sacco** on the understanding that they would be bound by the outcome of the case. The affidavits were deposed on the **26th** day of **July, 2011.**

Further, there is affidavit evidence availed by the Defendants of minutes of a Special General Meeting held on the **24th March, 2017** where the Defendants were present as members of the Sacco.

18. From the foregoing it is apparent that the dispute is between the Sacco represented by some of its current members and the Defendants, subject to proof, who may be its current members, or past members. A dispute that revolves around carrying on the business of the Plaintiff.

19. The High Court of Kenya has original and appellate jurisdiction in Civil Cases conferred upon it by the statute. **Section 81** of the **Act** provides that:

“Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty (30) days of such order, appeal against such order to the High Court.”

20. Having considered the application I find that the body with requisite jurisdiction to determine the dispute herein is the Co-operative Tribunal while the High Court is seized of the Appellate jurisdiction. Accordingly, the suit is struck out. Costs shall be paid by the Respondent/Plaintiff.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of September, 2018.

L. N. MUTENDE

JUDGE