



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 13 OF 2018

JOHN MUANGE KIOKO & 6 OTHERS.....PLAINTIFFS

VERSUS

SAMSON OJWANG & 17 OTHERS.....DEFENDANTS

RULING

Introduction

1. In these proceedings the plaintiffs herein seek *inter alia* the following orders:

- a. A declaration that the 1st to 16th defendants are in office illegally and are not the bonafide officials of the 17th defendant
- b. A permanent injunction restraining the 1st to 16th defendants who constitute the membership of the interim Katelembo Management Committee and the Katelembo Taskforce Committee, either by themselves, their agents, servants or in any manner howsoever from running and managing the affairs of the 17th Defendant, and interfering with the running and management of the same, or in any manner whatsoever taking up office;
- c. An order directing the 18th Defendant to convene and constitute a valid Annual General Meeting and thereafter oversee and conduct valid elections under the 17th Defendant's constitution and the Co-operatives Societies Act.

2. The applicants' case arises from their belief that the interim committee is in office beyond the 90 days that they were given from 10th August, 2015 and no elections have been held. Further that the interim committee has been carrying out malpractices at the expense of the members of the committee.

3. According to the plaintiffs, there is need to elect new management of the committee hence the need for an order directed to the 17th defendant. Further, that the state department of cooperatives has confirmed that fresh elections need to be conducted.

Defendants' Objection

4. Upon being served with the application, the 5th, 7th, 10th to 17th and 18th defendants and the attorney general filed Notice of Preliminary Objections dated 27.6.2018, 28.6.18 and 9.8.2018, and in which they contended that this Court has no jurisdiction to entertain a dispute concerning the business of a Co-operative Society as provided in section 76 of the *Co-operative Societies Act*, Cap 490 Laws of Kenya (hereinafter referred to as "the Act"). Further, that the application and the suit herein violated the provisions of Section 81(1) of the Act and is therefore improperly before the court.

5. The plaintiffs replied by filing grounds of opposition to the defendants' preliminary objection stating that the subject matter of the suit is a contention as regards the composition and management of the 17th Defendant's management and taskforce committee, therefore it does not fall within the definition of a dispute under Section 76 of the Act

6. It is this preliminary objection that is the subject of this ruling. Parties were directed to file submissions therein

7. The 5th and 18th respondents submitted that Section 76 of the Act ousts this court's original jurisdiction and section 81 empowers this court as a court of final appeal on matters commenced at the Cooperatives Tribunal. The grievances and the applicable law in this matter, the jurisdiction lies with the Co-operative Tribunal. This court was invited to consider the case of **Gerald Wambua Makau v Lukenya Ranching and Farming Co-operative Society Ltd and Another (2014) eKLR** Learned counsel further contended that because section 81 of the Act deals with appellate powers of this court, entertaining this matter at first instance here would shut out other parties from the right

of appeal.

8. The 7th, 10th to 17th respondents in submitting what constitutes a dispute for purposes of section 76(2) of the *Co-operative Societies Act* referred me to the case of **Gatanga Coffee Growers Co-operative Society Ltd v Gitau (1970) 1EA 361** where the Appeal Court interpreted the term “business of the society” as not only the internal management of the society but also every activity of the society within the ambit of its by-laws and rules. According to learned counsel the suit ought to be struck out for this court has no jurisdiction to hear the said suit. They also submitted that in case the plaintiff submits that some of the parties sued are not members of the society therefore section 76 applies, the finding of Nyamweya J in the case of **Republic v Commissioner for Co-operative Development & 69 others Ex Parte Katelembo Athiani Maputi Ranching & Farming Co-operative Society Limited [2016] eKLR** that the said parties represented the position of the defendants who were members of the society, therefore the import of this case is that the argument of the plaintiffs will not be available to support them.

9. The attorney general submitted that the orders sought by the plaintiffs entirely relate to the business of the 17th defendant herein and to that extent the dispute ought to be referred to the Co-operatives Tribunal for determination. They quoted the *locus classicus* on jurisdiction, **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**

Respondents’ Case

10. On behalf of the Respondents, it was submitted by **B. J Sawe and Co Advocates**, that the subject of the dispute is elections, illegal holding of office and failure to convene a general meeting by the management committee to allow for valid elections to be held and such dispute did concern the business of the society but was not within the ambit of Section 76(1) and (2) of the Act. This court was invited to consider the case of **Alex Malikhe Wafubwa & 7 Others v Elias Nambakha Wamita & 4 Others (2012) eKLR**. Learned counsel distinguished the said case submitting that though it related to a judicial review application which is a matter different from the instant case, it served to illustrate that not all matters concerning Co-operative Societies fall under the jurisdiction of the tribunal. This Court was therefore urged to dismiss the objection.

Determination

11. I have considered the issues raised herein. This being a decision on a preliminary objection, the Court ought to set out the principles guiding the raising of such objections. I refer to the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case Law, JA was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

As for Newbold, P:

“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

12. That leads me to the issue of jurisdiction. That an issue going to jurisdiction ought to be raised as a preliminary issue is now old hat. Since the issue of jurisdiction is central to these proceedings and any legal proceedings, as was stated by Nyarangi JA in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

13. Similarly in **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** the same Court expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

14. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

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

(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.

16. In this case, it is clear that with respect to the appeals in respect of mismanagement and misuse or misappropriation of funds, if it is an appeal from a dispute between the members or some of them on one hand and the Co-operative Society and its officials on the other having been handled by the Tribunal therefore falls squarely within the purview of section 81 of the Act. If that is the dispute before the Court, this Court would have jurisdiction to entertain these proceedings, but this is not the case.

17. In this case, the crux of the dispute according to the plaintiffs is the failure or refusal by the committee to hold elections, failure to convene a general meeting by the management committee and illegal holding of office by the interim committee. This goes to the powers of the Commissioner to carry out its statutory obligation under section 58 of the Act. The said provision material to this case provides as follows:

1) The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.

2) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.

3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.

4) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—

(a) dissolve the Committee; and

(b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.

18. In my view, the plaint as filed does not raise any issues as to infringement of any fundamental rights and freedoms of the plaintiff and at this point I wish to refer to the case of Alex **Malikhe Wafubwa & 7 Others v Elias Nambakha Wamita & 4 Others (2012) eKLR** that the plaintiffs have quoted, and state that for this reason the case does not apply to the facts before me. The orders which the applicants seek from this Court relates to the internal management of the society and its activity within the ambit of its by-laws and rules, brought about by a dispute between the members who feel that the current committee is misusing the property entrusted to them and therefore elections need to be conducted so that the committee is replaced. For that reason, this is a dispute that falls within Section 76 of the **Co-operative Societies Act** and this is a matter that the tribunal has powers to handle at first instance. The plaintiffs may approach the tribunal to grant them the orders sought in the plaint and if dissatisfied, they may approach this court under Section 81 of the **Co-operative Societies Act**.

19. An analysis of the prayers sought in the plaint as well as the content of the complaints in the body of the plaint shows that the dispute relates to the business of the society. In the quoted case of **Gatanga Coffee Growers Co-operative Society Ltd v Gitau (1970) 1EA 361** where the Appeal Court interpreted the term “business of the society” as not only the internal management of the society but also every activity of the society within the ambit of its by-laws and rules, therefore I find that the complaints that current committee is misusing the property entrusted to them and therefore elections need to be conducted so that the committee is replaced relate to the business of the society and such a dispute can be ably handled by the tribunal.

20. I therefore find that the objection raised that this Court has no jurisdiction to entertain these proceedings has merit and succeeds.

21. Consequently the preliminary objections dated 27.6.2018, 28.6.18 and 9.8.2018 are allowed. This suit is hereby dismissed with costs to the defendants.

Orders accordingly.

Dated and delivered at Machakos this 4th day of December, 2018

D.K. KEMEI

JUDG