



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 39 OF 2015

1. KATELEMBO ATHIANI MUPUTI FARMING AND RANCHING

CO-OPERATIVE SOCIETY suing through its members:

- 2. WILSON MASILA MUEMA**
- 3. PETER MUASYA KIITI**
- 4. LAZARUS MUANGE WAMBUA**
- 5. JAMES MASAI KASWII**
- 6. TIMOTHY MUSYOKA KIALA**
- 7. DANIEL NTHIANI MUTISYA.....PLAINTIFFS**

VERSUS

- 1. JOSEPH MUINDE**
- 2. WILSON KYUMBU**
- 3. GREGORY NGUI**
- 4. JOHN NDUU**
- 5. JONES NZAU**
- 6. JOSEPH MUTHAMA**
- 7. JOSEPH KALUNDE**
- 8. ORINA RIECHI t/a ORINA & CO. ADVOCATES.....DEFENDANTS**

AND

**MACHAKOS COUNTY CO-OPERATIVE
COMMISSIONER.....INTERESTED PARTY**

RULING

Introduction

The Plaintiff instituted the suit herein by way of a Plaint dated 13th August 2005, seeking prayers that the Defendants return all the official records, documents and items belonging to the 1st Plaintiff, and restraining them from interfering with the 1st Plaintiff's affairs, or remaining in possession of or dealing with the 1st Plaintiff's premises. The 1st Plaintiff is a co-operative society registered under the Co-operative Societies Act, while the 2nd to 7th Plaintiffs claimed they are members of the 1st Plaintiff. Further, that the 1st to 6th Defendants were until 10th August 2015 the management committee members of the 1st Plaintiff, the 7th Defendant was a former management committee member, and the 8th Defendant an advocate acting on the instructions of the 1st to 7th Defendants.

The Plaintiffs claimed that the 1st Plaintiff has been experiencing problems brought about by mismanagement of the society's affairs and properties, and that several complaints have been lodged with the police and the Interested Party herein, and indeed several criminal and civil proceedings have been instituted as against the management committee members. Further, that on or about 10/8/2015, the Interested Party herein through powers conferred upon him by section 28(7) the Co-operative Societies Act , suspended the entire management committee of the 1st Plaintiff, which committee comprised of the 1st to 6th Defendants herein. However, that after the said suspension, the 1st to 7th Defendants illegally and without any color of right, purported to enter into the 1st Plaintiff's premises and illegally collected all the official public documents records and items belonging to the 1st Plaintiff, which they handed over to the 8th Defendant.

The Plaintiffs also filed an application by way of a Notice of Motion contemporaneously with the Plaint, in which they sought various injunctions. This Court (Kariuki J.) after hearing the application on 13th August 2015 made the following orders:

1. THAT an ORDER be and is hereby issued that, pending the hearing and determination of this Application the defendants by themselves, their agents, servants or persons acting under their authority do return and deposit with the Machakos County Co-operative Commissioner the following documents;

- a) 2.04 Acres plots Members Register- 2 books
- b) Members register for 3500 members
- c) Members Register for 1/2 Acres plots
- d) Register for Athi river /Athi river 2.04 Acres Titles
- e) Register for Machakos Town/Block 3 for 2.04 Acres titles
- f) Transfer Register for 2 .04 Pots- 2 books
- g) Transfer Register for 1/2 Acres plots - 2 books
- h) Society Common Seal- With Padlock And Keys

2. THAT pending the hearing and determination of this Application, the respondents be and are hereby restrained from entering remaining, trespassing into and or in other way dealing with the society's office premises located at Katelembo within Machakos County and, from dealing with the affairs of the society.

3. THAT the matter be mentioned on 1st of September 2015 for directions.

4. THAT the documents be served upon the Respondents herein.

The Application and Preliminary Objection

On 25th August 2015 the Defendants thereupon filed an application by way of Notice of Motion and a Notice of Preliminary Objection to the Plaintiff's application and Suit. The Application sought the following orders:

1. That the court do discharge and/or set aside the orders granted herein on 13.8.2015 pending hearing and determination of this application
2. That the court do strike the plaint herein or dismiss this suit with costs to the Defendants.
3. That the cost of this application be borne by the Plaintiffs.

The grounds for the application were that the Court was misled by the Plaintiffs to grant orders without jurisdiction owing to the provisions of section 76 and 81 of the Co-operative Societies Act. Further, that the 2nd to 7th Plaintiffs lacked capacity to sue in the name of the 1st Plaintiff in view of sections 12 and 28 of the Co-operative Societies Act, and that the Court does not have power to call for the documents pursuant to section 26 of the said Act.

The 1st Defendant reiterated these grounds in a supporting affidavit he swore on 25th August 2015, and in addition gave a detailed account of the activities of the 1st Plaintiff leading to the suspension of the 1st to 6th Defendants. The same grounds were also reiterated in the Preliminary Objection.

The Plaintiffs filed a replying affidavit sworn on 1st October 2015 by the 3rd Plaintiff, wherein they stated that this Court has jurisdiction and reiterated and detailed the averments in their Plaint on the activities of the 1st Plaintiff and Defendants. The Interested Party also filed a replying affidavit sworn 7th October 2016 by Charles Nalyanya, and in which it was averred that the 8th Defendant and Interested Party are not members of the 1st Plaintiff, therefore this dispute does not fall within the jurisdiction of the Co-operatives Tribunal. The Interested Party also responded to the allegations made by the Defendants about the running of the 1st Plaintiff and their suspension from office.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination. The first is whether the suit filed herein by the Plaintiff should be struck out, and the second is whether Defendants' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld.

The Defendants' application and preliminary objection were canvassed by way of written submissions which I have read and considered. B.M. Mungata Advocates, the Defendant's Advocates in this respect filed submissions dated 22nd October 2015, while Gladys Gichuki Advocates, the Plaintiffs' Advocate, filed submissions dated 21st November 2016.

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In **D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1** at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues.

The circumstances in which a preliminary objection may be raised were also explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side 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 effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. A preliminary objection cannot therefore be raised if any fact requires to be ascertained or discretion of the Court is sought to be exercised.

Coming to the issues raised by the Defendants, the issue as to the 2nd to 7th Plaintiff’s locus to sue is covered by section 12 of the Co-operative Societies Act which provides as follows:

Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

Section 28(3)(b) in addition provides as follows:

(3) The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to—

(a) enter into contracts;

(b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and

(c) do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.

The issue is whether the 2nd to 7th Plaintiffs have locus to bring the suit in light of the suspension of the 1st to 6th Defendants, which is a triable issue, and is in any event one that can be cured by the necessary amendment to bring on board the valid members of the management committee of the 1st Plaintiff as additional Plaintiffs.

Likewise, section 26 of the Co-operative Societies Act only serves to give powers to the Commissioner of Co-operatives as regards the production of books and documents from co-operative societies, and does not preclude the inherent power of this Court to give such orders in the interests of justice as provided by section 3A of the Civil Procedure Act and Article 159 of the Constitution. Section 26 provides as follows:

Any officer, agent, servant or member of a co-operative society who is required by the Commissioner, or by a person authorized in writing by him to do so shall, at such place and time as the Commissioner may direct, produce all moneys, securities, books, accounts and documents belonging to or relating to the affairs of such society which are in the custody of such officer, agent, servant or member.

In addition, the above issues are issues of fact and which involve the exercise of the Court's discretion, and cannot be raised in a preliminary objection.

The only issue that therefore remains for determination is whether this Court has jurisdiction to hear the suit, which issue is one that raises pure point of law and makes this suit amenable to striking out. In the present application and objection, the issue of jurisdiction of this Court has been raised *vis-a-vis* the jurisdiction of the Co-operatives Tribunal. Jurisdiction is always granted by law or other like instrument as held by the Court of Appeal in **The Owners of the Motor Vessel "Lilian S" –VS- Caltex (Kenya) Ltd [1989]** KLR 1 .

“By jurisdiction is meant the authority which a court has to decide 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. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

Therefore the issue of jurisdiction is a pure point of law that can be raised in a preliminary objection. In addition, this Court is alive to the position that parties should exhaust all statutory and alternative procedures for redress, before moving this Court for remedies, as held by the by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**. The existence of these statutory or alternative remedies do not oust the jurisdiction of the court, however the court will defer to the same when they are applicable or appropriate. The question to be answered is whether the said alternative procedures and remedies are applicable or appropriate in the circumstances of the suit filed herein.

The Defendants relied in this respect on section 76 of the Co-operative Societies Act, that provides for the scope of disputes which fall within the jurisdiction of the Co-operative Tribunal as follows:

(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 license or any other due, from the Authority.

This Court therefore need to determine whether the claim by the Plaintiffs before it amount to a “*dispute concerning the business of the society*” in the sense of section 76(1) and (2) of the Act. In construing whether a dispute is one concerning the business of a society within the meaning of section 76(1) and (2) of the Co-operative Societies Act. Gikonyo J. in held as follows in **Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others**[2012] eKLR:

“ [60] In construing a statute where a category of some descriptors is provided in a manner that is not closed as is in section 76(2) of the Act, the canon to be applied is that of *ejusdem generis*. Accordingly, as far as possible, anything else that is to be included in that category must be of the same kinds, class, or nature. In this sense, an overly wide meaning of such prescription should be avoided, and be restricted within the overall objective of the Act. I think, this is the proper construction that should be applied in the interpretation of section 76(2) of the Act since the issue here is one of ouster of the jurisdiction of the court. The jurisdiction of any quasi-judicial tribunal is never unlimited but is always circumscribed by the law creating it. That is the reason why the Honourable Justice Makhandia J (as he then was) adopted a subtle craft in the case of *Peter Ochara Anam* when he said:

‘These acts ((sic) ...continue to apply and should be applied to resolve disputes akin to them’
[Emphasis supplied]

[61] This approach of construction of statutes, and which is expressed in the words of Honourable Justice Makhandia J (as he then was), does not allow an expansion of open ended provisions of the law to the extent of covering matters that are not akin to or are strange to or are incompatible with or outside the essential jurisdictional bounds circumscribed by the Act.”

Likewise in Muriithi J held as follows in **Republic vs Matheka Kithome & 4 Others** (2011) eKLR;

“In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws and rules.”

The matters in the suit herein as shown by the prayers sought by the Plaintiffs in the Plaint are the records and documents currently held by the Plaintiffs, and the continued possession and use of the 1st Plaintiff’s premises This is a dispute touching on the internal management of the 1st Plaintiff which in my view is a matter touching on the business of the 1st Plaintiff and ought to be heard by the Co-operatives Tribunal pursuant to section 76(1) and (2) of the Co-operative Societies Act.

On the arguments that the dispute involves the 8th Defendant and Interested Party who are not members of the 1st Plaintiff, I find that the 8th Defendant is sued as advocate and an agent of the 1st to 7th Defendants, and therefore only represents the said Defendants positions who are members of the 1st Plaintiff. There are also no orders sought as against the Interested Party in the suit, and the dispute therefore does not involve him.

This Court accordingly finds for the above reasons that the Defendant’s Preliminary Objection dated 25th August 2015 does raise a pure point of law, and has merit. This suit is hereby struck out and the orders made on 13th August 2015 by Kariuki J. are accordingly vacated.

The Plaintiffs shall meet the costs of the Notice of Motion and Preliminary Objection dated 25th August

2015 and of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 6th day of March 2017.

P. NYAMWEYA

JUDGE