



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO. 40 OF 2012**

**KISII COUNTY STAKEHOLDERS FORUM.....PETITIONER**

**VERSUS**

**KENYA AGRICULTURAL RESEARCH INSTITUTE.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DR. OSCAR MAGEYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. On 13<sup>th</sup> November 2012, the Petitioner herein, who describes itself as a registered society under the Societies Act filed the instant petition against the Respondents seeking for the revocation of the 3<sup>rd</sup> respondent's appointment citing irregularities in the recruitment process, failure to comply with chapter 6 of the constitution on leadership and integrity, and lack of accountability. The petitioner's case was that the 3<sup>rd</sup> respondent's appointment was irregular, unconstitutional, illegal and unlawful.

2. The respondents opposed the petition through a replying affidavit sworn on 26<sup>th</sup> November, 2013 by one **EPHRAIM MUKISIRA**, the 1<sup>st</sup> respondent's director in which he stated that the petitioner is a non-entity, unknown in law as it has no known registration of itself, its officials, office or anything capable of ascertainment in the event that the court would grant an order for or against it requiring enforcement or compliance. The 1<sup>st</sup> respondent's deponent added that the recruitment of the 3<sup>rd</sup> respondent as Centre Director of KARI, Kisii, was done above board in full compliance with the laws and regulations guiding such an appointment.

3. On 9<sup>th</sup> January 2015, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a Notice of Preliminary Objection seeking the striking out or dismissal of the petitioner's entire petition on the following grounds.

**1. That the petitioner filed the petition as a registered society registered under the Societies Act, Cap 108 of the laws of Kenya.**

**2. That the petitioner lacks capacity to sue by virtue of it being an unincorporated organization and or not being a legal entity capable of suing and being sued in its own name.**

**3. That the petitioner has no legal capacity to institute proceedings in any court in its own names and cannot maintain such proceeding.**

**4. That the petitioner's suit is incurably defective for failing to comply with the provision of Order 1 Rule 8 (1) and (2) of the Civil Procedure Rules, 2010.**

**5. That the petitioner's failure to comply with rules governing representative suit renders the whole suit null and void ab initio.**

**6. That the petitioner's/respondent's suit herein is incurably defective, non-starter in law, a legal nullity and amount to an abuse of the court process.**

**7. That the cost of this objection and the entire suit be paid by the petitioner.**

4. Parties agreed to canvass the preliminary objection by way of written submissions.

5. This ruling, therefore, is in respect to the 1<sup>st</sup> and 3<sup>rd</sup> respondents' objection.

6. From the outset, I wish to observe that the Petitioner did not file any written submissions to the preliminary objection despite having been duly notified of the hearing date and despite having been served with the respondents' written submissions. This ruling has therefore been prepared by this court without the benefit of having the petitioner's rejoinder to the same.

7. The main gist of the 1<sup>st</sup> and 3<sup>rd</sup> respondent's objection relates to the the petitioner's lack of legal capacity to institute the suit which, according to the respondents, is bad in law and ought to be struck out.

8. M/s Milimo, Muthomi & Co. Advocates for the 1<sup>st</sup> and 3<sup>rd</sup> respondents have submitted that it is now trite law that a society registered under the Societies Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. The 1<sup>st</sup> and 3<sup>rd</sup> respondents added that members of an ordinary society, if they wish to sue, can only do so in a representative capacity under order 1 Rule 8 of the Civil Procedure Rules.

9. The respondents added that it was not disputed that the petitioner is a non incorporated body of many members registered under the **Societies Act Cap 108 of the laws of Kenya** as the petitioner itself does not describe itself in any other way or with any other name or capacity.

10. The 1<sup>st</sup> and 3<sup>rd</sup> respondents bolstered their arguments on this point on the petitioner's lack of capacity with numerous decided cases to wit, **Eritrea Orthodox Church vs Wariwax Generation Ltd [2007] eKLR, Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 5116 of 1992, Simu Vendors Association vs Town Clerk, City of Nairobi and Another in Nairobi HCCC Misc. Application No. 427 of 2005, African Orthodox Church of Kenya vs Charles Omiroka & Another [2014] eKLR and Football Kenya Federation vs Premier league Ltd & 4 others [2015] eKLR among others.**

11. In all the above cases, the judges were unanimous on the principle that an incorporated association cannot, in the absence of a statute authorizing it, be sued in its society or company name, but all the members must be made parties since such bodies have, in the absence of statute, no legal entity distinct from their members – See **Baskins vs United Mine Workers (1921) 150 ARK. 398, 40L, 234 S.W. 464, 465.1).**

12. I have considered the preliminary objection raised and I have no doubt in my mind that the petitioner is a non-incorporated body of many members registered under the **Societies Act Cap 108 Laws of Kenya**. Indeed, this is the description that the Petitioner has given itself in the first paragraph of its petition. The petition does not give the petitioner any other name or capacity.

13. I concur with the decision of **Ekirapa Aburil J in Football Kenya Federation vs Premier League Limited and 4 others (supra)** where she held that there must be a statutory provision that permits a society to sue in its name for good reason, especially where the society comprises a large number of

members, but that even where such happens, it can only be by way of a representative suit where only a few members would sue on behalf of the rest.

**14. Order 1 Rule 8 of the Civil Procedure Rules** provides as follows:

**”(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.**

**(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**

**(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”**

15. The Petitioner in this suit is a Stakeholders Forum registered under the Societies Act. It is therefore my finding that it has no capacity to sue in the manner in which it has filed the petition. This is a pure point of law that falls directly within the purview of Preliminary Objection as observed in the landmark case of **Mukisa Biscuits Manufacturing Co. Ltd vs West end Distribution Ltd (1969) EA 696** in which a preliminary objection was described as consisting of a point of law which has been pleaded, or which arises by implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

16. In the circumstances, I find that the preliminary objections is well founded, it has merit and it must succeed.

17. The Petitioner’s petition is hereby struck out with costs to the respondents.

**Dated, signed and delivered in open court this 8<sup>th</sup> day of September, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Petitioner
- N/A for the Respondent
- Omwoyo court clerk