



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.13 OF 2014

CYRUS ROBERT SALA ZIBU..... 1ST PLAINTIFF
DR. KALUS-HERBERT RICHTER 2ND PLAINTIFF
STEVE MAKAU 3RD PLAINTIFF
PETER KIMEU MWANGANGI 4TH PLAINTIFF
LILIAN KATUNGE MUEMA 5TH PLAINTIFF
PETER MANG'ALA 6TH PLAINTIFF
GIDEON KIOKO KIVANGULI 7TH PLAINTIFF
PETER MUSAU 8TH PLAINTIFF
JUMA OLIVER MASILA 9TH PLAINTIFF
MUTUKU KATALA 10TH PLAINTIFF

(Suing on their own behalf and on behalf of the people of Makueni County)

VERSUS

HENRY MULI MUNGUTI 1st DEFENDANT
HENRY MWAKE 2ND DEFENDANT
DAVI D NYUNGU 3RD DEFENDANT
MICHAEL KIOKO 4TH DEFENDANT
PENINA MUMBE 5TH DEFENDANT
ALICE WANGECI 6TH DEFENDANT

NATIONAL LAND COMMISSION7TH DEFENDANT
GOVERNMENT OF MAKUENI COUNTY 8TH DEFENDANT
REGISTRAR OF SOCIETIES 9TH DEFENDANT
HON. ATTORNEY GENERAL 10TH DEFENDANT
GOOD HOPE REHABILITATION CENTER
(CERTIFICATE NO.26442) 11TH DEFENDANT

R U L I N G

1. The Applicants have moved court via a **Notice of Motion** dated **28.2.2014** seeking the following orders.

1.Spent

2.Spent

3.That pending the hearing and determination of this suit, this court do appoint a neutral board to run the affairs of Good Hope Rehabilitation Centre (hereinafter referred to as GHRC), the 11th Defendant.

4.That pending the hearing and determination of this suit, the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants be restrained from disposing, selling, transferring or in any manner whatsoever parting with the assets of the GHRC, the 11th Defendant.

5.That this dispute be referred to a court guided arbitration/mediation.

6.That the costs of this application be provided for. The same is anchored on Order 1 Rule 8, Order 40 Rule 2, Order 46 Civil Procedure Rules, Section 1A and 1B, Article 159(2) of Constitution and other enabling provisions of the law.

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2. The Application is supported by the grounds on the face of the motion (a) to (aa). The application is supported by the affidavits of Steve Makau sworn on 26.2.2014 and Affidavit of Dr. Klaus Herbert Richard unfiled and undated on the bundle of documents pages 85 – 93(a). Both have massive documents annexed to them.

3. The application is opposed by Defendants No.1, 2, 3, 4, 5, 6 and 11 who have a replying affidavit sworn by Henry Muli Munguti on his behalf and that of Defendants No.2, 3, 4, 5, 6, and 11. The Defendant No.8 has filed replying affidavits sworn by Shadrack Mwanzia Mutua Mulanga and a preliminary objection dated 24.7.2014. Defendants Nos. 7, 9 and 10 have not filed any reply to the application.

4. The parties agreed and the court directed that the application to be canvassed by way of written submissions. The Plaintiffs, Defendants No.1, 2, 3, 4, 5, 6, 8 and 11 filed their respective submissions but defendants No.7, 9 and 10 have not filed any written submissions. The Plaintiffs allege that in 1991 the 2nd Plaintiff came to Kenya on vacation as a missionary. In the same year he met the 1st Defendant who

he helped in spear-heading his (2nd Plaintiff's) vision in Kenya which included setting up a children's facility, rescue/rehabilitation facility and community outreach program which 1st Defendant registered on 2nd Plaintiff's instruction as an organization known as **HOPE BELL REHABILITATION CENTRE** in 2008. Later the name changed to **GOOD HOPE REHABILITATION CENTRE**.

5. The 2nd Plaintiff was the sponsor of the same via sending money to the 1st Defendant for the purposes of operations and acquisition in order to run and manage the children's home and rehabilitation centre. With time more donors joined the organization in sponsorships including international rehabilitation of the Blue Cross (IFBC) who later demanded an audit to be conducted on the accounts of the organization. The audit revealed massive malpractices in connection to the management of the funds issued by the donors.

6. The Plaintiffs therefore contend that the 1st Defendant breached his fiduciary duty that existed towards the 2nd Plaintiff and other Plaintiffs since what existed between the 2nd Plaintiff and the 1st Defendant was an implied trust whereby the 2nd Plaintiff was the founder while the 1st Defendant was the interim trustee. The other Plaintiffs were the beneficiaries of the target group.

7. The Plaintiffs contend that the 1st Defendant was supposed to do all that acts within the Society in good faith and for the benefit of the beneficiaries. However, he involved himself in fraudulent acts in activities of the society and thus breached trust bestowed on him. The Applicants contend that under Order 1 Rule 8 and also in terms of the holding by **ORTHODOX CHURCH OF ERITREA VS. WARIWAX GENERATION LTD. 672/07**, they are entitled to sue as its ordinary members in representative capacity. They contend that same position was held in **FREE PENTECOSTAL FOLLOWING IN KENYA VS. KCB NRB HCC.5116/1992** and also in terms of the provisions of Section 46(1) of the Societies Act Cap.108 Laws of Kenya.

8. They thus submit that they have requisite *locus standi*. In any event on 4.3.2014 they were granted leave by court to proceed with prosecution of the suit on behalf of the other Plaintiffs whose names are disclosed in the affidavits and same order has never been impugned. The Plaintiffs contend that the audit conducted revealed massive malpractices which led donors to withdraw their funding towards the 11th Respondent. The Plaintiffs contend that the 11th Respondent board meeting on 16.2.2013 attended by Respondents 1, 2, 3, 4, 5, and 6 was furnished with audit report by the organization treasurer update which revealed cases of misappropriation and falsification. They allege that the report mentions 1st Respondent adversely. Further, the Plaintiffs state that due to the aforesaid audit report which forced donors to withdraw, there is stalemate in management and operations of the organization.

9. On the Preliminary objection by the 8th Defendant/Respondent the Plaintiffs contend that the same does not meet the thresh hold enunciated in the case of **MUKISA BISCUITS MANUFACTURING LTD. VS. WESTWIND DISTRIBUTERS LTD. EA (1969) EA Page 696** as the facts in the case herein are yet to be ascertained. The Plaintiff contend further that since defendant plays crucial role in the allocation, administration and protection of public land, it is thus properly sued and thus the suit against it reveals a reasonable cause of action.

10. The Applicants thus pray for the application to be allowed. The Defendants/Respondents No.1, 2, 3, 4, 5, 6 and 11th in their case state that save for Plaintiff No.2 who was one of the donors of the 11th Defendant the Applicants have not shown their connection with the 11th Defendant/Respondent. The 11th Defendant is managed via its Constitution which provides how its officials should be elected and removed. If the Plaintiffs are members of the 11th Defendant which is denied, they should have invoked the provisions of governance charter of the 11th Defendant to canvass issues they have brought to court. The 1 – 6 Respondents contend that the court has no reason to intervene in the affairs of the 11th Defendant as there is no demonstration of the breach of the society's constitution and in any event the 1 – 6 Respondents are bonafide officials of the society in accordance with its constitution. The court thus cannot appoint a board to run 11th Defendants affairs.

11. On whether the injunction sought should issue/granted, the 1 – 6 Respondents contend that the suit lands have no title documents and thus cannot be sold. In any event if title deeds are to be issued, still the Land Control Board would be required before any sale is effected and the Board would interrogate the reasons for such sale. On issue as to whether the suit should be referred to a court guided arbitration/mediation, the Respondents No.1-6 and 11 contend that the court has jurisdiction and in any event there exists no contractual relationship between the parties to warrant that referral.

12. The Respondent No.1-6 and 11th contend that the 2nd Plaintiff was only a donor but not a member of the organization and thus the 11th Respondent is not 2nd Plaintiffs property and thus 1st Defendant not a trustee of the 2nd Plaintiff. On capacity to file suit, the Respondents No.1-6 and 11th contend that the Plaintiffs have failed to give concise description of themselves as members of the 11th Defendant. Further in the meeting of the 11th Defendant of 16.2.2013 only 2nd Plaintiff attended as an advisor without a vote and none of the other Plaintiffs attended. The 1-6 and 11th Respondents contend that there was no audit carried out nor were there misappropriation demonstrated as alleged and in any event no audit is produced.

13. The Respondents No.1-6 and 11th thus pray for the dismissal of the application with costs. On the 8th Defendant/Respondent case, it contends that there is no reasonable cause of action against it nor does court have jurisdiction to entertain the matter. These 2 grounds are raised in its preliminary objection and the replying affidavit. The 8th Respondent contends that there is no accusation against it nor reliefs sought against it in the Plaint. It does not involve itself in affairs of the 11th Respondent and has no role in the 11th Respondent affairs. No particulars of fraud, illegality or breach and/or otherwise are pleaded against it.

14. On the allegation that the 8th Respondent has role to play in allocation, administration and protection of the public land, the 8th Respondent contend that the suit lands are not public land as defined by the provisions of article 62(1) of the Constitution of Kenya. The Respondent No.8 further contends that the plea on paragraph 19 of the Plaint stating how the organization acquired suit lands leaves no doubt that the suit lands are private land and not public land and thus it has no role to play in the private lands and in any event it is not among the functions under Section 5 of the County government Act Cap No. 17 (2012) and the 4th Schedule of the Constitution of Kenya assigned to it.

15. According to the 8th Respondent, that the core of the dispute in the instant suit is the management of the 11th Respondent affairs which it (8th Respondent) has no role at all. The 8th Respondent thus submit that the preliminary objection filed raises a pure point of law in terms of the threshold set by the case of **MUKHISA BISCUIT *supra*** and in terms of the provisions of Order 1 Rule 3 Civil Procedure Rules of 2010. The 8th Respondent has also cited the authorities below in order to buttress its submission that it is unnecessary party in the suit.

- **WERROT & CO. LTD & OTHERS VS. ANDREW DOUGLAS GREGORY & OTHERS NAI HCC 2363/98.**
- **MARY MBULA MUKUVI VS. DAVID MWOSHE MWALUKO & 6 OTHERS ELC.6/2013 (2014 eKLR)**
- **TECHNOMATIC LTD. VS. KWA LTD & ANOTHER (2014) eKLR.**
- **KINGORI VS. CHEGE & 30 OTHERS (2002) 2KLR 250.**

The 8th Respondent thus prays for the court to invoke Order 1 Rule 10(2) of the Civil Procedure Rules and strike it out from the suit with costs.

16. After going through materials placed before the court by the parties, the court distills the following issues for determination:

1. Whether the 8th Respondent should be struck out from the suit?

2. Whether the Plaintiffs have capacity to file the suit?

3. Whether the court should appoint a board to run the affairs of the 11th Respondent?

4. Whether the court should grant an interim injunction against the Respondents No.1, 2, 3, 4, 5 and 6 to stop them from disposing, selling, transferring or in any other manner whatsoever parting with assets of GHRC the 11th Respondent?

5. Whether the dispute should be referred to a court guided arbitration/mediation?

17. The court will deal with the Preliminary objection first. In the plaint filed in this case dated 28.2.2014 the reliefs are directed against Defendants 1, 2, 3, 4, 5, 6, and 9th. Non of the prayers are directed against the 8th Defendants. In particulars of breach of fiduciary duty vide paragraph 29 of the Plaint non of the particulars of breach is attributed to the 8th Defendant/Respondent. The only instant the 8th Defendant is mentioned in the Plaint, is in paragraph 31 of the Plaint where it is averred that it has a crucial role to play in the allocation, administration as well as protection of public land.

18. On paragraph 19 of the Plaint the Plaintiffs aver that the 2nd Plaintiff via 1st Defendant managed to purchase: unsurveyed plot No.3792 and registered it in the 5th Defendant's names. The unsurveyed Plot No.3762 is registered in the 11th Defendant's names. That averment clearly demonstrates that plots are private lands under Article 64 of the Constitution of Kenya. The suit lands do not fall under the provisions of Article 62 of the Constitution of Kenya which defines public land.

19. The functions of the 8th Defendant under Section 5 of the CGA No.17/012 and 4th schedule of the Constitution of Kenya do not include the allocation, administration as well as protection of the private land. In the case of the **TECHNOMATIC LTD. *Supra***, the court set out the guiding principles applicable when an intending party is to be enjoined thus; It must be a necessary party, there must be a relief (in case of a defendant) flowing from it to the Plaintiff, the ultimate Order/Decree cannot be enforced without its presence in the matter.

20. Its presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. The court relied on the content of Order 1 Rule 10 Civil Procedure Rules 2010. It is this court's finding that the above threshold set is not met and the Plaintiffs have not demonstrated any of the guiding principle above applicability to the enjoining of the 8th Respondent. The court thus strikes out the 8th Respondent from the suit herein with costs.

21. The court finds it unnecessary to deal with the issue of the jurisdiction of court to handle the matter after the 1st limb of preliminary objection succeeds. In any case the court on the face of the pleadings, it finds that among the subjects of the suit are 2 lands which squarely place the matter within the jurisdiction zone of the ELC court. On the issue as to whether the Plaintiffs have capacity to sue, the court makes the following findings. The Defendants do not deny and in fact admit especially Respondents No.1-6 that the organization GHRC was founded by the 2nd Plaintiff and was and has been a principle donor to the same. He is associated with the same Society that he even attends its meeting such as on 16.2.2013 as its adviser. The institution was founded to benefit the residents of Makueni including the Plaintiffs. The 1st - 6th Defendants being officials of the same society are in a fiduciary relationship with the beneficiaries including the Plaintiffs.

22. The court is of the opinion that it is on that basis the orders of 4.3.2014 were granted to the Plaintiffs to prosecute the instant suit. The said orders have never been challenged by the Defendants and thus court holds that the Plaintiffs have capacity and leave to institute and prosecute the instant suit. In any event under the doctrine of implied trust the court upheld it in the circumstances where the beneficial interest in property comes back or results to the person... who transferred the property to the trustee or provided the means of obtaining it. Refer to **DE FACTO RELATIONSHIPS AND IMPLIED TRUSTS QLD. *Institute of Technology Law Journal Citing Osborn's Law Dictionary (1983) page***

292. The Plaintiffs have demonstrated on the prima facie basis beneficial interest in 11th Respondent properties and affairs thereof.

23. On whether the court should appoint neutral board to run the affairs of the society, the court finds that the genesis of the dispute is the alleged mismanagement of the society's finance. The information on mismanagement of the finance is alleged to be contained in the audit report. The said report has not been produced by any party in the suit. The court has no benefit of perusing the same to confirm the allegation. Further the Respondents contend that the society is run via a charter of governance (Constitution) which sets the rules of procedure in running the society's affairs including electing and removal of the officials including the 1st – 6th Respondents.

24. The Applicants have not demonstrated that the Defendants No.1-6 are in breach of the same Constitution to warrant the courts interference. In any event this court (ELC) is mandated to deal with occupation, use and title of land or environmental matters. The question then arises as to whether this court can supplant the 1st – 6th Respondents and be deemed to be operating with its jurisdiction as conferred by Article 162 of the Constitution and the provisions of the ELC Act. The court thus holds that the Plaintiffs have not *on prima facie* basis established a case for the interference with the running of the instant society's affairs.

25. On the issue as to whether the court should refer the matter to the arbitration or court guided mediation, the court finds that there is no arbitration clause on any contractual relationship between parties disclosed to enable the invocation of the provisions of Section 6 of the Arbitration Act. In any case the Defendants No.1-6 and 7 had already filed defenses implying that the matter is not amenable for arbitration under the Arbitration Act. However, the court is alive to the fact that the Civil Procedure Section 59 C has mandated court on its motion or on application by a party to refer the matter to alternative dispute resolution mechanism including mediation and arbitration.

26. However, at this stage the application is premature in view of the facts that the parties are yet to comply with the provision of order 11. The court will consider the sought referral at the stage of pre-trial direction. The parties will have liberty to apply.

27. On the issue of the issuance of an interim injunction pending hearing and determination of the suit, the court makes the following findings; The Applicants are enjoined to establish the condition for grant as set out in the case of **GIELLA VS. CASSMAN BROWN**. Thus the Applicants have to prove prima facie case with probability of success. The Applicants have also to prove that if orders are not granted, they are likely to suffer irreparable damages. In case of doubts, the court is mandated to resort to the limb of balance of convenience. There is no dispute that the 2nd Plaintiff is the founder and principle sponsor of the 11th Respondent.

28. The only lands bought for the objects of the 11th Respondent are in the names of 5th and 11th Respondents. The society is founded and operated for benefit of the beneficiaries including the Plaintiffs. There seem to be mistrust between the beneficiaries and the 1st-6th Respondents who run the affairs of the 11th Respondent. There is no guarantee that the Respondents No.1-6 will not act in relation to the 11th Respondent in a prejudicial manner which may render the suit nugatory.

29. In the interest of the parties and the wider interest of the people of Makueni, it is this court's finding that the assets of the 11th Respondent should be preserved pending hearing and determination of the suit. The court thus makes the following orders:

1. Prayer No.3 is declined.
2. Prayer No.4 is granted.
3. Prayer No.5 is deferred.

4. Costs in the cause.

5. The parties to comply with the order 11 within a period of 30 days. Dates for confirmation of compliance be fixed before the Deputy Registrar.

Dated and Delivered at Machakos, this 6th day of February, 2015.

CHARLES KARIUKI

JUDGE