

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 63 OF 2012

KENTON KIJABE CO-OPERATIVE SOCIETY.....PLAINTIFF

VERSUS

THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT.....1ST DEFENDANT
LIQUIDATOR KENTON KIJABE CO-OP SOCIETY.....2ND DEFENDANT
DISTRICT CO-OPERATIVE OFFICER, SOCIETY.....3RD DEFENDANT
LAND REGISTRAR, NAIVASHA.....4TH DEFENDANT
CHIEF LAND REGISTRAR.....5TH DEFENDANT
THE ATTORNEY-GENERAL.....6TH DEFENDANT

RULING

This Ruling relates to a Notice of Motion dated 28th February 2012 but filed on 6th March 2012. In it the Applicant sought the following orders -

THAT this Honourable Court be pleased to issue a temporary order of injunction restraining the respondent's agents, servants employees or any other person working under their instructions from making entries in the green card, transferring or interfering in any other manner with all that parcels of land known as Kenton Kijabe Block 3 and Mwachiringiri Block 9 in matters of Kenton Kijabe Co-operative Society pending hearing and determination of this Application.

THAT this Honourable Court be pleased to issue a permanent order of injunction restraining the respondents agents servants, employees or any other person working under their instructions from making entries in the green card, transferring or interfering in any other manner with all that parcels of land Reference Kenton Kijabe Block 3 and Kenton Kijabe Mwachiringiri Block 9 in matters of Kenton Kijabe Co-operative Society pending hearing and determination of this suit.

THAT costs of this application be in cause.

The Motion (hereinafter called the Application) was supported by the Supporting Affidavit of one Isaac Kigo Mbugua who described himself as Chairman of the Plaintiff sworn on 28th February 2012, and the grounds set out on the face of the application.

Although the grounds upon which the interim orders are sought are couched in non-complimentary language against the Defendants, the Applicant's case is that the membership of the plaintiff has lost large tracts of land which it owned as a land buying cooperative society due to the liquidation exercise all ordered by the 1st Defendant and that the liquidation should therefore cease and the matters complained of should be resolved in the manner the Chairman has sought as orders of court in the prayers to his plaint of 28th February 2012.

Before considering the merits (if any), of the Applicant's application it is necessary to acknowledge certain facts and the consequences of those facts in law.

Firstly, the applicants acknowledge that the plaintiff was put under liquidation by Gazette Notice Number 5272 of 1st September 1997. The consequences of putting a Cooperative Society into liquidation are set out in Section 65(1) of the Cooperative Societies Act, (Cap. 490, Laws of Kenya), as Amended by the Co-operative Societies Act, 1997.

By that Gazette Notice the Commissioner of Cooperative Development cancelled the registration of the plaintiff society. Under Section 61(2) of the Act, a member of a Cooperative Society who feels aggrieved with an order of the Commissioner of Cooperative Development cancelling the registration of a society, is required to appeal to the Minister for Cooperative Development within two months after the making of the order, with a final appeal to the High Court.

Section 61(3) of the Act states that where no appeal is filed within the prescribed time, the order (of cancellation of registration) shall take effect on the expiry of that period, otherwise where an appeal is filed within the prescribed time, the order shall not take effect unless it is confirmed by the Minister or by the High Court as the case may be.

Upon the cancellation of registration of a Society under the preceding Sections, the Commissioner is empowered to appoint a liquidator, and the property of the Society shall vest in the liquidator from the date upon which the order of cancellation takes effect. That is what Section 65 of the Cooperative Societies Act, provides.

Section 63 of the Act further provides that where the registration of a Cooperative Society is cancelled, the society shall cease to exist as a body corporate from the date the order takes effect. For purposes of the liquidation of the Cooperative Society certain provision of the Companies Act (Cap. 486, Laws of Kenya) apply to the liquidation of the Cooperative Society (S. 64 of the Cooperative Societies Act). Among the provision of the Companies Act applicable is Section 223 (to stay or restrain proceedings against the company) and Section 309, (proof of debts).

In this case, once the Gazette Notice took effect after the expiration of the 2 months open window application period, the Plaintiff herein ceased to exist as a body corporate. That means that it could not sue or be sued. Only the liquidator who stepped into its shoes, could sue or be sued. It also meant that the Management Committee of the Cooperative Society ceased to function as such and only its individual former managers could be called upon by the liquidator from time to time to aid in his liquidation duties.

Legally therefore the current suit by the plaintiff is incompetent and ought to be struck out ab initio. However this Ruling is not about the suit itself but about the Notice of Motion or the Application brought under it.

The first point to note is that the Application is a departure from the prayers in the main suit. While appreciating that the Applicants are very knowledgeable people, but not schooled in law, the law is however, the law, and it binds every person.

The remedy of injunction under Order 40 (former Order 39) of the Civil Procedure Rules, is predicted upon the existence of the suit. The Order expressly provides that “where in any suit” (order 40 rule (1)), for restraining the defendant from committing a breach of contract or other injury of any kind (Order 40 rule 2). Where in a suit, those prayers are not averred or prayed for, to seek restraining orders, in an Application dependent upon the suit, is a major departure from the pleadings and it breaches the clear provisions of Order 2, rule 6(1) of the Civil Procedure Rules - “No party may in any pleading make an allegation of fact, or raise new ground of claim inconsistent with the previous pleading of his in the same suit.” To make such an additional claim, the party must amend his pleadings.

To that extent therefore the purported Notice of Motion dated 28th February 2012 is incompetent and ought to be struck out.

I have already stated the other major ground why the Notice of Motion should be struck out. The registration of the Plaintiff having been cancelled, it ceased being a body corporate, and cannot sue or be sued. It does not have the necessary legal standing or competence (*locus standi*) to institute suit against any person or the Defendants in this case.

Finally, even if the plaintiff were competent to sue, Section 16 of the Government Proceedings Act only empowers the court to give declaratory orders against the Government, in this case represented by Defendants or Respondents in this Application. The said Section expressly prohibits the issue of any orders in the nature of injunction against the Government. That is another reason why the prayers sought cannot be granted.

Lastly, Mr. Gitu argued eloquently for himself and the deponent of the Supporting Affidavit, Isaac Kigo Mbugua, that they were sons of former members of the Cooperative Society and were therefore competent to bring suit against the Defendants. Firstly they gave no material that they were sons of former members of the Kenton Kijabe Cooperative Society Ltd. Secondly, even if they were, they also failed to give any material to show transmission to them or either of them, of any shares of their former members to them or either of them. Either way, the suit, and application are incompetent. In this respect I entirely agree with submission by Mr. Maina learned counsel for the Respondents the application herein is incompetent, and has no merit at all.

For those reasons, I find no merit in the application herein, and the same is hereby dismissed with costs against Isaac Kigo Mbugua.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of July 2012

J. ANYARA EMUKULE
JUDGE